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

COURT (CHAMBER)

CASE OF BERREHAB v. THE NETHERLANDS

(Application no. 10730/84)

JUDGMENT

STRASBOURG

21 June 1988

In the Berrehab case*,

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 the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Mr. G. LAGERGREN,
Mr. C. RUSSO,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. S.K. MARTENS, *ad hoc judge*,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 February and 28 May 1988,

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 Netherlands Government ("the Government") on 13 March and 10 April 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10730/84) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Moroccan national, Abdellah Berrehab, a Netherlands national, Sonja Koster, and their daughter Rebecca Berrehab, likewise of Netherlands nationality, on 14 November 1983. "The applicants" hereinafter means only Abdellah and Rebecca Berrehab, as the Commission declared Sonja Koster's complaints inadmissible (see paragraph 18 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands Government recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the

* Note by the Registrar: The case is numbered 3/1987/126/177. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 (art. 3, art. 8).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mr. A.M. Donner, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. C. Russo, Mr. A. Spielmann and Mr. J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). In December 1987, as Mr. Donner was unable to attend, the Government appointed Mr. S.K. Martens, Vice-President of the Netherlands Court of Cassation (Hoge Raad), to sit as an ad hoc judge (Rules 23 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence on 31 July 1987, the registry received:

(a) on 3 November, the memorials of the Government and of the applicants;

(b) on 26 October, the applicants' claims for just satisfaction (Article 50 of the Convention) (art. 50), which they supplemented in January 1988.

In a letter of 23 November, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Registrar - the persons due to appear before the Court, the President directed on 24 November that the oral proceedings should commence on 23 February 1988 (Rule 38).

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government
  Miss D.S. VAN HEUKELOM, Assistant Legal Adviser,
  Ministry for Foreign Affairs, *Agent*,
  Mr. J.L. DE WIJKERSLOOTH DE WEERDESTEIJN, Landsadvocaat,
  Counsel;
- for the Commission
  Mr. H. SCHERMERS, *Delegate*;
- for the applicants
  Mr. C.N.A.M. CLAASSEN, advocaat, *Counsel*.

The Court heard addresses by Mr. De Wijkerslooth de Weerdesteijn for the Government, Mr. Schermers for the Commission and Mr. Claassen for the applicants, as well as their replies to its questions.

At the hearing the Commission produced various documents at the Registrar's request on the President's instructions. By a letter of 19 April 1988, the Government supplemented their reply to a question posed by the Court.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr. Berrehab, a Moroccan citizen born in Morocco in 1952, was permanently resident in Amsterdam at the time when he applied to the Commission.

His daughter Rebecca, who was born in Amsterdam on 22 August 1979, has Netherlands nationality. She is represented by her guardian, viz. her mother, Mrs. Koster, who is likewise a Netherlands national.

8. After marrying Mrs. Koster on 7 October 1977, Mr. Berrehab sought permission to stay in the Netherlands where he had been for some time already. The Ministry of Justice granted him permission on 25 January 1978 "for the sole purpose of enabling him to live with his Dutch wife", and then renewed it until 8 December 1979.

From November 1977 Mr. Berrehab worked for a self-service shop. On 9 March 1978, a work permit was issued to him under the Aliens (Work Permits) Act 1964 (replaced since 1 November 1979 by the Employment of Aliens Act). This permit was renewed on 18 October 1979. From April 1981 to April 1983 Mr. Berrehab was employed by a cleaning firm.

9. On 8 February 1979, his wife sued for divorce. The Amsterdam Regional Court (Arrondissementsrechtbank) granted the divorce on 9 May 1979 on the ground of the irretrievable breakdown of the marriage, which was dissolved by registration of the decision in the Civil Registry of Amsterdam on 15 August 1979. By an order of 26 November 1979, the Amsterdam Regional Court appointed Mrs. Koster guardian of her daughter, Rebecca, who had been born in the meantime, and appointed the girl's father as an auxiliary guardian (toeziende voogd). On 5 February 1980, it ordered the latter to pay the Child Welfare Council 140 guilders a month as a contribution to the cost of maintaining and educating his daughter.

When Rebecca was born, her father and Mrs. Koster agreed to ensure that the child had frequent, regular contacts with her father. On 27 February 1984, they had a notary legalise an agreement between them as to

arrangements for these contacts and certify that over the previous two years Mr. Berrehab had seen his daughter four times a week for several hours each time.

10. On 7 December 1979, Mr. Berrehab made an application for renewal of his residence permit. The head of the Amsterdam police refused the application on the same day, stating that it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.

By letter of 26 December 1979, Mr. Berrehab asked the Minister of Justice to review this decision. He pointed out among other things that he needed an "independent" residence permit in order to fulfil his moral and legal obligations as a father. He said he had sufficient means of subsistence and that he was in a position to bear part of the costs of Rebecca's upbringing and education.

11. The Minister did not reply within the statutory period of three months, which under Netherlands law constituted an implied rejection of the request.

Mr. Berrehab consequently appealed, on 23 April 1980, to the Litigation Division (Afdeling Rechtspraak) of the Raad van State. He stated that he could not see how the grant to him of a residence permit could be prejudicial to the national interest, particularly since he was under various legal obligations as a father and he had been able to support himself since 1977 by working. At the hearing on 14 March 1983, he claimed that the impugned decision infringed Article 8 § 1 (art. 8-1) of the Convention on the ground that it prevented him from remaining in contact with his daughter whom he saw regularly four times a week.

The Raad van State dismissed his appeal on 9 May 1983. It recalled in the first place that, under section 11(5) of the Aliens Act of 13 January 1965 (Vreemdelingenwet - "the 1965 Act"), renewal of a residence permit could be refused in the public interest. As the Minister of State for Justice had pointed out, Mr. Berrehab no longer satisfied the condition upon which the grant of his residence permit depended; consequently, the refusal appealed against could be justified under section 11(5). As for Mr. Berrehab's obligations to his daughter, the Raad van State held that the fulfilment thereof did not serve any vital national interest and that those obligations subsisted independently of his place of residence. It added that four meetings a week were not sufficient to constitute family life within the meaning of Article 8 (art. 8) of the Convention and that the impugned decision would, moreover, not necessarily entail a break in relations between the child and her father, as the latter could remain in contact with his daughter by agreement with his ex-wife.

12. On 30 March 1983, Mr. Berrehab was dismissed by his employer with effect from 15 April. He was, furthermore, arrested on 28 December 1983 for the purpose of his deportation. He made an urgent application (kort geding) to the presiding judge of the Amsterdam Regional Court, but withdrew it shortly after the execution of the impugned deportation order on 5 January 1984; on 18 January, the presiding judge accordingly held that there was no ground on which to give a decision.

In 1984, Rebecca and her mother spent two months with Mr. Berrehab and his family in Morocco. On 28 August 1984, Mr. Berrehab applied to the Netherlands Embassy in Rabat for a three-month residence permit. After an initial refusal he obtained a visa valid for one month, for the purpose of enabling him to exercise his rights of access. Accordingly, he went to the Netherlands on 27 May 1985 where he requested an extension of his visa until the following 27 August. His request having been turned down on 6 June, he lodged an appeal with the Raad van State, accompanied by an urgent application. Hearing the latter application, the President of the Litigation Division decided, on 20 June, that the applicant should be treated - subject to a condition which is not relevant to this judgment - as if he had been granted a visa valid until 27 August.

13. On 14 August 1985, Mr. Berrehab remarried Mrs. Koster in Amsterdam. On 9 December 1985, the Ministry of Justice granted him permission (which he had sought on 29 August) to reside in the Netherlands "for the purpose of living with his Dutch wife and working during that time".

II. THE RELEVANT LEGISLATION, PRACTICE AND CASE-LAW

A. The general context of Netherlands immigration policy

14. The Netherlands authorities pursue a restrictive immigration policy. The authorities, however, permit exceptions prompted, inter alia, by the wish to honour the obligations flowing from the Convention, by the country’s economic well-being and by humanitarian considerations, including the reuniting of families.

The entry requirements and the grounds on which aliens may be expelled are laid down primarily in the 1965 Act and its implementing regulations. In addition to these legal provisions, there is the "Circular on Aliens" (Vreemdelingencirculaire), which is a body of directives drawn up and published by the Ministry of Justice.

The right to stay is therefore governed in principle by sections 8-11 of the Act. A prolonged stay requires the authorisation of the Minister of Justice or a body acting under his control. A refusal to grant an authorisation must be accompanied by a statement of the reasons on which

it is based. An appeal lies to the Minister of Justice and then, if need be, to the Raad van State. An application is usually granted - normally for one year - only if the individual's presence serves an essential national interest or if there are compelling humanitarian grounds.

Foreigners married to a Netherlands national fall into the latter category; they may obtain a residence permit "in order to live with their spouse" in the Netherlands and, if appropriate, "in order to work there during that time".

B. Changes in this policy

15. This policy, however, has changed over the years. Foreigners coming to live with their husbands or their wives were initially granted resident status and a conditional residence permit. That status was forfeited if the marriage in respect of which it was granted was dissolved, in which case the foreigner had to leave the country.

In order to enhance the position of foreigners lawfully established in the Netherlands, the Minister of State for Justice felt it necessary to soften the line followed in this respect. Under the terms of the "Vreemdelingencirculaire" (Chapter B 19, paragraph 4.3), foreigners who had been married for more than three years and had lived with their spouses in the Netherlands for at least three years prior to the dissolution of their marriage were enabled to apply for an "independent" residence permit; the underlying idea was that after that length of time they would have forged sufficient links with the country for it to be unnecessary to make their status subject to conditions.

It was subsequently thought advisable to make further changes in the regulations in favour of this category of foreigner. The requirement of three years' marriage was retained but the requisite period of residence was reduced to one year. The purpose of this relaxation was to improve the often precarious position of divorced women, particularly those of Mediterranean origin; it was felt that they ought to be permitted to stay in the Netherlands with a status independent of that of their former husbands.

This policy was later refined still further, when it was decided that even where the aforementioned conditions were not met, overriding humanitarian considerations might justify the grant to a foreigner of authorisation to remain on Netherlands territory on an independent residence permit, for example if he had close links with the Netherlands or with a person resident there. According to the Government, this was an exceptional measure that was rarely applied.

C. Case-law

16. As far as the Netherlands case-law on aliens is concerned, a distinction must be drawn between the courts hearing urgent applications -

the civil courts up to and including the Court of Cassation at last instance - and the court conducting a full examination of the merits of the case, namely the Litigation Division of the Raad van State.

While the Court of Cassation in its decisions in other fields, such as the right of access, had already favoured a fairly broad conception of "family life" (see in particular the leading case decided on 22 February 1985, in Nederlandse Jurisprudentie, 1986, no. 3), the Litigation Division of the Raad van State had tended to take a narrower view. Its decision in the instant case is fully in line with that tradition. Several of its most recent decisions, however, suggest that it is going to adopt the principle laid down in a Court of Cassation judgment of 12 December 1986 concerning aliens, from which it emerges that cohabitation is not a sine qua non of "family life" for the purposes of Article 8 (art. 8) of the Convention (Nederlandse Jurisprudentie, 1988, no. 188).

The Court of Cassation recently had before it a case similar to the present one. A court of appeal, hearing an urgent application, had held that where a foreigner threatened with expulsion pleads the right to respect for his own and his child's family life, the onus is on him to show that the minor's interest is sufficiently important to outweigh the State's interest. On appeal, the Court of Cassation quashed the decision on 18 December 1987 (Rechtspraak van de Week, 1988, no. 9). It fell to be decided whether "family life" existed between the alien and his child, and the Court of Cassation began by emphasising that the child was a legitimate one. It went on:

> "For the duration of the marriage, there existed between Garti and his son a relationship that amounted to family life within the meaning of Article 8 (art. 8) of the ... Convention .... Neither the cessation of cohabitation nor the divorce ended that relationship. It must also be noted that, as Garti claimed and as the Court of Appeal apparently regarded as having been established, Garti and his son remained in close touch after the cessation of cohabitation."

The decision was quashed on the ground, inter alia, that the appeal court had lost sight of the fact that:

> "if, in such a case, the expulsion of a foreigner must be regarded as an interference with his right to respect for family life within the meaning of Article 8 (art. 8) ..., the sole means of determining whether that interference is justified or may be justified is to weigh, in the light of the facts of the case and the policy directives (beleidsregels) in force, the seriousness of the interference with the right of the foreigner concerned and his minor child to respect for their family life against the interests served by those policy directives, and in so doing one may, in order to assess the seriousness of the interference, have regard notably to the length of time during which those concerned have lived together, to the nature and degree of intensity of the contacts maintained after cohabitation came to an end and to whether it is the parent or the child who is threatened with expulsion".

PROCEEDINGS BEFORE THE COMMISSION

17. In their application of 14 November 1983 to the Commission (no. 10730/84), Mr. Berrehab and his ex-wife Mrs. Koster, the latter acting in her own name and as guardian of their under-age daughter Rebecca, alleged that Mr. Berrehab's deportation amounted - in respect of each of them, and more particularly for the daughter - to treatment that was inhuman and therefore contrary to Article 3 (art. 3) of the Convention. In their submission, the deportation was also an unjustified infringement of the right to respect for their private and family life, as guaranteed in Article 8 (art. 8).

18. On 8 March 1985, the Commission declared Mrs. Koster's complaints inadmissible, but Mr. Berrehab's and Rebecca's complaints were declared admissible.

In its report of 7 October 1986 (made under Article 31) (art. 31), the Commission concluded that there had been a violation of Article 8 (art. 8) (by eleven votes to two) but not of Article 3 (art. 3) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

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

19. In the applicants' submission, the refusal to grant a new residence permit after the divorce and the resulting expulsion order infringed Article 8 (art. 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."

The Government disputed this submission but the Commission accepted it.

A. Applicability of Article 8 (art. 8)

20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words "right to respect for ... private and family life" did not

presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life.

The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as "family life" (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together.

Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.

B. Compliance with Article 8 (art. 8)

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

22. In the applicants' submission, the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance between the Netherlands and Morocco and the financial problems entailed by Mr. Berrehab's enforced return to his home country.

The Government replied that nothing prevented Mr. Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa.

23. Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal (see paragraph 12 above). The two disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures

accordingly amounted to interferences with the exercise of a right secured in paragraph 1 of Article 8 (art. 8-1) and fall to be considered under paragraph 2 (art. 8-2).

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

(a) "In accordance with the law"

24. The Court finds that, as was submitted by the Government and the Commission, the measures in question were based on the 1965 Act; and indeed, the applicants did not dispute that.

(b) Legitimate aim

25. In the applicants' submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8 § 2 (art. 8-2); in particular, they did not promote the "economic well-being of the country", because they prevented Mr. Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.

The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.

(c) "Necessary in a democratic society"

27. The applicants claimed that the impugned measures could not be considered "necessary in a democratic society".

The Government rejected this argument, but the Commission accepted it, being of the view that the interferences complained of were disproportionate as the authorities had not achieved a proper balance between the applicants' interest in maintaining their contacts and the general interest calling for the prevention of disorder.

28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, §

60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

30. The applicants maintained that the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting deportation infringed Article 3 (art. 3), which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In the Government's submission, the applicants' complaints disclosed no problem under this provision.

In the Commission's view, the facts of the case did not show that either of the applicants underwent suffering of a degree corresponding to the concepts of "inhuman" or "degrading" treatment.

31. The Court shares this view and finds that there has been no violation of Article 3 (art. 3).

III. APPLICATION OF ARTICLE 50 (art. 50)

32. By Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants, who had legal aid for the proceedings before the Commission and the Court, did not seek reimbursement of costs and expenses. They did, on the other hand, claim financial compensation for twofold pecuniary damage: loss of earnings (31,429.56 guilders) allegedly suffered by Mr. Berrehab from April 1983 to May 1985 by reason both of the dismissal from his job following the refusal to issue him with a new residence permit and of the impossibility of finding work in his home country; and the cost (4,700 guilders) of the journey made by Rebecca Berrehab and her mother to Morocco in July 1984 and by Mr. Berrehab to the Netherlands in May 1985 (see paragraph 12 above). The applicants also sought an unspecified amount of compensation for the mental suffering caused by their separation.

33. In the Government's submission, no causal link had been established between the disputed measures and the alleged pecuniary damage. The Commission accepted that argument with respect to the loss of earnings, but considered that partial compensation for the travel expenses was justified. It also recognised that Mr. Berrehab and Rebecca had sustained non-pecuniary damage; the Government did not express any view on that point.

34. The Court shares the view of the Commission. Taking its decision on an equitable basis, as required by Article 50 (art. 50), it awards the applicants the sum of 20,000 guilders.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been a violation of Article 8 (art. 8);

2. Holds unanimously that there has been no violation of Article 3 (art. 3);

3. Holds unanimously that the Netherlands is to pay to the applicants 20,000 (twenty thousand) Dutch guilders by way of just satisfaction;

4. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 June 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the dissenting opinion of Mr. Thór Vilhjálmsson is annexed to this judgment.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I have not been able to agree with my colleagues who have found a violation of Article 8 (art. 8) of the Convention in this case. I can agree with the judgment with the sole exception of paragraph 29. It is therefore not necessary for me to elaborate on the issues where I share the opinion of the majority of the Court, namely that there was family life between the applicants, that the first applicant, Mr. Abdellah Berrehab, was treated in accordance with the Aliens Act 1965 and other applicable rules and that the legislation pursues a legitimate aim. There remains the question of whether the interference complained of was "necessary in a democratic society". As already indicated, I have no comments to make on what is stated on this point in paragraph 28 of the judgment. As to the final assessment of whether or not there was a violation of Article 8 (art. 8), I would make the following observations.

The policy of the Netherlands in the field at issue here is set out in detailed rules found in or based on the 1965 Act, as amended. The amendments have been made in the light of experience and there has been a tendency to enable persons of foreign nationality who have certain family ties with Netherlands citizens to take up residence in the Netherlands. As already indicated, the rules pursue a legitimate aim. It may be added that the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules.

Against this have to be weighed the rights embodied in the first paragraph of Article 8 (art. 8-1). There are two applicants, the father and his daughter. It was the father who had to leave the Netherlands and who had dealings with that country’s authorities. As stated in the judgment, he and the mother of his daughter had been married to each other, but they had been divorced by the time their child was born. They did not live together. The mother and the first applicant agreed that he should see his daughter frequently and regularly and it must be assumed that he did so during the relevant period. He was also formally appointed an auxiliary guardian of his daughter. Notwithstanding their contacts, which constituted family life, I nevertheless find, taking into account the circumstances that the applicants did not live in the same home and that the parents of the child were not married to each other at the relevant time, that on balance the first applicant’s rights did not outweigh the respondent State’s interests recognised in paragraph 2 of Article 8 (art. 8-2). This conclusion is supported by the fact that the contacts between the two applicants were not completely terminated after the first applicant left the Netherlands.

As to the rights of the second applicant, the daughter, it seems that they were not considered by the Netherlands authorities who dealt with the first

applicant's case. That in itself did not, in my opinion, give rise to a violation of Article 8 (art. 8). I take the view that the Court must assess the competing rights and interests independently. It should be noted that the second applicant was a young girl when her father had to leave the Netherlands. The family life she had enjoyed with him was limited to what he had agreed with the mother. The child had hardly any voice on the scope of her contacts with her father and the respondent State could not alter that situation by any positive action on its part. Thus, her situation was very precarious. In my opinion, this is an argument in favour of the respondent State's position in this case. Taking into account the family situation already described, I have come to the conclusion that neither the rights of the second applicant, taken alone, or the combined rights of the two applicants can lead to a finding of a breach of Article 8 (art. 8).

It should be mentioned that I have, in accordance with the practice in this Court, voted on the question of Article 50 (art. 50) on the basis that there was a violation of Article 8 (art. 8) as decided by the majority.