



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF DALIA v. FRANCE

(154/1996/773/974)

JUDGMENT

STRASBOURG

19 February 1998

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SUMMARY¹

Judgment delivered by a Chamber

France – order permanently excluding from French territory a convicted Algerian woman who had arrived in France when she was 17 or 18 to join her mother and seven brothers and sisters lawfully resident there and is the mother of an under-age child of French nationality

I. GOVERNMENT'S PRELIMINARY OBJECTION (failure to exhaust domestic remedies)

The Government had not produced before the Court any case-law to support their argument concerning the sufficiency and effectiveness in the instant case of appeal on points of law that applicant could have lodged against Court of Appeal's judgment.

Conclusion: objection dismissed (seven votes to two).

II. ARTICLE 8 OF THE CONVENTION

A. Paragraph 1

Examination of question whether applicant had a private and family life at date of Court of Appeal's refusal to lift the exclusion order made against her – applicant could rely on birth of her son – there had been an interference with her right to respect for her private and family life.

B. Paragraph 2

1. *"In accordance with the law"*

Basis of interference in law: not disputed that it lay in provisions of national legislation.

2. *Legitimate aim*

Prevention of disorder or crime.

3. *"Necessary in a democratic society"*

Recapitulation of case-law: Contracting States' duty to maintain public order, in particular by exercising their right to control entry and residence of aliens – to that end, power to deport aliens convicted of criminal offences.

1. This summary by the registry does not bind the Court.

Applicant had real ties in France but also important links with Algeria – interference in issue not so drastic as that which might result from expulsion of applicants who had been born in host country or had first gone there as young children.

Link she had formed with child when she had been in France illegally could not be decisive – great weight given to nature of offence underlying prison sentence and exclusion order, namely dealing in heroin.

Conclusion: no violation (six votes to three).

III. ARTICLE 3 OF THE CONVENTION

Facts of case did not establish that renewed enforcement of exclusion order would cause applicant suffering of such intensity as to constitute “inhuman” or “degrading” treatment.

Conclusion: no violation (unanimously).

COURT’S CASE-LAW REFERRED TO

20.2.1991, Vernillo v. France; 7.8.1996, C. v. Belgium; 29.1.1997, Bouchelkia v. France; 26.9.1997, Mehemi v. France; 26.9.1997, El Boujaïdi v. France

In the case of Dalia v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr THÓR VILHJÁLMSOON,

Mr L.-E. PETTITI,

Mr J. DE MEYER,

Mr J.M. MORENILLA,

Mr L. WILDHABER,

Mr D. GOTCHEV,

Mr P. KÜRIS,

Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 25 October 1997 and 31 January 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) and by the French Government (“the Government”) on 4 December 1996 and 5 February 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 26102/95) against the French Republic lodged with the Commission under Article 25 by an Algerian national, Mrs Aïcha Dalia, on 3 November 1994.

The Government’s application and the Commission’s request referred to Articles 44 and 48 of the Convention and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the application and of the request was to obtain a decision as to whether

Notes by the Registrar

1. The case is numbered 154/1996/773/974. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case’s position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 20 January 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr J. De Meyer, Mr J.M. Morenilla, Mr L. Wildhaber, Mr D. Gotchev, Mr P. Kūris and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 16 June 1997 and the Government's memorial on 20 June. On 1 July 1997 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 26 September 1997 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 October 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr J.-F. DOBELLE, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr D. DOUVENEAU, Assistant Principal,
Legal Affairs Department, Ministry of Foreign Affairs,
Mr J.-P. VIDALLIER, *magistrat*, on secondment to the
Department of Criminal Affairs and Pardons,
Ministry of Justice,
Mr E. BOSCO, Administrative Assistant, Department of
Civil Liberties and Legal Affairs,
Ministry of the Interior, *Advisers*;

(b) *for the Commission*

Mr J.-C. SOYER, *Delegate*;

(c) *for the applicant*

Mr A. MIKOWSKI, of the Paris Bar,

Counsel.

The Court heard addresses by Mr J.-C. Soyer, Mr Mikowski and Mr Dobelle.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mrs Aïcha Dalia, an Algerian national, was born in Algeria, which was then French territory, on 4 August 1959. In 1976 or 1977, when she was 17 or 18, she arrived in France under the provisions governing entry and settlement of family members; her father had been living there since 1970 and her mother and four brothers and sisters had joined him in 1974. A child was born to the couple in France in 1977 and two others were born there in 1979 and 1984. After her parents divorced in 1978, the applicant remained with her mother. Three of her brothers and sisters had French nationality, the other four were residents, like her mother.

A. The criminal proceedings

1. *In the Nanterre tribunal de grande instance*

8. On 10 May 1985 the Nanterre *tribunal de grande instance* passed a sentence of twelve months' immediate imprisonment on Mrs Dalia for offences against the dangerous drugs legislation (acquiring, possessing and selling heroin). Under Article L. 630-1, first paragraph, of the Public Health Code, it also made orders for her deportation and her permanent exclusion from French territory.

2. *In the Versailles Court of Appeal*

9. On 21 May 1985 the applicant appealed. In a judgment of 11 July 1985 the Versailles Court of Appeal quashed the impugned judgment on account of a procedural irregularity in the trial court's composition and then, dealing with the merits of the case itself, passed the same sentence of a year's immediate imprisonment on the applicant and made an order permanently excluding her from French territory.

3. *In the Court of Cassation*

10. On 13 July 1985 Mrs Dalia lodged an appeal on points of law against the Court of Appeal's judgment but subsequently withdrew it. The President of the Criminal Division formally recorded the withdrawal of the appeal in an order of 17 February 1986.

B. Enforcement of the permanent exclusion order and changes in the applicant's personal circumstances

11. Mrs Dalia was taken into custody on 13 October 1984 and released on 28 October 1985, when she rejoined her family at Nogent-sur-Oise.

12. On 8 April 1986 she married a French national.

13. Following a police summons, she was convicted on 29 July 1987, sentenced to three months' imprisonment and excluded from France for one year for having remained there in spite of the permanent exclusion order.

On her release a six-day compulsory residence order was made in respect of her so that she could organise her departure herself, and on 14 August 1987 she left France for Algeria pursuant to the Versailles Court of Appeal's judgment of 11 July 1985 (see paragraph 9 above). She was given accommodation there by an aunt.

She returned to France on 15 July 1989 with a visa valid for thirty days and stayed at her mother's home at Nogent-sur-Oise with other members of her family. She asserts that she is still living there.

14. On 5 November 1989 the Senlis *tribunal de grande instance* granted the applicant and her husband a divorce. No child had been born of the marriage.

15. On 6 June 1990 Mrs Dalia gave birth to a boy, who was given the name of Karim and had French nationality as he had been born in France of a mother who had herself been born in a French *département* (see paragraph 7 above). She had parental responsibility for him as the father had not acknowledged the child.

C. The applications to have the permanent exclusion order lifted

16. Mrs Dalia asserts that she made three applications to have the permanent exclusion order lifted, the first being lodged in 1988 and refused on 3 March 1989 and the other two being registered on 4 May 1992 and 5 February 1994. According to the Government, the Versailles Court of Appeal received only the latter two.

1. The application of 4 May 1992

17. On 4 May 1992 the applicant applied to lift the order permanently excluding her from French territory. She relied on Article L. 630-1, paragraph 2-2, of the Public Health Code, as amended by the Law of 31 December 1991 (see paragraph 26 below).

18. In a judgment of 26 November 1992 the Versailles Court of Appeal refused that application in the following terms:

“The conviction and sentence having become final by the date of commencement of the Law of 31 December 1991, the provisions of that Law, except in so far as they have the effect of making the application admissible on the basis of Article 55-1 of the Criminal Code, are purely indicatory as regards the applicant.

In the instant case the Court declines to grant the application.”

2. The application of 5 February 1994

19. On 5 February 1994 Mrs Dalia lodged a fresh application to have the permanent exclusion order lifted.

20. In a judgment of 4 October 1994 the Versailles Court of Appeal held that the application was inadmissible, on the following grounds:

“Mrs Dalia alleged in support of her application that she arrived in France in 1976, that three of her brothers and sisters are French and two others are currently applying for naturalisation and that she is the mother of a French child born on 6 June 1990, in respect of whom she has parental responsibility.

Relying on these factors, her counsel submitted at the Court hearing that if section 28 *bis* of the Ordinance of 2 November 1945, as amended by Law no. 93-1027 of 24 August 1993 on immigration and the conditions of aliens’ entry into and residence in France, were strictly applied, it would entail a violation of Article 8 of the [European] Convention on Human Rights.

The above-mentioned Law provides that an application to have an exclusion order lifted can be made only if the foreign national is resident outside France, and that is a rule of procedure which admits of no exception.

Mrs Aïcha Dalia’s application must therefore be declared inadmissible.”

D. The reports on the applicant

1. The medical reports

21. In a report drawn up for the Versailles Court of Appeal on 18 May 1994 a psychiatrist from the Creil Medical and Psychiatric Centre noted:

“Mrs Aïcha Dalia’s mental state requires long-term medical treatment. Separating her from her family would have disastrous consequences for her mental balance and might lead to serious psychological decompensation, which would have repercussions on her son Karim, who is currently 3 years old.”

22. In a medical certificate of 21 December 1994 intended for the Ministry of Justice the same doctor set out the following findings:

“Mrs Aïcha Dalia’s mental state requires long-term treatment.

Mrs Aïcha Dalia has received regular treatment at our centre since November 1990. Her condition has not improved, owing to the material and psychological insecurity in which she is living. Separation from her family would have disastrous consequences for her and for her small boy, aged 4, of French nationality, who lives with her.”

23. In a certificate drawn up for the Court on 4 June 1997 at the applicant’s request, the same doctor indicated:

“Mrs Dalia is still receiving regular treatment at the Creil Medical and Psychiatric Centre. Her psychological vulnerability is closely bound up with the stress and instability inherent in her social, legal and financial position.

Regularisation of her legal position would be a decisive factor for clinical improvement, but departure for Algeria would have serious effects on Mrs Dalia’s already precarious mental balance and also on that of her son, aged 6, who needs the emotional stability provided by his mother.”

2. The welfare report

24. In a report drawn up on 6 June 1997 a welfare assistant from the Creil Medical and Psychiatric Centre, where Mrs Dalia has been treated since 1990 stated:

“Mrs Dalia has no resources or State family benefit and is therefore supported entirely by her mother.

She has a small boy, Karim, born at Creil on 6 June 1990.

Karim is very attached to his mother. She is his only immediate relative who is present, and Mrs Dalia does everything to ensure that her little boy does not suffer from having no father.

Similarly, she is trying as hard as she can to protect him from the threat of separation or deportation to which their relationship is exposed. She is an attentive and responsible mother, who is aware of a child's physical and, above all, emotional needs and she fulfils her maternal role.

In conclusion, Karim is an integrated, open child, and it would be a pity to allow him to remain under the threat of separation for much longer. Like all children, he needs security. His mother's presence is essential to his balance and it is with her that he will be able to develop normally."

II. RELEVANT DOMESTIC LAW

A. The Public Health Code

25. At the material time Article L. 630-1 of the Public Health Code provided:

"... the courts ... may order an alien convicted of an offence under Article L. 627 to be permanently excluded from French territory.

Exclusion from French territory shall of itself entail the deportation of the convicted person at the end of his sentence.

...

Where a person, on conviction, is permanently excluded from French territory, he may not request the benefit of the provisions of Article 55-1 of the Criminal Code."

26. Law no. 91-1383 of 31 December 1991 replaced the last three paragraphs by the following provisions:

"However, exclusion from French territory shall not be imposed on:

...

(2) a convicted alien who is the father or mother of a French child resident in France, on condition that he or she is vested with or shares parental responsibility for that child or actually provides for its needs;

...

Nor shall exclusion from French territory be imposed on a convicted alien who can prove either:

(1) that he has been normally resident in France since reaching the age of 10 at the most or for more than fifteen years, or

(2) that he has been lawfully resident in France for more than ten years.

The provisions of the eight preceding paragraphs shall not be applicable in the event of a conviction for ... importing or exporting [toxic plants classified as drugs] or for conspiracy to commit those offences.

...

Exclusion from French territory shall of itself entail the convicted person's deportation, where necessary after the end of his prison sentence.”

27. Article L. 630-1 was repealed by Law no. 92-1336 of 16 December 1992.

B. Ordinance no. 45-2658 of 2 November 1945

28. Section 28 *bis* of the Ordinance of 2 November 1945, as inserted by the Law of 24 August 1993 and amended by the Law of 30 December 1993, provides:

“An application to have an exclusion ordered lifted ... that is made after the time allowed for an administrative appeal has expired may only be granted if the foreign national is resident outside France. This provision shall not, however, apply while the foreign national is serving an immediate custodial sentence in France or is the subject of a compulsory residence order...”

29. The first three subsections of section 12 *bis* of the Ordinance of 2 November 1945 as amended by the Law of 24 August 1993 were replaced by the following provisions by virtue of the Law of 24 April 1997:

“... Other than where the presence of the person concerned constitutes a threat to public order, a temporary residence permit shall be issued as of right:

...

(5) to an alien not living polygamously who is the father or mother of a French child under 16 resident in France, on condition that he or she actually provides for the child's needs...”

C. The Criminal Code

30. Article 55-1 of the Criminal Code provides:

“ ...

... any person who has incurred a prohibition ... as an automatic consequence of a criminal conviction or on whom such a prohibition ... has been imposed by the convicting court in its judgment, ... may request the court which convicted him ... to lift the prohibition ..., in whole or in part, or vary its duration.

...”

PROCEEDINGS BEFORE THE COMMISSION

31. In her application to the Commission of 3 November 1994 (no. 26102/95) Mrs Dalia alleged that returning her to Algeria would amount to treatment contrary to Article 3 of the Convention in respect both of her and of her child and that the Versailles Court of Appeal's refusal of 4 October 1994 to allow her application to lift the order permanently excluding her from French territory infringed her right to respect for her private and family life as secured in Article 8 of the Convention. She also stated that when the Versailles Court of Appeal had considered the application she had made on 5 February 1994 to have the exclusion order lifted, it had not heard her case in accordance with Article 6 of the Convention.

32. On 17 May 1995, in a partial decision, the Commission (Second Chamber) declared the complaint based on Article 6 of the Convention inadmissible and adjourned the application as to the remainder. On 18 April 1996, in a final decision, the plenary Commission (in favour of which the Second Chamber had relinquished jurisdiction) declared the other two complaints admissible. In its report of 24 October 1996 (Article 31), it expressed the unanimous opinion that there had been no violation of Article 3 of the Convention and by twenty-one votes to nine the opinion that there had been no violation of Article 8. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

33. In their memorial the Government submitted “that Mrs Dalia’s application should be dismissed”.

34. The applicant asked the Court to

“hold that [she had] been the victim of a breach of Articles 3 and 8 of the European Convention [on] Human Rights and that she should consequently be awarded compensation of 100,000 French francs and reimbursement of her costs and lawyer’s fees”.

AS TO THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

35. As their primary submission the Government maintained, as they had done before the Commission, that Mrs Dalia had not exhausted domestic remedies. She had not lodged an appeal on points of law against either the Versailles Court of Appeal’s judgment of 26 November 1992 or its judgment of 4 October 1994. Such an appeal against the latter judgment was both sufficient and accessible and it could not be held in advance that it would have been ineffective. Mrs Dalia’s submission to the Court of Appeal that applying section 28 *bis* of the Ordinance of 1945 would entail a breach of Article 8 of the Convention was a matter precisely within the Court of Cassation’s jurisdiction.

36. The applicant replied that only the last set of proceedings to have the exclusion order lifted – and therefore the Versailles Court of Appeal’s judgment of 4 October 1994 – was in issue and not the proceedings which had given rise to the judgment of 26 November 1992. An appeal on points of law against the former judgment would have been ineffective; it would have been bound to fail as the Court of Cassation ruled on issues of law, not of fact. Not a single appeal on points of law in relation to an application to have an exclusion order lifted had yet succeeded, and indeed the Government had not produced any decision in which the Court of Cassation had held on an appeal of that type that there had been a breach of Article 8 of the Convention. Moreover, legal aid for such an appeal would be refused.

37. The Commission submitted that Mrs Dalia had satisfied the requirements of Article 26 of the Convention. Even though the applicant had argued that a strict application of section 28 *bis* of the Ordinance of 2 November 1945 would entail a breach of Article 8 of the Convention, the Versailles Court of Appeal in its judgment of 4 October 1994 had peremptorily made a domestic rule of procedure prevail over the Convention. If there had been an appeal on points of law, the Court of Cassation would have been compelled to look at the facts of the case, which in principle lay outside its jurisdiction. For want of any authorities showing that the Court of Cassation indeed undertook such a review in relation to Article 8, it had to be inferred that in the instant case such an appeal would have been ineffective.

38. The Court will confine itself to considering the question of exhaustion of domestic remedies in relation to the proceedings concerning the application of 5 February 1994 to have the exclusion ordered lifted, the only application in issue. It reiterates that the only remedies which Article 26 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, the Vernillo v. France judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27).

In this instance the Government did not produce before the Court any case-law to support their argument concerning the sufficiency and effectiveness of the remedy. The Court consequently considers, like the Commission, that the appeal on points of law which the applicant could have lodged at the time against the judgment of 4 October 1994 did not meet the requirement of effectiveness.

The preliminary objection must accordingly be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

39. Mrs Dalia alleged that the Versailles Court of Appeal's refusal on 4 October 1994 to grant her application to lift the exclusion order made against her in 1985 interfered with her private and family life and contravened Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In strictly applying section 28 *bis* of the Ordinance of 2 November 1945, as amended by the Law of 24 August 1993 making the admissibility of an application to lift an exclusion order conditional on residence abroad, the Court of Appeal had taken no account of her new family life.

40. That submission was not accepted by either the Government or the Commission.

A. Paragraph 1 of Article 8

41. It must first be determined whether the applicant is entitled to maintain that she has a “private and family life” in France within the meaning of Article 8 § 1 and whether the measure in issue amounted to an interference with it.

42. The applicant submitted that she had arrived in France in 1976 at the age of 17 and had lived there ever since, except for a period of twenty-three months. Her mother, with whom she lived, and her seven brothers and sisters were lawfully resident there. In 1990 she had given birth to a child of French nationality. That fact, although of later date than the making of the order permanently excluding her from French territory, could not be ignored.

43. In the Government’s submission, Mrs Dalia had led a marginal existence in France before 1985, and since her arrest and trial had lived there in hiding. Her social relations had been reduced to occasional contacts with her family living in France. Having spent the first eighteen years of her life in Algeria, the applicant had, the Government said, created an independent social life and formed personal relationships. When she was deported to Algeria in 1987, she re-established those links by living with members of her family. On her return to France at the age of 38 the family ties with her mother and her brothers and sisters had been loose and she could not put them forward in the context of the instant case to secure recognition of her rights under Article 8. The only tangible link with France was the one with her son, born in 1990. But the question whether the applicant had a family life had to be considered in the light of the position at the date of the permanent exclusion order, 11 July 1985 (see the *Bouchelkia v. France* judgment of 29 January 1997 and the *El Boujaïdi v. France* judgment of 26 September 1997, *Reports of Judgments and Decisions* 1997-I, p. 63, § 41, and 1997-VI, p. ..., § 33). It had to be recognised that in 1985 the applicant was not married nor was she yet the mother of Karim. The decision to exclude her from the territory therefore did not infringe the right that was guaranteed her by Article 8. At all events, there was nothing to prevent Mrs Dalia from taking her son – who had dual nationality – to Algeria.

44. The Commission considered that the permanent exclusion from French territory amounted to an interference with the applicant's right to respect for her private and family life.

45. The Court notes that while the exclusion order became final on 11 July 1985, the applicant's complaint relates not to that order but to the Versailles Court of Appeal's refusal on 4 October 1994 to lift it. In order to consider the question whether the applicant had a private and family life, the Court will consequently take the latter date as the relevant one (contrast the El Boujaïdi judgment previously cited, p. ..., § 33). Mrs Dalia can therefore rely on the birth of her son Karim in 1990.

The Court notes, as the Commission did, that the applicant has been living in France since the age of 17 or 18 (see paragraph 7 above), except for a period of twenty-three months from 14 August 1987 to 15 July 1989. She gave birth in that country to a child who, at birth, had French nationality (see paragraph 15 above). She has parental responsibility for him. The Court consequently has no doubt that the Versailles Court of Appeal's refusal in 1994 of her application to lift the exclusion order made against her in 1985 amounted to an interference with her right to respect for her private and family life.

B. Paragraph 2 of Article 8

46. It must accordingly be determined whether the exclusion order in question, combined with the refusal to lift it, satisfied the conditions of paragraph 2, that is to say whether it was "in accordance with the law", whether it pursued one or more of the legitimate aims listed and whether it was "necessary in a democratic society" to achieve the aim or aims concerned.

1. "In accordance with the law"

47. It was not disputed that the permanent exclusion order made against Mrs Dalia was based on Article L. 630 of the Public Health Code. The application to have the exclusion order lifted was refused by the Court of Appeal pursuant to section 28 *bis* of the Ordinance of 2 November 1945, as amended by the Law of 24 August 1993.

2. Legitimate aim

48. It was likewise common ground that the interference in question sought to achieve an aim which was wholly compatible with the Convention, namely "the prevention of disorder or crime".

3. “*Necessary in a democratic society*”

49. The applicant submitted that she had spent, in all, nineteen years in Algeria and nineteen in France. When the exclusion order was made in 1985 she had had a resident’s card, was fully integrated and had retained no links with Algeria, so that her twenty-three months’ stay with one of her aunts had proved very trying. Admittedly, her child had been conceived after her conviction and exclusion from French territory. Nevertheless, in 1989, when she had returned to France, she had had a visa and the child had been born on 6 June 1990. Since then she had had no further trouble with the police or the administrative authorities.

The particularly light sentence imposed on her showed how minor her role in the commission of the offence had been. Subsequently she had had nothing more to do with the drugs world and had not committed any further offences.

Lastly, separation from her family surroundings would have disastrous consequences for her mental balance and serious effects on her little boy of French nationality.

50. The Government pointed out that the exclusion order had been made on account of Mrs Dalia’s involvement in large-scale heroin trafficking. The importance of an offence against the dangerous drugs legislation could not be minimised. The applicant had taken an active part in spreading the scourge of drugs. Furthermore, she had chosen to lead a marginal existence shortly after settling in France. On the other hand, a temporary residence permit could be issued to her by virtue of section 12 *bis* of the Ordinance of 1945, as amended by the Law of 24 April 1997 (see paragraph 29 above), as the mother of a French child. Deportation, moreover, would not entail separation from her son, who could accompany her to Algeria.

51. The Commission accepted the Government’s submissions in substance.

52. The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences.

However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, among other authorities, the *Mehemi v. France* judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34).

The Court’s task accordingly consists in ascertaining whether the refusal to lift the order in issue struck a fair balance between the relevant interests,

namely the applicant's right to respect for her private and family life, on the one hand, and the prevention of disorder or crime, on the other.

53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989. In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France.

Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children (see the *C. v. Belgium* judgment of 7 August 1996, *Reports* 1996-III, p. 924, § 34).

54. The Court notes further that, as the Government pointed out, the French legislature, in restricting (other than in the exceptional cases provided for in section 28 *bis* of the Ordinance of 1945) relief from exclusion orders to aliens who had complied with such an order, had wished to remove the benefit of such relief from those who remained in France unlawfully. Applying this rule of procedure – which has a legitimate aim – to the applicant cannot in itself entail a breach of Article 8. In support of her application to have the exclusion order lifted, Mrs Dalia relied mainly on the fact that she was the mother of a French child. The evidence shows that the applicant formed this vital family link when she was in France illegally. She could not be unaware of the resulting insecurity. In the Court's view, this situation, which was created at a time when she was excluded from French territory, cannot therefore be decisive.

Furthermore, the exclusion order made as a result of her conviction was a penalty for dangerous dealing in heroin. In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

56. The applicant also complained that if the exclusion order was enforced again, her deportation to Algeria would amount to treatment, in respect both of her and of her child, contrary to Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Furthermore, it was likely that in Algeria she would be subjected to treatment prohibited by that provision.

57. The Government argued that the exclusion order made against Mrs Dalia did not in itself presuppose that Algeria was the only possible destination if the order was enforced. A person required to comply with such an order would be able to choose which country to go to. If the decision was taken to enforce the order, it would have to be specifically decided which country the applicant would be deported to. In that event, in accordance with section 27 *bis* of the Ordinance of 2 November 1945, the applicant could not be returned to Algeria if, at the time when the deportation decision was taken, it appeared that she would be exposed to the risk of treatment contrary to Article 3. To date, however, no decision had been taken to the effect that the order was to be enforced and that she was to be deported to Algeria. That being so, the threat of deportation did not reach the threshold of severity beyond which Article 3 of the Convention would have been infringed.

58. The Commission considered that the facts of the case did not establish that renewed enforcement of the exclusion order would cause the applicant suffering of such intensity as to constitute “inhuman” or “degrading” treatment within the meaning of Article 3.

59. The Court shares that opinion and, in the light of the applicant’s present position, holds that there has been no violation of Article 3.

FOR THESE REASONS, THE COURT

1. *Dismisses* by seven votes to two the Government's preliminary objection;
2. *Holds* by six votes to three that there has been no violation of Article 8 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 3 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Pettiti and Mr Kūris;
- (b) dissenting opinion of Mr De Meyer, joined by Mr Bernhardt and Mr Levits.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION
OF JUDGES PETTITI AND KŪRIS

(Translation)

We voted with the majority in favour of finding that there had been no violation of Article 8. We did not, however, vote with the majority as regards the objection. We took the view that the applicant had not exhausted the domestic remedies in that she could and should have appealed on points of law against the Versailles Court of Appeal's judgment – an appeal that would not have been ineffective if the ground of appeal had been the national courts' application of the criteria relating to family life, within the meaning of Article 8 of the European Convention, with respect to section 28 *bis* of the Ordinance of 2 November 1945 (notably as regards the residence condition).

DISSENTING OPINION OF JUDGE DE MEYER,
JOINED BY JUDGES BERNHARDT AND LEVITS

(Translation)

In my opinion, there has been a violation of the applicant's right to respect for her private and family life.

Even if it is reasonable to consider that the exclusion order made against her in 1985 was justified at the time, it was certainly no longer so in 1994.

As the minority of the Commission observed, without being contradicted by the Government, the applicant had had nothing more to do with the drugs world and her presence in France, where she lives with her family and child, no longer prejudiced public order in any way.

That being so, a strict application of the "rule of procedure" – questionable enough in itself – laid down by section 28 *bis* of the Ordinance of 2 November 1945, as amended by the Law of 24 August 1993, could not be regarded as "necessary in a democratic society".