THIRD SECTION

CASE OF MAWAKA v. THE NETHERLANDS

*(Application no. **29031/04**)*

JUDGMENT

STRASBOURG

1 June 2010

FINAL

01/09/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mawaka v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ann Power, *judges,*
and Stanley Naismith, *Deputy Section Registrar*,

Having deliberated in private on 4 May 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. **29031/04**) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Congolese national, Sita Mawaka ("the applicant"), on 10 August 2004.

2. The applicant, who had been granted legal aid, was represented by Ms H. van der Wal, a lawyer practising in Rotterdam. The Dutch Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Netherlands Ministry of Foreign Affairs.

3. The applicant alleged that he would face a real risk of treatment contrary to Article 3 if he were to be expelled to the Democratic Republic of the Congo (the "DRC"). He further alleged an unjustified interference with his right, under Article 8, to respect for his family life with his wife and child in the Netherlands.

4. On 9 September 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, who is a national of the DRC, was born in 1969 and lives in Rotterdam.

6. From September 1992 until January 1994 the applicant resided in Belgium, at which point he returned to Zaire (as the DRC was then called) after having obtained a laissez-passer from the Zairean Embassy in Brussels.

7. In 1994 the applicant was working in Kinshasa, the DRC, as the personal secretary of a prominent member of the opposition party *Union pour la Démocratie et le Progrès Social* ("UDPS"), who was also the editor of the opposition newspaper *NSEMO*. In October 1994 the applicant was contacted by unknown men who asked him to help assassinate his boss. The applicant refused, but a few weeks later his boss disappeared and was then found unconscious and badly beaten. He died a few days later in a local hospital. On 20 November 1994 the applicant was arrested and put in prison; he was never shown an arrest warrant. On 25 November 1994 the applicant was transferred to the central Makala prison in Kinshasa. During the interrogations he was told he had been arrested because he had refused to help assassinate his boss. He was also told he would not live to see 1995. The applicant was beaten during the interrogation. On 26 December 1994 the applicant managed to escape with the assistance of a guard who happened to be from the same tribe as the applicant. He stayed in the guard's house while travel documents were arranged and on 6 January 1995 the applicant flew to Belgium. After arriving in Brussels, the applicant was driven to the

Netherlands where he requested asylum on 7 January 1995.

8. The applicant was granted a residence permit for the purposes of asylum for an indefinite period (*verblijfsvergunning asiel voor onbepaalde tijd*) on 2 July 1996 since there were sufficient grounds to believe that he would be persecuted should he return to the DRC.

9. On 27 July 1999 the applicant filed a request for naturalisation. On the basis of this request, the applicant was interviewed by an official from the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) on 13 October 2000. During the interview the applicant was confronted with the fact that, on 2 January 1997, he had been convicted and sentenced to two years' imprisonment in Belgium for participation in a criminal organisation and possession of cocaine, by the Brussels *tribunal de première instance*.

10. On 4 October 1999 the applicant married Ms M. with whom he had already had a son who was born on 22 May 1999. Ms M., also a national of the DRC, requested a residence permit for the purpose of staying with her spouse (*verblijfsvergunning voor verblijf bij echtgenoot*) and the permit was granted to her.

11. By letter of 23 November 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) notified the applicant of her intention (*voornemen*) to revoke the applicant's residence permit pursuant to article 35 of the Aliens Act (*Vreemdelingenwet*), which allows the withdrawal of a residence permit on the basis of a criminal conviction of a certain severity.

12. In her letter the Deputy Minister noted that the applicant had enjoyed legal residence in the Netherlands since 2 July 1996 and that his conviction in Belgium dated back to 2 January 1997. She further concluded that, according to Dutch sentencing guidelines, a sentence of 10 months' imprisonment would have been imposed on the applicant had the offence been committed in the Netherlands. The Deputy Minister concluded accordingly that the length of the sentence, compared to the length of time the applicant had been living in the Netherlands, justified revoking the applicant's residence permit. Considering that the applicant had been granted asylum in the Netherlands, the Deputy Minister held that a forced return of the applicant would have to be in compliance with the non-refoulement principle contained in the UN Refugee Convention. In this regard the Deputy Minister considered that an individual report (*ambtsbericht*) from the Ministry of Foreign Affairs explained that there had already been some doubts, given certain inconsistencies in the applicant's story, when he had applied for asylum and that a new individual report had confirmed these doubts created by the inconsistencies. Moreover, since the applicant had left the DRC, regime changes had taken place in that country in 1997 and 2001. The Deputy Minister considered that since the applicant had not shown that he had anything to fear from the new regime, he had not established that he would still face a real and personal risk of persecution in his country of origin. Finally, the Deputy Minister considered that revoking the applicant's residence permit did not constitute an interference with the applicant's right to respect for family life under the Convention since the interests of public order outweighed the interests of the applicant. Furthermore, it had become known that the applicant and his wife had separated, that he had not had any contact with her or their child for some weeks and that there were no indications that he was actively participating in the upbringing of their son. In any event, since the applicant, his wife and their son all had Congolese nationality, there were no objective obstacles for them to continue their family life in the DRC.

13. In his written comments (*zienswijze*) of 19 December 2001, the applicant disputed the finding that he would have been sentenced to 10 months' imprisonment in the Netherlands for an offence similar to the one he had committed in Belgium. The applicant argued that there was no set indication of the length of a sentence but that the individual circumstances of the person concerned would always be taken into consideration. It was therefore not possible to determine what kind of sentence he would have received had he been tried by a Dutch court. The applicant further submitted that the grounds on which he had been granted his residence permit were still valid and that the reports used by the Deputy Minister in no way detracted from that. A forced return to the DRC would therefore entail a violation of the Convention. The applicant also submitted that he could exercise his family life only in the Netherlands, since his wife and child were living there.

14. On 4 July 2002 the applicant appeared before an official board of inquiry (*ambtelijke commissie*) and on 24 July 2002 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*, the successor to the Deputy Minister of Justice – hereafter “the Minister”) issued a decision to revoke the applicant's residence permit. The Minister considered that

the estimate of a 10-month sentence in the Netherlands for the Belgian offence was indeed correct, as an advisory letter from the prosecutor at the Regional Court of 's-Hertogenbosch ("Den Bosch") stated that a 10-month sentence would have represented the minimum length of sentence the prosecutor could have sought based on the facts available to him. The Minister further noted that the applicant's statement regarding his arrest in Belgium before the official board of inquiry differed from the original statement he had given during the interviews that were conducted pursuant to his request for naturalisation on 13 October 2000. From these new statements the Minister concluded that the applicant had been fully aware of his actions when transporting the drugs across the border between the Netherlands and Belgium. The Minister further noted that although the applicant had stated during the hearing before the board that he had had no further contact with judicial authorities, he had in fact been convicted of a number of insurance offences as well as violations of the 1994 Road Traffic Act (*Wegenverkeerswet 1994*). Concerning the risk of persecution that the applicant would face upon his return to the DRC, the Minister considered that the reports of the Ministry of Foreign Affairs did disclose discrepancies in the applicant's story. The Minister further considered that it had been concluded in the intention to revoke the applicant's residence permit that the situation in the DRC had changed since the applicant had last been in that country and that he had failed to establish that he would still be at risk of persecution there. A forced return to the DRC would thus not be in violation of the UN Refugee Convention, nor would it be contrary to Article 3 of the Convention. Moreover, the applicant had been convicted of a drugs-related offence. For these reasons the Minister considered that the interests of the State in protecting public order outweighed the interests of the applicant. Finally, the Minister noted that the applicant and his wife (with whom he had been reconciled by then) and child all had Congolese nationality and that there were no objective obstacles for them to continue their family life in the DRC.

15. By submissions of 14 August 2002 and 3 September 2003 the applicant appealed against the decision of the Minister to the Regional Court of The Hague. On 26 February 2004 the Regional Court rejected the applicant's appeal. The Regional Court considered that the Minister had been correct in applying article 35 of the Aliens Act and that the estimated sentence of 10 months' imprisonment, had the offence been committed in the Netherlands, was reasonable as well. The Regional Court further determined that the Minister had been correct in taking notice of the reports from the Ministry of Foreign Affairs in finding that the applicant's original story contained inconsistencies. The resulting lack of credibility of the applicant's story was sufficient to show that the applicant would not face a real, personal risk of treatment contrary to Article 3 upon his return to the DRC. The Minister had therefore been entitled to attach more weight to the protection of public order in relation to the interests of the applicant. The Regional Court finally considered that the applicant had failed to establish a possible violation of Article 8.

16. On 22 March 2004 the applicant appealed against the judgment of the Regional Court to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State* – "the Division") on essentially the same grounds. The applicant added, however, that according to a letter dated 24 June 1998 from the prosecutor in Den Bosch (which the Minister had neglected to add to the case file and for which the Regional Court had reopened the proceedings so that it could be introduced), the prosecutor in Den Bosch did not have possession of the complete Belgian case file and had thus only been able to estimate the length of the sentence that could be imposed. Furthermore, a judicial sentencing document submitted in the proceedings showed that a similar offence in the Netherlands would attract a custodial sentence of only 8 months and 28 days. A sentence of that duration would not engage the consequences of article 35 of the Aliens Act, meaning that the applicant's residence permit would not be in jeopardy.

17. On 9 June 2004 the Division dismissed the applicant's appeal. The Division considered that the Minister had correctly applied the provisions of article 35 of the Aliens Act in determining the length of imprisonment had the offence been committed in the Netherlands, based on the information obtained from the prosecutor in Den Bosch. In particular, the Division considered that the indication of an 8 month and 28 day sentence applied solely in relation to the possession of cocaine and did not include the charge of participation in a criminal organisation. The remaining grounds of appeal submitted by the applicant were dismissed summarily as not raising any points of law warranting determination.

18. The applicant currently lives in the Netherlands and has since divorced his wife but continues

to visit her and their child regularly.

19. After the introduction of the application the applicant informed the Court by a letter of 23 April 2008 that he had spent a number of days in an aliens' detention centre in France after being apprehended there without a valid residence permit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum and residence permits

20. The applicant's original asylum application was submitted under article 15 § 1 of the Aliens Act 1965 (*Vreemdelingenwet*), pursuant to which aliens coming from a country where they had a well-founded reason to fear persecution on account of their religious or political conviction, or of belonging to a particular race or a particular social group, could be admitted by the Minister of Justice as refugees.

21. Since 1 April 2001 the admission, residence and expulsion of aliens have been governed by the Aliens Act 2000 (*Vreemdelingenwet 2000)*, the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), the Regulation on Aliens 2000 (*Voorschrift Vreemdelingen 2000*) and the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) is also applicable, except where otherwise stipulated.

22. Pursuant to article 115 § 7 of the Aliens Act 2000, an asylum-based right of abode that was valid at the time that Act entered into force automatically entails a permanent residence permit under that Act.

23. Under the policy laid down in article 35 § 1 (b) of the Aliens Act 2000 in conjunction with article 3.86 § 1 (c) of the Aliens Decree 2000, an alien who has been given a custodial sentence (at least part of which was not suspended) by a Dutch or foreign court in a judgment that has become final and conclusive, for intentionally committing an offence punishable by a custodial sentence of three years or more, could be refused permission for continued residence in the country. Underlying this policy is the principle that the longer an alien has lawfully resided in the Netherlands, the more serious the offence has to be before it may justify refusing continued residence; the authorities thus apply a "sliding scale" (*glijdende schaal*). The seriousness of an offence is determined on the basis of the sentence attached to it. To determine whether an alien may be refused permission for continued residence, the length of the sentence imposed is compared to the length of time that the alien had been living in the Netherlands when he or she committed the offence.

24. The revocation of a residence permit is also assessed in the light of the principle of non-refoulement and whether returning the alien to his country of origin would be in violation of Article 3 of the Convention.

B. Netherlands policy on DRC asylum seekers

25. The respondent Government's policy on asylum seekers from the DRC is devised by the Deputy Minister of Justice (*Staatssecretaris van Justitie*) and, was temporarily – between July 2002 and December 2006 – devised by the Minister for Immigration and Integration. It is based on official country reports published by the Minister of Foreign Affairs and external sources.

26. At the time of the applicant's initial request for asylum, his application was assessed on the basis of the official country reports of 2 June 1992, 14 December 1993, 8 March 1994 and 14 September 1994 in conjunction with the US State Department's Country Reports on Human Rights Practices – Democratic Republic of Congo (formerly Zaire) of 1994 and 1995.

27. In the period when the applicant's residence permit was revoked, applications from the DRC were assessed on the basis of the Netherlands official country report of 8 November 2000. Since then further reports have been issued by the Netherlands Minister of Foreign Affairs in 2005, 2006, 2007, 2008 and the latest in January 2010.

28. The Netherlands authorities operate on the basis that the human rights situation in the DRC remains a cause for concern, but that it is not such that every asylum seeker should automatically be deemed a refugee within the meaning of the 1951 Convention relating to the Status of Refugees. The latest official country report of January 2010 classifies the general security situation as such:

> "During the entire reporting period the Congolese authorities were unable to control their territory in large parts of

the country, as well as to ensure the safety of citizens and maintain their monopoly on the use of force. In both the North and South Kivu province the security situation remained under pressure due to military operations of the Congolese army against the FDLR, after which the FDLR resorted to large scale retaliations. Other rebel factions, including several Mai-Mai groups, caused a large decrease in security. In the Haut- en Bas-Uélé districts in the Orientale province there was an increase in attacks by the LRA despite military actions by the FARDC. In the district of Ituri militias of the FRPI and FPJC fought with the FARDC and launched assaults on villages. In all areas where FARDC units were stationed and active the security situation was such that soldiers displayed severe misconduct towards the civilian population. The former rebel faction CNDP, which had recently integrated into the FARDC, played a key role in these infractions. At the end of the reporting period the security situation in the Equateur province deteriorated because of violent confrontations between a number of ethnic groups who later turned against the FARDC. In the remaining parts of the country the security situation remained stable, although some security incidents occurred in the Bas-Congo province."

III. RELEVANT INTERNATIONAL MATERIALS

A. Fourth special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 21 November 2008

29. The report describes the overall situation in the DRC as follows:

"Efforts to stabilize the eastern region of the Democratic Republic of the Congo witnessed significant setbacks during the reporting period. The processes relating to the Goma statements of commitment (*actes d'engagement*) and the Nairobi communiqué stalled, and large-scale hostilities between the Armed Forces of the Democratic Republic of the Congo (FARDC) and the Congrès national pour la défense du peuple (CNDP), led by Laurent Nkunda, resumed on 28 August. The fighting, which spread throughout North Kivu, has further exacerbated the humanitarian crisis, displacing over 250,000 people and bringing the number of internally displaced persons in the eastern part of the country to more than 1.35 million. Exchanges of fire across the border between Rwanda and the Democratic Republic of the Congo, as well as a resurgence of armed groups in Ituri and a resumption of atrocities committed by the Lord's Resistance Army (LRA), further compounded the crisis in the area. While the security situation remained stable elsewhere in the Democratic Republic of the Congo, little progress was achieved in the key peace consolidation tasks, including the delivery of basic services and the extension of State authority. Preparations for local elections continued, but key legislation, without which the necessary preparatory work cannot proceed, has yet to be adopted, risking further delays in the conduct of the elections."

B. U.S. Department of State Country Reports on Human Rights Practices 2008, 25 February 2009

30. Concerning freedom of speech in the DRC and the treatment of UDPS supporters, the report stated:

"Generally individuals could privately criticize the government, its officials, and private citizens without being subject to official reprisals. However, on February 8, ANR agents in Goma arbitrarily arrested and detained a member of the Union for Democracy and Social Progress/Goma for discussing politics with local citizens. The victim, who was released on February 13 after the UNJHRO intervened, claimed that he was subjected to cruel, inhumane, and degrading treatment while in detention. No action had been taken against the responsible ANR agents by year's end."

C. Freedom House report: Freedom in the World 2009 - Congo, Democratic Republic of (Kinshasa) of 16 July 2009

31. Concerning political rights and parties, the report stated:

"The DRC is not an electoral democracy. The 2006 elections were a significant improvement over previous elections, but serious problems remained. The opposition Union for Social Democracy and Progress (UDPS) party did not participate as a result of the party leader's call for a boycott of the recent constitutional referendum. International observers noted voter registration irregularities and corruption. The campaign period included clashes between opposition militants and government forces as well as an attempt on opposition leader Jean-Pierre Bemba's life. The 2007 Senate elections were similarly plagued by political corruption, with allegations of vote buying. Local elections initially scheduled for 2008 were delayed until at least 2009."

D. U.K. Home Office Country of Origin Information Report of 30 June 2009

32. Regarding the treatment of failed asylum-seekers upon return to the DRC, the report noted:

"34.02 The UNHCR response on the ill-treatment of failed asylum seekers returned to the Democratic Republic of Congo noted: 'The Congolese human rights NGO 'Voix des Sans Voix' informed the office that rejected asylum-seekers are received upon arrival at the airport by agents of DGM, who question them why they left and applied for asylum. The NGO had an office at the airport and are closely monitoring the situation. They mentioned that there were many failed asylum-seekers who are sent back by western European countries, but they are not aware of any of these persons detained and/or tortured upon return. They reported that some of the failed asylum-seekers had to pay some money to the police (5 to 10 USD).'

34.03 UNHCR's response also recorded that the International Office for Migration (IOM) Kinshasa, the Mission of the United Nations in the Democratic Republic of Congo (MONUC), the Association Africaine de Defense des Droits de l'Homme (ASADOH) and UNHCR staff who were '... at times present at the airport [in Kinshasa] ...' did not hold the information to confirm the existence of instances of the detention, abuse or torture of failed asylum-seekers. The UNHCR response concluded 'With the limited information available to UNHCR, it does not have evidence that there is a systematic abuse, including detention and mistreatment, of failed asylum-seekers returned to the DRC through Kinshasa airport.'

34.04 An e-mail from the British Embassy in Kinshasa via the FCO dated 11 October 2007 stated that at a meeting with a Policy Officer of the Asylum and Migration Affairs Division of the Netherlands MFA, the officer told them that he had spent a week talking to NGOs, international organisations and Embassies, he said that MONUC, UNHCR, IOM and all the NGOs he spoke to said that, while there were obviously serious human rights issues in DRC, returned failed asylum seekers were not targeted, nor were they singled out as a particular group by the authorities. All of his interlocutors had said that the stories of abuse that they had heard had all come from Europe, and that their investigations had shown the allegations to be either false, or doubtful due to lack of evidence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicant complained that his expulsion to the DRC would expose him to a real risk of treatment in breach of Article 3 of the Convention. Article 3 reads as follows:

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

34. The Government contested that argument.

A. Admissibility

35. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

36. The applicant argued that he would face a real risk of treatment contrary to Article 3 if he were to be expelled to the DRC. He submitted that the Minister had failed to strike a proper balance between the interests involved. Furthermore, the applicant stated that the decision to revoke his residence permit was based on an incorrect conversion of the custodial sentence he had received in Belgium.

37. Apart from indicating that there was a general state of violence in the DRC, the applicant also argued that he had originally been admitted for asylum purposes and that he could not now go back to the DRC as the authorities there were aware of the fact that he used to be politically active and that he had sought asylum in the Netherlands. In that respect the applicant submitted that the current situation in the DRC was not relevant to his situation but that the circumstances pursuant to which he had been granted asylum should be taken into account.

(b) The Government

38. The Government remained of the opinion that the applicant, if expelled, did not run a real risk of being exposed to treatment in breach of Article 3. The Government submitted that, in the light of the Court's *ex nunc* assessment of the facts as well as recent country reports of the Ministry of Foreign Affairs, the applicant had failed to establish that he would still face a real and personal risk upon return to his country of origin.

39. With regard to the applicant's argument relating to the equivalence of the sentence imposed on him in Belgium, the Government submitted that the applicant had not shown in any way that the sentence conversion applied by the Dutch Public Prosecution Service had been incorrect. Accordingly the use of the sliding scale and the fact that the applicant, who had been residing in the Netherlands for less than three years when he committed the offence, would have been sentenced to a prison term of more than nine months, meant that the revocation of the residence permit had been in accordance with the law.

2. The Court's assessment

(a) General principles

40. In assessing whether there would be a violation of Article 3 if a Contracting State were to expel an individual to another State, the Court will apply the general principles as set out in its settled case-law (see, among other authorities, *NA. v. the United Kingdom*, no. 25904/07, §§ 108-117, 17 July 2008).

(b) Application in the present case

41. The Court observes from the materials in its possession and the materials submitted by the Government that, although significantly better than in 1996, the general situation in the DRC at the present time certainly gives cause for concern (see paragraphs 29-32 above), with the circumstances in the Kivu provinces in the north-east being particularly dire. The applicant has not submitted evidence that would lead the Court to change that observation.

42. The Court notes that the applicant resided in Kinshasa before he left his country of origin. It is therefore considered that there is no reason to assume that he would be expelled to the north-eastern part of the DRC.

43. Furthermore, the applicant has not adduced evidence capable of proving that the general situation in the DRC is such as to entail that any removal to it would necessarily breach Article 3.

44. The Court therefore cannot but conclude that the general situation in the DRC is not one of such extreme general violence that there exists a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

45. As regards the existence of a real and personal risk by virtue of the applicant's past activities in the DRC, the Court notes first of all that a significant period of time has elapsed since the applicant left his country of origin. There is no indication from the case file that the applicant has attracted any other negative attention from the DRC authorities since that time apart from the problems he submitted as the basis for his asylum request in the Netherlands. In this regard the Court further notes that the domestic authorities carried out an assessment of the alleged risk of treatment contrary to Article 3 at the time when the applicant's residence permit was revoked.

46. The Court notes that the applicant was granted asylum in the Netherlands on 2 July 1996. After obtaining asylum, the applicant spent time in Belgium (*inter alia* in order to serve a custodial sentence) before returning to the Netherlands.

47. The applicant has argued that the risk he faces of treatment in violation of Article 3 must be assessed on the basis of the situation that existed in 1996 when he was granted asylum in the Netherlands.

48. The Court reiterates however that in cases where an applicant has not yet been extradited or deported when it examines the case, the relevant time for the assessment of the existence of a real risk will be that of the proceedings before the Court. A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time (see *NA. v. the United*

Kingdom, cited above, § 112).

49. The Court considers that the applicant has not adduced evidence that supports his claim that his previous political activism, membership of the UDPS or position as a returning asylum seeker would create specific personal risks of persecution on the part of the DRC authorities in the light of an *ex nunc* assessment.

50. The Court therefore cannot but conclude that the applicant has failed to establish that he would face a real and personal risk upon his return to his country of origin.

51. The foregoing considerations are sufficient to enable the Court to conclude that the expulsion of the applicant to the DRC as envisaged by the respondent Government would not be in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant complained of a violation of his right to respect for his family life as guaranteed by Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life ....
>
> 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."

53. The Government contested that argument.

A. Admissibility

54. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The applicant

55. The applicant submitted that the revocation of his residence permit had constituted an unjustified interference with his right to respect for his family life with his ex-wife and their son. He claimed that the Dutch authorities had not taken this family life into consideration and had thus failed to strike a proper balance between the interests involved. He further argued that he had a right to be able to exercise his family life and that the Netherlands was the country best suited for that purpose.

56. The applicant further alleged that owing to the revocation of his residence permit he was no longer able to work or apply for social security in the Netherlands. These circumstances had led to his wife divorcing him for another man.

(b) The Government

57. The Government submitted that whilst they considered that the applicant indeed had a family life with his son, the envisaged expulsion of the applicant would not constitute an interference with that family life. The Government stated that after the applicant's residence permit had been revoked, the dependent residence permits held by his ex-wife and son were revoked as well. As a result, the applicant's ex-wife and son did not have lawful residence status in the Netherlands either and were also obliged to leave the country. As all three were nationals of the DRC, the Government concluded, there were no reasons why they should not return to the DRC to continue their family life there.

2. *The Court's assessment*

58. The Court reiterates that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see *Boultif v. Switzerland*, no. 54273/00, § 39, ECHR 2001-IX).

59. As regards the facts of the present case, the applicant arrived in the Netherlands in 1995. He married Ms M. in 1999 and together they had a son who had been born earlier that year. Ms M. and the applicant's son were granted a temporary residence permit for the purpose of residing with the applicant. Upon the revocation of the applicant's residence permit, the residence permits of Ms M. and the applicant's son were revoked as well, on 2 October 2002, as their residence permits were dependent on that of the applicant. Ms M. and their son have not instituted any proceedings concerning their residence status and therefore do not have a legal entitlement to reside in the Netherlands. Since the lodging of the present application the applicant and Ms M. have divorced, but the applicant regularly visits his son.

60. In this light the Court considers that the relationship between the applicant and his son evidently falls within the scope of "family life" as indicated in Article 8 (see also *Berrehab v. the Netherlands*, 21 June 1988, § 21, Series A no. 138). However, the Court notes that the envisaged measure of the applicant's removal from the Netherlands is not aimed at breaking up the family (see also *Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003-X). The Court notes moreover that at this moment the applicant's ex-wife and son do not have legal residence in the Netherlands and might therefore be required to leave the country as well.

61. While the withdrawal of the applicant's residence permit results in the situation that he is unable lawfully to reside in the country where he has been enjoying family life with his wife and child (and, subsequent to his divorce, with his child), the Court notes that these family members are also no longer lawfully residing in the Netherlands. As mentioned above (see paragraph 58) it is indeed well-established in the Court's case-law that an issue may arise under Article 8 due to the removal of a person from a country where close members of his family are living. However, that principle is in general to be understood as applying only if those family members are residing lawfully in that country or, exceptionally, if there is a valid reason why it could not be expected of them to follow the person concerned. In the present case, it has not appeared that the applicant's ex-wife and son - who are not parties to the present proceedings and who have not themselves lodged an application to the Court - have attempted to regularise their situation in the Netherlands, and neither have any arguments been submitted to the effect that they are unable to return to the DRC.

62. Accordingly, there has been no violation of Article 8.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there would be no violation of Article 3 of the Convention if the applicant were expelled from the Netherlands;

3. *Holds* that there would be no violation of Article 8 of the Convention if the applicant were expelled from the Netherlands.

Done in English, and notified in writing on 1 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Josep Casadevall
Deputy Registrar President