



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

COURT (CHAMBER)

CASE OF BOUGHANEMI v. FRANCE

(Application no. 22070/93)

JUDGMENT

STRASBOURG

24 April 1996

In the case of Boughanemi v. France ¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A ², as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mr A.N. LOIZOU,

Mr A.B. BAKA,

Mr M.A. LOPES ROCHA,

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

Having deliberated in private on 24 November 1995 and 27 March 1996,

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 1 March and 20 April 1995 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 22070/93) against the French Republic lodged with the Commission under Article 25 (art. 25) by a Tunisian national, Mr Kamel Boughanemi, on 3 June 1993.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

¹ The case is numbered 16/1995/522/608. 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 A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently

the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). By a letter of 1 August 1995 the lawyer in question informed the Registrar that he was no longer acting for Mr Boughanemi.

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mr S.K. Martens, Mr A.N. Loizou, Mr A.B. Baka and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, 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 para. 1 and 38). Pursuant to the orders made in consequence, the registry received the Government's memorial on 28 August 1995. On 30 October 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 19 June 1995 the Commission had produced various documents that the Registrar had requested 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 21 November 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Perrin de Brichambaut, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent,*

Mr J. Cochard, Emeritus President of the Social Division
of the Court of Cassation and President
of an association for the prevention of procuring,

Mrs M. Pauti, Head of the Comparative and International
Law Office, Department of Civil Liberties and
Legal Affairs, Ministry of the Interior,

Mrs S. Crouzier, assistant at the Legal Affairs Department,
Ministry of Foreign Affairs, *Counsel;*

(b) for the Commission

Mr J.-C. Geus, *Delegate.*

The Court heard addresses by Mr Geus, Mr Perrin de Brichambaut and Mr Cochard.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Kamel Boughanemi was born on 23 November 1960 in Tunisia and has Tunisian nationality. He came to France in 1968 and lived there continuously until his deportation. His parents and his ten brothers and sisters reside in France. Eight of his brothers and sisters were born there. He claims that he lived with a woman of French nationality (Miss S.), whose child, born on 19 June 1993, he formally recognised on 5 April 1994.

A. The applicant's criminal record

8. The applicant was convicted on a number of occasions. On 21 December 1981 he was sentenced to ten months' imprisonment, four of which were suspended, for burglary. On 22 September 1983 he was sentenced to two months' imprisonment for an assault resulting in the victim's not being fit for work for a period exceeding eight days. On 25 September 1986 he was fined 1,500 francs for driving without a licence and without insurance and on 24 March 1987 he was sentenced to three years' imprisonment for living on the earnings of prostitution with aggravating circumstances.

B. The deportation procedure

1. The deportation order

9. On 8 March 1988 the Minister of the Interior issued an order for Mr Boughanemi's deportation worded as follows:

"... Having regard to sections 23 and 24 of Ordinance no. 45-2658 of 2 November 1945, as amended, concerning the conditions of entry and residence of aliens in France;

Having regard to Decree no. 82-440 of 26 May 1982;

Whereas Kamel Boughanemi ... committed the following offences: on 21 August 1981 a burglary; on 21 November 1981 an assault on the person of a representative of the public authority who was performing his duties; on 25 January 1983 an assault; and from 26 September 1986 to 10 October 1986, acts amounting to living on the earnings of prostitution with aggravating circumstances;

Whereas on account of his behaviour the presence of this foreign national on French territory represents a threat to public order;

... IT IS HEREBY ORDERED AS FOLLOWS

Article 1: the above-mentioned person is enjoined to leave the French territory;

Article 2: the Prefect of Police and the prefects are instructed to serve and execute this order.

..."

10. The deportation order was executed on 12 November 1988 but the applicant returned to France and lived there illegally.

11. On 16 March 1989 the Lyons Administrative Court dismissed the applicant's appeal alleging that the deportation order was an abuse of authority.

2. The application to have the deportation order rescinded

12. On 21 March 1990 the applicant applied to the Minister of the Interior to have the deportation order rescinded. His application was rejected on 10 August 1990 on the following grounds:

"...

I hereby inform you that the deportation order was made by the competent authorities in view of the nature and increasing gravity of the offences committed by the applicant. The threat to public order was also assessed with reference to Mr Boughanemi's general conduct as was required under the circular on the implementation of the Law of 9 September 1986.

In addition, the Lyons [Administrative Court] confirmed the deportation order on 16 March 1989.

It is accordingly impossible for me to grant your request. The deportation order of 8 March 1988 must therefore remain in force.

..."

3. The application for judicial review

(a) In the Lyons Administrative Court

13. On 9 October 1990 Mr Boughanemi lodged with the Lyons Administrative Court an application for judicial review of the Minister's decision refusing to rescind the deportation order. In its judgment of 26 February 1991 dismissing the application, the Lyons court gave the following grounds:

"...

Under section 23 of the Ordinance of 2 November 1945, as amended in particular by the Law of 2 August 1989, 'subject to the provisions of section 25, deportation may be decided by order of the Minister of the Interior if an alien's presence on French territory constitutes a serious threat to public order. The deportation order may be

rescinded at any time by the Minister of the Interior ...' Although section 25, as amended by the aforementioned Law, prohibits the Minister, save in cases of extreme urgency as provided for in section 26, from ordering the deportation of certain categories of alien, that provision cannot be usefully invoked to support an application to have a previously issued deportation order rescinded. It is exclusively a matter for the Minister to whom such an application has been made to assess pursuant to section 23 whether the presence of the person concerned on French territory constitutes at the date on which he gives his decision a serious threat to public order.

In the first place, it follows from the foregoing that the submission based on the fact that Mr Boughanemi has lived continuously in France since the age of 8 and that for that reason, in accordance with the new section 25 of the Ordinance of 2 November 1945, a deportation order could not be made against him after the coming into operation of the Law of 2 August 1989 is without force in regard to the decision refusing to rescind the deportation order made against him on 8 March 1988. Nor can he rely on the principle that more lenient criminal legislation should be applied with retrospective effect.

Secondly, an appeal brought against the deportation decision of 8 March 1988 alleging that it was an abuse of authority was dismissed as unfounded by a judgment of this court on 16 March 1989. That decision carries with it the authority of res judicata, which precludes Mr Boughanemi from pleading the unlawfulness of that measure in support of his submissions directed against the refusal to rescind it.

Finally, the documents in the file show that the Minister, who took his decision in the light of all the circumstances of the case, did not make a manifest error of assessment in concluding, on the basis of the acts that gave rise to the applicant's being arrested and prosecuted on several occasions between 1981 and 1988 and aspects of Mr Boughanemi's conduct, that the latter's presence on French territory constituted a serious threat to public order and in refusing on those grounds to rescind the deportation order made against him.

It follows from all the foregoing considerations that the applicant's submission that the impugned decision is vitiated as an abuse of authority is unfounded and his application to have it set aside on that ground must fail."

(b) In the Conseil d'Etat

14. On 7 December 1992 the Conseil d'Etat dismissed the applicant's appeal lodged on 23 October 1991. It gave, *inter alia*, the following reasons:

"...

Although the wording of section 25 of the above-mentioned Ordinance of 2 November 1945 was amended by the Law of 2 August 1989, Mr Boughanemi cannot usefully rely on this change in the legal position in order to plead that the Minister of the Interior was under a duty to rescind the deportation order issued against him under previous legislation concerning aliens. It was exclusively a matter for the Minister to whom an application for such an order to be rescinded has been made to determine whether, in accordance with section 23 of the Ordinance of 2 November 1945 as in force at the date of the application, the presence of the person concerned on French territory represented a serious threat to public order.

It appears from the documents in the file that the Minister, who took his decision in the light of all the evidence in the case, did not make a manifest error of assessment in finding that the presence in France of the appellant, who had committed repeated and increasingly serious offences, including that of living on the earnings of prostitution with aggravating circumstances, still represented, as at 10 August 1990, a serious threat to public order. He was therefore entitled to refuse to rescind the order for Mr Boughanemi's deportation.

In the circumstances of this case, the Minister of the Interior's refusal to rescind the deportation order made against Mr Boughanemi, who returned to France and lived there illegally after the execution of that deportation order, did not interfere with the latter's family life to an extent that exceeded what was necessary to preserve public order. Thus the submission that the refusal to rescind the deportation order of 8 March 1988 infringed the right to respect for family life guaranteed by Article 8 (art. 8) of the European Convention on Human Rights must fail.

..."

4. The deportation

15. Mr Boughanemi was arrested on 28 July 1994 for breach of the deportation order and was sentenced to three months' imprisonment. On 12 October 1994 he was deported to Tunisia.

C. The statements of Miss S.

16. On 20 June 1994 the Commission received from Miss S. (see paragraph 7 above) the following letter, dated 15 June 1994:

"As partner (concubine) and mother of the child of Mr Kamel Boughanemi, I wish by this letter to draw your attention to our situation.

The difficulty of getting his identity papers back makes it impossible for us to lead a normal life.

There is also the fact that, as I am myself unemployed, my financial circumstances make it impossible for me to give him either moral or financial support. What is more, I am his partner and, despite all his efforts to be recognised as a normal citizen, it is unfortunately impossible for us to live together. Faced with all the problems raised by his getting administrative recognition, I write to you in the hope that you will take account of the fact that both he and I are acting in good faith.

..."

On 6 December 1994 Miss S. made the following statement to an officer of the criminal investigation department (extracts from the police report):

"...

I do know Kameledine Boughanemi. I've known him for about three years. I lived with him from the end of 1992 till Christmas 1993 when we separated because of a disagreement.

When we lived together he was out of work. He lived at my place ... I paid for his keep.

He never gave me any money because he didn't have any.

He didn't recognise my son until April 1994, because to begin with I wasn't too keen on the idea.

So far he has never sent any money for our child. He calls me from time to time to find out if there is any news about his application to the European Court. I don't intend to live with him if he comes back.

I have nothing else to say on this matter.

..."

II. RELEVANT DOMESTIC LAW

17. Deportation is governed by Ordinance no. 45-2658 of 2 November 1945 concerning the conditions of entry and residence of aliens in France, as amended by, *inter alia*, the following Laws: no. 81-973 of 29 October 1981; no. 86-1025 of 9 September 1986; no. 89-548 of 2 August 1989; no. 91-1383 of 31 December 1991; and no. 93-1027 of 24 August 1993.

A. The rules governing deportation

1. Normal procedure

(a) Principles and procedure

18. According to the first paragraph of section 23 of the Ordinance, as amended by the Law of 9 September 1986, "subject to the provisions of section 25, deportation may be decided by order of the Minister of the Interior if an alien's presence on French territory constitutes a threat to public order".

The Law of 2 August 1989 restored the wording that this section had contained prior to the Law of 9 September 1986, to the effect that deportation might only be ordered in the event of a "serious" threat to public order.

19. Section 24, as amended by the Laws of 29 October 1981 and 9 September 1986, stated:

"Deportation as provided for in section 23 may be ordered only where the following conditions are satisfied:

1° The alien must be given advance notice in accordance with the conditions laid down in a decree of the Conseil d'Etat;

2° The alien shall be summoned to be interviewed by a board which is convened by the prefect and is composed as follows:

the President of the tribunal de grande instance of the administrative capital of the département or a judge delegated by him, chairman;

a judicial officer (magistrat) designated by the general assembly of the tribunal de grande instance of the administrative capital of the département; and

an administrative court judge.

The head of the aliens' department at the prefecture shall act as rapporteur; the director of health and social affairs of the département or his representatives shall be heard by the board. They shall not attend the board's deliberations.

The summons, which must be served on the alien at least eight days before the board's meeting, shall inform him that he has the right to be assisted by a lawyer or by any other person of his choice and to be heard with the help of an interpreter.

The alien may request legal aid in accordance with the conditions laid down in Law no. 72-11 of 3 January 1972. This possibility shall be mentioned in the summons. A provisional grant of legal aid may be decided by the chairman of the board.

The board's hearing shall be public. The chairman shall ensure the proper conduct of the proceedings. All the orders made by him to that end must be executed immediately. Before the board the alien may put forward all the reasons that militate against his deportation. A report recording the alien's statements shall be transmitted, together with the board's opinion, to the Minister of the Interior, who shall give a decision. The board's opinion shall also be communicated to the person concerned."

The Law of 2 August 1989 inserted, *inter alia*, the following provision:

"3° If the board issues an opinion opposing deportation, a deportation order may not be made."

The latter provision was however repealed by the Law of 24 August 1993.

(b) Protected aliens

20. Section 25 of the Ordinance, as amended by the Law of 29 October 1981, subsequently amended by the Law of 9 September 1986, provided:

"A deportation order made under section 23 may not be issued against the following persons:

1° A minor alien under 18 years of age, unless a deportation or removal order has been made against the persons who actually provide for his or her maintenance and no other person lawfully residing in France is in a position to so provide for him or her; in

the case of a minor alien under 16 years of age, the opinion of the deportation board of the département must be in favour of deportation;

2° An alien, who has been married for at least one year and whose spouse is a French national, provided that the two spouses genuinely live together;

3° An alien who is the father or the mother of a French child residing in France provided that he or she exercises parental rights, even only on a partial basis, in respect of the child or actually provides for him or her;

4° An alien who proves by any means that he has habitually resided in France since the age of 10 or younger or for over ten years and who has not been convicted with final effect of an offence for which he or she has been sentenced to a non-suspended term of imprisonment of at least six months or a suspended term of one year or several terms of imprisonment whose aggregate is at least equal to such periods;

5° An alien who is in receipt of an industrial accident disability pension paid by a French institution where his or her permanent and partial disability is at least 20%."

21. The Law of 2 August 1989 amended those provisions, restoring to a large extent the wording in force prior to the Law of 9 September 1986:

"A deportation order made under section 23 may not be issued against the following persons:

1° A minor alien under 18 years of age;

2° An alien who proves by any means that he has habitually resided in France since the age of 10 or younger;

3° An alien who proves by any means that he has habitually resided in France for more than fifteen years or an alien who has lawfully resided in France for more than ten years;

4° An alien, who has been married for at least six months and whose spouse is a French national;

5° An alien who is the father or the mother of a French child residing in France provided that he or she exercises parental rights, even only on a partial basis, in respect of the child or actually provides for him or her;

6° An alien who is in receipt of an industrial accident or occupational disability pension paid by a French institution where his or her permanent disability is at least 20%;

7° An alien residing lawfully in France by virtue of one of the residence permits provided for in this Ordinance or in the international agreements, who has not been sentenced with final effect to a non-suspended term of imprisonment of one year or more.

..."

The same law added a paragraph, which was worded as follows:

"The aliens referred to in sub-paragraphs 1° to 6° may not be the subject of a removal order made under section 22 of this Ordinance or of an exclusion order made by a court under section 19 of this Ordinance prohibiting them from entering the territory."

22. Section 25 was further amended and supplemented by the Laws of 31 December 1991 and 24 August 1993:

"A deportation order made under section 23 may not be issued against the following persons:

1° A minor alien under 18 years of age;

2° An alien who proves by any means that he has habitually resided in France since the age of 6 or younger;

3° An alien who proves by any means that he has habitually resided in France for more than fifteen years or an alien who has lawfully resided in France for more than ten years, unless for the whole of this period he has been in possession of a temporary residence permit bearing the word 'student';

4° An alien, who has been married for at least one year and whose spouse is a French national provided that they have not ceased to live together and that the spouse has kept his or her French nationality;

5° An alien who is the father or the mother of a French child residing in France provided that he or she exercises parental rights, even only on a partial basis, in respect of the child or actually provides for him or her;

6° An alien who is in receipt of an industrial accident or occupational disability pension paid by a French institution where his or her permanent disability is at least 20%;

7° An alien residing lawfully in France by virtue of one of the residence permits provided for in this Ordinance or in the international agreements, who has not been sentenced with final effect to a non-suspended term of imprisonment of one year or more.

...

The aliens referred to in sub-paragraphs 1° to 6° may not be the subject of a removal order made under section 22 of this Ordinance.

By way of derogation from the provisions of this section, a deportation order under sections 23 and 24 may be made against an alien falling within one of the categories listed in sub-paragraphs 3°, 4°, 5° and 6° if he or she has been sentenced with final effect to a non-suspended term of imprisonment of at least five years."

2. Procedure for urgent cases

23. Section 26 of the Ordinance, as amended by the Law of 9 September 1986 provided:

"In cases of extreme urgency and by way of derogation from sections 23 to 25, deportation may be ordered where the alien's presence on French territory constitutes a particularly serious threat to public order

This procedure may not however be applied in respect of minors under the age of 18."

24. Section 26 was subsequently amended by the Law of 2 August 1989 and then by the Law of 24 August 1993 and now reads as follows:

"Deportation may be ordered:

(a) in cases of extreme urgency, by way of derogation from section 24 (2°);

(b) where such a measure constitutes an absolute necessity for the security of the State and public safety, by way of derogation from section 25.

In cases of extreme urgency and where the measure is an absolute necessity for the security of the State and public safety, deportation may be ordered by way of derogation from sections 24 (2°) and 25.

The procedures provided for in this section may not be applied in respect of a minor alien under 18."

B. Applications to have a deportation order rescinded

25. The second paragraph of section 23 of the Ordinance, as amended by the Law of 9 September 1986, provided:

"The deportation order may at any time be rescinded by the Minister of the Interior. Where the application for an order to be rescinded is submitted on the expiry of a period of five years from the actual execution of the order, it may be rejected only after the opinion of the board provided for in section 24 has been sought. The person concerned may be represented before the board."

The wording that applied prior to the Law of 9 September 1986 was restored by the Law of 2 August 1989: the Minister was required to abide by the opinion expressed by the board.

However, this provision was again amended by the Law of 24 August 1993 to the effect that the board's opinion must compulsorily be sought, but it no longer binds the Minister.

C. Sanctions

26. Section 27 of the Ordinance, as amended by the Law of 9 September 1986, provided:

"Any alien who has evaded or attempted to evade the execution of a deportation order or a removal order or who, having been deported or being subject to a prohibition on entering the territory, re-enters the national territory without an authorisation shall be liable to a term of imprisonment of from six months to three years.

The court may in addition issue an order banning a person so convicted from re-entering the territory for a period not exceeding ten years.

The ban on re-entering the territory automatically entails the convicted person's removal from French territory, on completion of his prison sentence where appropriate."

27. The Law of 31 December 1991 states that the same penalty applies to "any alien who has evaded or attempted to evade the execution of a measure refusing him or her entry into France" (the first paragraph as supplemented) or "who has not submitted to the relevant administrative authority the travel documents making possible the execution of one of the measures referred to in the first paragraph or who, where he or she has no such documents, has failed to communicate the information making it possible to execute such measures" (new paragraph inserted between the first and second paragraphs).

PROCEEDINGS BEFORE THE COMMISSION

28. Mr Boughanemi applied to the Commission on 3 June 1993. He complained of a violation of his right to respect for his private and family life as guaranteed under Article 8 (art. 8) of the Convention.

29. The Commission declared the application (no. 22070/93) admissible on 29 August 1994. In its report of 10 January 1995 (Article 31) (art. 31), it expressed the opinion by twenty-one votes to five that there had been a violation of Article 8 (art. 8). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment ³.

FINAL SUBMISSIONS TO THE COURT

30. In their memorial the Government

"request the Court to dismiss Mr Boughanemi's application".

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-II), but a copy of the Commission's report is obtainable from the registry

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

31. In Mr Boughanemi's submission, his deportation by the French authorities interfered with his private and family life and breached Article 8 (art. 8) of the Convention, which is worded as follows:

"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."

The Government contested this contention, whereas the Commission accepted it.

A. Paragraph 1 of Article 8 (art. 8-1)

32. It is necessary in the first place to determine whether the applicant can claim to have had in France a "private and family life" within the meaning of Article 8 para. 1 (art. 8-1).

33. According to the Government, the applicant has failed to show that he had close and real ties with his parents and his brothers and sisters. Admittedly they lived in France, but the applicant, who was aged 34 at the date of his second deportation, no longer lived with them. None of the evidence examined by the administrative courts substantiated the applicant's claim that he had actually received assistance from his family.

In addition, the applicant's relationship with a woman and the fact that he had fathered a child, circumstances to which he had referred before the Commission, could not be taken into account. He had begun to live with the woman and had recognised the child after the deportation order had been issued and after the judgment of the Conseil d'Etat of 7 December 1992. In any event, these ties, which had been established after the applicant's illegal return to France, could not constitute family life. It was clear from the statements made on 6 December 1994 by the applicant's former companion (see paragraph 16 above) that their life together had ended for good well before 28 July 1994, the date of the applicant's last arrest and, a fortiori, before 12 October 1994, when the applicant had been deported to Tunisia a second time. As far as the child was concerned, Mr Boughanemi had not formally recognised him until 5 April 1994, ten months after his birth - on

19 June 1993 - although under French law he could have done so even before the birth and without the mother's being able to prevent him. Nor had the applicant indicated that the child's birth was imminent in his application lodged with the Commission on 3 June 1993; he had mentioned the birth for the first time in his observations of 5 May 1994. Furthermore no relationship that could have been compromised by the deportation had developed between the applicant and his son. Finally, Mr Boughanemi had not shown that he provided for his son, or that he contributed to his education or that he enjoyed parental rights.

34. The Commission took the view that the execution of the deportation order amounted to an interference with the applicant's right to respect for his private and family life.

35. The Court considers that the Government's doubts as to the reality of family ties between Mr Boughanemi and Miss S. are not wholly unfounded. It would appear that their life together did not begin until after the applicant's return as an illegal immigrant and only lasted one year. When he was deported for the second time the couple had already separated; this separation occurred several months before the child's birth.

However, these observations do not justify finding that the applicant had no private and family life in France.

In the first place, Mr Boughanemi recognised, admittedly somewhat belatedly, the child born to Miss S. The concept of family life on which Article 8 (art. 8) is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate (see, *mutatis mutandis*, the judgments of *Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138, p. 14, para. 21, and *Gül v. Switzerland*, 19 February 1996, Reports of Judgments and Decisions 1996-I, pp. 173-74, para. 32). Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances (see the *Gül* judgment cited above, *loc. cit.*). In the present case neither the belated character of the formal recognition nor the applicant's alleged conduct in regard to the child constitutes such a circumstance.

Secondly, Mr Boughanemi's parents and his ten brothers and sisters are legally resident in France and there is no evidence that he has no ties with them.

Mr Boughanemi's deportation had the effect of separating him from them and from the child. It can therefore be regarded as an interference with the exercise of the right guaranteed under Article 8 (art. 8).

B. Paragraph 2 of Article 8 (art. 8-2)

36. It is accordingly necessary to determine whether the deportation in issue satisfied the conditions laid down in paragraph 2 (art. 8-2), namely whether it was "in accordance with the law", whether it pursued one or more

of the legitimate aims listed in that paragraph (art. 8-2) and whether it was "necessary in a democratic society" to attain such aim or aims.

1. "In accordance with the law"

37. It is not in dispute that the order for Mr Boughanemi's deportation was based on sections 23 and 24 of the Ordinance of 2 November 1945 on the conditions of entry and residence of aliens in France, as amended (see paragraphs 18 and 19 above).

2. Legitimate aim

38. The Government and the Commission considered that the interference in question pursued aims that were fully consistent with the Convention, namely "the prevention of disorder" and the prevention of "crime". The Court arrives at the same conclusion.

3. "Necessary in a democratic society"

39. The Government maintained that the interference was proportionate to the aims pursued. They drew attention to the number of offences committed by Mr Boughanemi and the seriousness of the last offence which had led to his conviction for living on the earnings of prostitution with aggravating circumstances. They pointed to those aggravating circumstances, namely violence, the fact that there were several perpetrators and the pressure brought to bear on the victim to prostitute herself outside the territory of mainland France.

In addition, the prejudice to the applicant's private and family life caused by the interference should not be exaggerated. The applicant had failed to show either that he had particularly close ties with his family living in France or that he was in any way integrated in the society of that country, where he had never really worked. Furthermore, on attaining his majority he had not sought French nationality. At the same time he had retained ties with Tunisia that went beyond mere nationality. His parents were Tunisian; he had spent his infancy there and in France he moved in Tunisian circles. Mr Boughanemi could speak Arabic or at least had an adequate command of everyday language. Moreover, having lived in Tunisia up to the age of 8, the two years of schooling that he had received there had laid the foundations of his education. In addition, the applicant did not claim that he had never returned there or that he had cut all ties with that country. Finally, he maintained active relations with the Tunisian community so that his life was not confined to the French dimension.

40. The Commission rejected this line of argument. It observed, as regards the extent of the interference with the applicant's private and family life, that he had arrived in France aged 8 and had remained there until his first deportation to Tunisia in 1988, when he was 28, and again until his

second deportation in October 1994, when he was 34. He had all his family in France and had lived there with a French woman, whose child he had fathered and, on 5 April 1994, formally recognised. In this last connection, the Delegate of the Commission noted the wording of the letter that Miss S. had sent to the Commission on 15 June 1994 (see paragraph 16 above). Although legally an alien, the applicant therefore had family and social ties in France and the Government had not shown that he had any link with Tunisia other than nationality. Thus, despite the serious nature of the convictions leading to his deportation, a fair balance had not been struck between the aims pursued, on the one hand, and the right to respect for private and family life, on the other.

41. The Court acknowledges 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 and notably to order the expulsion of 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 (art. 8-1), 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 judgments of *Beldjoudi v. France*, 26 March 1992, Series A no. 234-A, p. 27, para. 74, and *Nasri v. France*, 13 July 1995, Series A no. 320-B, p. 25, para. 41). In determining whether the interference was "necessary", the Court makes allowance for the margin of appreciation that is left to the Contracting States in this field (see, for instance, the *Berrehab* judgment cited above, p. 15, para. 28).

42. Its task consists of ascertaining whether the deportation in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

43. The applicant arrived in France at the age of 8 and was legally resident there from 1968 to 1988, and then lived there, after his return as an illegal immigrant, until 12 October 1994. He had most of his schooling there. His parents and his ten brothers and sisters live there, five of his siblings are in school there, eight of them were born there and two have French nationality. In addition, Mr Boughanemi lived with a French woman there as man and wife and formally recognised - admittedly not until 5 April 1994 - her child who was born on 19 June 1993.

44. However, he kept his Tunisian nationality and, so it would seem, never manifested a wish to become French. It is probable, as the Government pointed out, that he retained links with Tunisia that went beyond the mere fact of his nationality. Before the Commission he did not claim that he could not speak Arabic, or that he had cut all his ties with his country of birth, or that he had not returned there after his deportation.

In addition, in the Court's view, the circumstances of the present case are different from those in the cases of *Moustaquim v. Belgium* (judgment of 18 February 1991, Series A no. 193), *Beldjoudi v. France* and *Nasri v. France* (judgments cited above), which all concerned the deportation of aliens convicted of criminal offences and in which the Court found a violation of Article 8 (art. 8).

Above all the Court attaches particular importance to the fact that Mr Boughanemi's deportation was decided after he had been sentenced to a total of almost four years' imprisonment, non-suspended, three of which were for living on the earnings of prostitution with aggravating circumstances (see paragraphs 8 and 39 above). The seriousness of that last offence and the applicant's previous convictions count heavily against him.

45. Having regard to the foregoing, the Court does not find that the applicant's deportation was disproportionate to the legitimate aims pursued. There has accordingly been no violation of Article 8 (art. 8).

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of Article 8 (art. 8) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Pettiti;
- (b) dissenting opinion of Mr Martens;
- (c) dissenting opinion of Mr Baka.

R. R.
H. P.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted with the majority to find no violation of Article 8 (art. 8) of the Convention. However, I consider that a different reasoning could have been adopted.

In view of the particular circumstances of the case (the applicant being a habitual offender and convicted of living on the earnings of prostitution), it would have been preferable to take as the starting-point for the Court's decision Article 1 (art. 1) of the Convention, which does not require States to refrain from deporting aliens who have repeatedly committed criminal offences, and then to find that there had been no violation of the right to respect for family life. Family life implies a degree of cohesion on the part of its members incompatible with conduct of such a kind as living on the earnings of prostitution with aggravating circumstances.

It would thus no longer have been necessary to examine the question whether or not there had been an interference. The fact that a person has brothers and sisters is not sufficient to constitute family life (see paragraph 43 of the judgment). Moreover, the majority did not make clear what the Court's approach was to an application seeking to rely on Article 8 (art. 8) but brought by an alien who had returned unlawfully to live in France as an illegal immigrant following his deportation.

Once again cases of deportation brought before the Court highlight the need for the States to adopt a European policy clarifying the extent of their commitments in this field. It is not necessary in a case such as the present one to examine whether a fair balance has been struck between the general interest and the applicant's individual interest.

The general interest of society and the family cannot be compared with and set against that of living on the earnings of prostitution. The member States of the Council of Europe must also take into account the protection of women who are the victims of prostitution forced on them by pimps.

The proper reasoning in cases concerning deportation should, in my view, be different from that adopted in the *Moustaquim v. Belgium* case (judgment of 18 February 1991, Series A no. 193), which involved the protection of an adolescent.

It should also be noted that few member States of the Council of Europe follow a policy of family reunion of the sort adopted by France.

DISSENTING OPINION OF JUDGE MARTENS

1. In this case the Court was again confronted with the issue of the expulsion of an integrated alien, the applicant having come to France when he was 8 years old and having lived there since then, like his parents, brothers and sisters, until - after twenty-two years of residence - he was expelled.

2. There are several ways of dealing with this issue.

3. Firstly, of course, there is the approach which the majority of the Court has followed up to now. Its starting-point is that the Convention does not protect aliens from expulsion, not even when they are integrated. They may, however, rely on the Convention to the extent that expulsion constitutes interference with their right to respect for their family life. If they do so, it is for the Court to assess whether the interference is justified under Article 8 para. 2 (art. 8-2).

4. This traditional approach has two obvious disadvantages.

Firstly, not every integrated alien has a family life.

Secondly, it leads to a lack of legal certainty. National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or not. The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court. A source of embarrassment since it obliges the Court to make well-nigh impossible comparisons between the merits of the case before it and those which it has already decided. It is - to say the least - far from easy to compare the cases of *Moustaquim v. Belgium* (judgment of 18 February 1991, Series A no. 193), *Beldjoudi v. France* (judgment of 26 March 1992, Series A no. 234-A), *Nasri v. France* (judgment of 13 July 1995, Series A no. 320-B) and *Boughanemi v. France*. Should one just make a comparison based on the number of convictions and the severity of sentences or should one also take into account personal circumstances ? The majority has, obviously, opted for the latter approach and has felt able to make the comparison ¹, but - with due respect - I cannot help feeling that the outcome is necessarily tainted with arbitrariness.

5. The first disadvantage of the majority approach is easily mended by accepting that expulsion of integrated aliens at any rate constitutes interference with their private life. I argued in favour of that approach in my concurring opinion in *Beldjoudi* ². This approach has, moreover, been advocated by Judges De Meyer³, Morenilla ⁴ and Wildhaber⁵. In my opinion the Court would already considerably improve its doctrine if it

¹ See paragraph 44 of the Court's judgment.

² Series A no. 234-A, pp. 37 et seq.

³ Series A no. 234-A, p. 35.

⁴ Series A no. 320-B, p. 31.

⁵ Series A no. 320-B, p. 32.

accepted this approach. I very much hope that the wording of paragraph 42 of the Court's judgment - where it refers to "the applicant's right to respect for his private and family life" - shows the Court's willingness to do so.

6. However, accepting the private-life approach does not, of course, in itself remove the second disadvantage of the traditional approach, since under the private-life approach it will likewise be necessary to assess whether the interference was justified.

7. There is only one way to remove all uncertainty and that is to accept the thesis advocated first by Judge De Meyer and recently also by Judge Morenilla ⁶. Judges De Meyer and Morenilla start from the idea that integrated aliens - that is, aliens who have lived all, or practically all, their lives within a State - should no more be expelled than nationals. Expulsion of nationals is forbidden by Article 3 para. 1 of Protocol No. 4 (P4-3-1), and Judges De Meyer and Morenilla assert that expulsion of integrated aliens is forbidden under Article 3 (art. 3) of the Convention. Accepting this thesis would, obviously, remove all uncertainty since Article 3 (art. 3) does not allow exceptions. Under this approach expulsion of an integrated alien *per se* constitutes a violation, whatever the crimes committed.

8. Although I share the idea that integrated aliens should no more be expelled than nationals, I find it difficult to accept that there cannot be exceptions. I therefore hold that although as a rule expelling integrated aliens should constitute a violation of their right to respect for their private life, under very exceptional circumstances such expulsion should be held justified. I have the feeling that Judge Wildhaber's concurring opinion in the Nasri case ⁷ goes in the same direction, although he would probably be inclined to be less severe as to what comes within the scope of the exception.

9. In my opinion the second disadvantage of the traditional approach - its unpredictability - could be considerably attenuated if the Court were to accept that expulsion of an integrated alien as a rule constitutes lack of respect for his private life, but may exceptionally be justified where the alien is convicted of very serious crimes, such as serious crimes against the State, political or religious terrorism or holding a leading position in a drug-trafficking organisation.

10. I agree that living on the earnings of prostitution with aggravating circumstances is a serious and, moreover, a contemptible crime, but I find, nevertheless, that for present purposes it falls within the category of "normal crimes" which are not serious enough to qualify as exceptional circumstances justifying expulsion of an integrated alien, since for normal crimes normal criminal sanctions and measures should suffice, as they have to suffice for crimes of nationals.

⁶ See notes 3 and 4

⁷ See note 5

11. On these grounds I voted for a violation.

DISSENTING OPINION OF JUDGE BAKA

Like the majority I am of the view that the deportation order amounted to an interference with the applicant's private and family life. I also share the view that the deportation was in accordance with the law and served a legitimate aim.

On the other hand, unlike the majority, I consider that the deportation order was not necessary in a democratic society, because it was disproportionate to the legitimate aim pursued, and consequently that there has been a violation of Article 8 (art. 8) of the Convention in the present case.

In my assessment the applicant has most of his family and social ties in France. His parents and his ten brothers and sisters reside in France and eight members of the family were born there. He has a child in France, although uncertainty remains as to the exact nature of the ties between them.

Taking into account all these factors and also that the applicant left Tunisia at the age of 8 with a knowledge of Arabic which definitely does not amount to an adequate command of everyday language for a grown-up and that he "had most of his schooling" in France, I have come to the conclusion that a fair balance has not been struck between the protected interests. Under these circumstances, the expulsion could completely ruin private and family life while giving very little protection to the prevention of crime and disorder.

I am also not persuaded by the argument of the Court that the applicant's "deportation was decided after he had been sentenced" and that the "seriousness of that last offence and the applicant's previous convictions count heavily against him".

In this respect, I believe that the applicant, who has spent most of his life (twenty-two years) in France, should enjoy treatment not significantly less favourable than would be accorded to a national of the country. He committed crimes and he has been sentenced for that. If the criminal sentence itself is adequate and proportionate to the crime committed - as it should be -, to add an expulsion order as well is, in my view, to overemphasise heavily the general interest in the prevention of crime and disorder as against the protection of the individual's right to private and family life.