CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF NSONA v. THE NETHERLANDS

(Application no. 23366/94)

JUDGMENT

STRASBOURG

28 November 1996

In the case of Nsona v. the Netherlands[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 B[2], as a Chamber composed of the following judges:

MM. R. BERNHARDT, *President*,
L.-E. PETTITI,
J. DE MEYER,
S.K. MARTENS,
J.M. MORENILLA,
M.A. LOPES ROCHA,
J. MAKARCZYK,
B. REPIK,
U. LOHMUS,

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

Having deliberated in private on 26 June and 26 October 1996,

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

PROCEDURE

1. The case was referred to the Court by the applicants, Bata Nsona and Francine Nsona, who are Zaïrean nationals, on 4 July 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 23366/94) against the Kingdom of the Netherlands, which they had lodged with the Commission under Article 25 (art. 25) on 25 January 1994.

The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 of the Convention (art. 3, art. 8).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicants designated the lawyer who would represent them (Rule 31).

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[1] The case is numbered 63/1995/569/655. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr J. De Meyer, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr J. Makarczyk and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr J.M. Morenilla and Mr B. Repik, substitute judges, replaced Mr Walsh and Mr Mifsud Bonnici, who were unable to take part in the consideration of the case.

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 1 March 1996. No memorial was received from the applicants within the time-limit set by the President.

On 12 April 1996 the Commission produced certain documents from the file of the proceedings before it which the registry had sought from it on the instructions of the President.

A document setting out the applicants' claims under Article 50 of the Convention (art. 50) was received at the registry on 23 April 1996.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 May 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr H. VON HEBEL, Assistant Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr A.P. VAN WIGGEN, Ministry of Justice, *Adviser*;

- for the Commission

Mr H.G. SCHERMERS, *Delegate*;

- for the applicants

Mr W.A. VENEMA, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Schermers, Mr Venema and Mr von Hebel and also replies to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Introduction

6. Francine Nsona and Bata Nsona are both Zaïrean nationals. Bata Nsona was born on 26 September 1960, Francine on 15 March 1984.

7. At the time of the events complained of Bata Nsona lived in Vlaardingen (near Rotterdam) with her son, who according to her passport was born there in March 1992. She has since moved to Rotterdam.

8. Bata Nsona arrived in the Netherlands in June 1989, claiming status as a refugee.

The Netherlands authorities did not recognise her as such but eventually, on 17 November 1992, issued her with a residence permit (vergunning tot verblijf - see paragraph 58 below) for "cogent reasons of a humanitarian nature" (klemmende redenen van humanitaire aard). This permit also applied to her son.

B. Francine's alleged family ties with Bata Nsona and other persons

9. A birth certificate issued by the District Commissioner and Registrar of Births, Deaths and Marriages (commissaire de zone et officier de l'état civil) of the Kalamu District of Kinshasa states that Francine was born on 15 March 1984 as the daughter of a Mr Mbemba (no first name given) and Ms Ndombe Nsona.

10. It is accepted by those appearing before the Court that Francine's parents are dead. The date of her father's death has not been communicated to the Court, although it appears to have been some time before the events complained of. The Government assume that her mother died in Brazzaville, Congo, in the spring of 1993. However, death certificates were produced neither before the Commission or Court nor, apparently, before the Netherlands judicial or administrative authorities.

11. The applicants claim that Bata Nsona is the sister of Francine's mother.

When interviewed by the immigration authorities in relation to her claim of refugee status, in September 1989, Bata Nsona stated that she had a sister called Ndombe Nsona who was then about twenty-five years old.

12. The Commission's file contains a photocopy of a note which is claimed by the applicants to be a request by Francine's mother to Bata Nsona to take care of Francine. This note is headed Testament and

handwritten in the Lingala language on a page apparently torn out of a school exercise book. It reads as follows:

> "I, NSONA NDOMBE,
>
> If today I die, please entrust my daughter NSONA FRANCINE to the care of my little sister NSONA BATA.
>
> Thank you.
>
> Brazzaville, 24.09.92."

13. It is not established whether, apart from the alleged ties between Francine and Bata Nsona, Francine has any other living relatives.

According to information obtained by the Government, before her journey to the Netherlands (see paragraph 14 below), she lived with a Mr Albert Mbemba and Ms Célestine Bakangadio in Kinshasa.

Ms Bakangadio is claimed to be a sister of a business relation of Francine's father, who had allegedly taken care of Francine on the death of her mother and subsequently entrusted her to Ms Bakangadio and her family. The Government further state that Mr Mbemba and Ms Bakangadio do not know any living relatives of Francine's, that they do not know Bata Nsona, and that they are not acquainted with the note dated 24 September 1992 allegedly written by Francine's mother.

A publication entitled "Haal de was maar binnen" (Gather in the washing) by C. de Stoop (published in January 1995) suggests that Mr Mbemba and Ms Bakangadio may simply be Francine's parents.

C. Events following the arrival of Francine and Bata Nsona in the Netherlands

14. Francine, Bata Nsona and the latter's son arrived at Schiphol Airport on 29 December 1993 on Swissair flight SR 794 from Geneva.

15. Bata Nsona's passport - which had been issued in Kinshasa the day before - listed Francine as one of Bata Nsona's children. However, on inspection by the Royal Military Constabulary (Koninklijke marechaussee) border guards, it was found that the passport had been tampered with: Francine's name and photograph had not been entered into it by the proper authority. When confronted with this finding, Bata Nsona claimed that Francine was her niece but she proffered no documentary evidence to prove this.

It appears that Bata Nsona was arrested on suspicion of having committed forgery but later released.

16. Other Zaïrean nationals arriving on the same flight included a Ms M.M. According to a note made by an officer of the Royal Military Constabulary, copies of documents relating to her were found in Bata

Nsona's luggage. Ms M.M. was found to be in possession of identity documents in the names of different persons.

17. Bata Nsona and her son were allowed to enter the Netherlands on 30 December 1993 since they held valid residence permits.

18. As Francine did not have a provisional residence visa (machtiging tot voorlopig verblijf) or even a travel visa (reisvisum) (see paragraphs 55 and 56 below), she was refused entry and taken to the airport hotel at Schiphol, where she stayed under the supervision of the Royal Military Constabulary.

19. Bata Nsona was informed by the Royal Military Constabulary that she would have to accompany Francine back to Zaïre, which - as would appear from a note by a Royal Military Constabulary officer – she agreed to do. Seats for her and Francine had already been reserved on a flight on 3 January 1994 to Zürich, from where they would fly on to Kinshasa the following day, tickets having been provided by Swissair.

20. On 31 December 1993 Bata Nsona filed an application to the head of the local police at Vlaardingen on behalf of Francine for a residence permit as a foster child and for compelling humanitarian reasons.

She also applied to the District Court (kantonrechter) of Schiedam to be appointed as Francine's temporary guardian (tijdelijk voogdes) and another person to be appointed as temporary co-guardian (tijdelijk toeziend voogd). It is common ground that the District Court, having been informed that Francine had been made to leave the country for the time being, suspended its decision on this application.

21. On the same day Bata Nsona returned to Schiphol Airport requesting that Francine be allowed to accompany her to her home in Vlaardingen, claiming that there was nobody in Zaïre who could take care of her. She also stated that she would not accompany Francine back to Zaïre.

22. Also on 31 December 1993, at about 12.30 p.m., the applicants' lawyer, intending to seek an injunction against the State prohibiting Francine's removal, applied for a hearing date for summary proceedings (kort geding) before the President of the Regional Court (arrondissementsrechtbank) of The Hague. The President set the case down for hearing on 11 January 1994. At about 1 p.m. this date was communicated by the applicants' lawyer to the lawyer representing the State (Landsadvocaat), who in turn informed the Ministry of Justice.

23. The responsible official of the Ministry of Justice decided that Francine would not be allowed to await the outcome of the summary proceedings in the Netherlands.

24. On 31 December 1993, at about 2.30 p.m., the applicants' lawyer was informed by telephone by an officer of the Royal Military Constabulary that at that time Francine was boarding a Swissair flight for Zürich. The lawyer informed this officer of the date set for the hearing in summary

proceedings before the President of the Regional Court. The officer, however, replied that he was bound to remove Francine from Netherlands territory unless instructed otherwise by the Ministry of Justice. The aircraft took off at about 2.45 p.m.

25. The Government state that the Royal Military Constabulary, assuming that the applicants and Ms M.M. had been travelling together - copies of documents relating to Ms M.M. having been found in Bata Nsona's luggage (see paragraph 16 above) - had entrusted Francine to Ms M.M., who was also being removed and had agreed to accompany Francine. Francine and Ms M.M. were both booked on a flight from Zürich to Kinshasa on 4 January 1994.

The applicants later claimed before the Netherlands courts that the person in whose company Francine arrived at Zürich was not Ms M.M. but someone else. In any event, it is common ground that this person left Zürich Airport before Francine. The applicants have stated before the Court that she absconded as early as 1 January.

26. Seeking to prevent Francine's being sent on from Zürich, the applicants' lawyer requested the President of the Regional Court of The Hague on 3 January 1994 to bring forward the date of the hearing. The hearing took place the same day at 2.30 p.m. There being no longer any point in obtaining an injunction preventing Francine's removal from the Netherlands, the lawyer sought an order addressed to the State to allow Francine to return and subsequently remain in the Netherlands pending a decision by the administrative authorities on a request for a residence permit.

27. On 4 January 1994, following a request by the applicants' lawyer not to send Francine to Zaïre, the Swiss authorities decided to postpone her departure from Zürich.

28. Also on 4 January 1994 the President of the Regional Court of The Hague gave judgment finding that the applicants had no locus standi. Francine being a minor, she had to be represented by a guardian, which Bata Nsona was not.

Noting that no death certificate of Francine's mother had been submitted, he found that the document of 24 September 1992 allegedly containing the last will of Francine's mother in respect of the care of Francine (see paragraph 12 above) did not contain any concrete indication that Bata Nsona had in fact been entrusted with the custody of Francine. Furthermore, Bata Nsona could have applied to the District Court for appointment as temporary guardian earlier than 31 December 1993; there were no exceptional circumstances on the basis of which the applicants' requests should be held admissible.

In an obiter dictum the President extensively discussed the substance of complaints adduced by the applicants.

He did not consider Francine's removal to be unlawful, since the application for a residence permit made on her behalf had no reasonable prospects of success in any event. Nor did he find it established that Francine had been made to travel unaccompanied.

In so far as the applicants had relied on Article 3 of the Convention (art. 3), there were no substantial grounds on the basis of which the existence of a genuine and personal risk of inhuman treatment in Zaïre had to be assumed.

It had not been suggested, nor did it appear, that the applicants were in a position to rely on the Government's policy with regard to foreign foster children.

Finally, he did not consider that Francine's removal gave evidence of disproportionate harshness. Francine had apparently been able to support herself either in Congo or in Zaïre from the death of her mother until she left for the Netherlands. Not finding it established that in these countries her care was not assured, the President found no compelling humanitarian reasons on the basis of which she should be allowed to reside in the Netherlands.

29. On 18 January 1994 the applicants appealed against this judgment to the Court of Appeal (gerechtshof) of The Hague.

30. On 5 January 1994 the applicants' lawyer was informed by the Swiss border police that Francine's departure was scheduled for 6 January 1994 and that this would only be cancelled if evidence were submitted that she would not be met upon her arrival in Zaïre, or if confirmation were received that she would be granted entry into the Netherlands.

31. On 6 January 1994, Francine, who until that moment had stayed in a Swissair nursery, left Zürich on a Swissair flight to Kinshasa, where she arrived on 7 January 1994. It appears that she travelled alone.

On the same day the Netherlands Embassy at Kinshasa requested the International Committee of the Red Cross to meet her at Kinshasa Airport. This request was later withdrawn, since the Netherlands authorities had been informed that Francine would be met there by a Mr Monga, the external relations manager of the Banque du Zaïre and a business relation of Swissair, whom Swissair had contacted apparently of its own motion.

32. Francine arrived in Kinshasa on 7 January 1994 at approximately 6.45 a.m.

Subsequent events are described in a letter dated 31 January 1994 from the Minister for Foreign Affairs (Minister voor Buitenlandse Zaken) to the Minister of Justice (Minister van Justitie). The Minister for Foreign Affairs stated that due to communication problems with the Embassy in Kinshasa it had not been possible to inform the Embassy in time about Francine's arrival in Kinshasa and that therefore no employee of the Embassy had been present at her arrival, but that she had been met by Mr Monga. Since Mr Monga could not reach Francine's family or any of her acquaintances,

he had entrusted her to the Zaïrean immigration authorities. In the afternoon of 7 January 1994 the Director of the Zaïrean Immigration Department had requested a member of his staff to take Francine to the address which she had given, as no member of her family had contacted the immigration authorities. After having spent the night at the home of this immigration officer, Francine had been taken to the address of Mr Mbemba and Ms Bakangadio (see paragraph 13 above), where she had lived since then. The Minister added that Francine also stayed with her grandmother from time to time.

33. Also on 7 January 1994 the head of the local police in Vlaardingen informed Bata Nsona of the refusal of her application on behalf of Francine for a residence permit. The application could not be considered, on the formal ground, inter alia, that the form had not been signed by Francine herself or by her legal representative, the question of custody over Francine being still pending before the District Court.

34. Bata Nsona filed an administrative appeal (administratief beroep - see paragraph 71 below) against this decision to the Deputy Minister of Justice (Staatssecretaris van Justitie) on 13 January 1994.

35. In his letter to the Minister of Justice (see paragraph 32 above), the Minister for Foreign Affairs stated that a meeting took place at the Netherlands Embassy at Kinshasa on 28 January 1994 between Embassy officials and Francine. Francine was accompanied by Mr Albert Mbemba and Ms Célestine Bakangadio. She was reported to be in good health and attending school.

36. By this time the case had been widely reported in the press.

By a notarial deed dated 15 February 1994, three Netherlands nationals founded the Stichting Francine terug ("Foundation for the return of Francine"), the purpose of which was "to further the interests" of Francine, inter alia by "promoting her immigration in the Netherlands".

37. On 3 March 1994 the applicants and the Stichting Francine terug applied under section 8:21 (3) of the General Administrative Law Act (Algemene Wet Bestuursrecht) to the President of the Hague Regional Court for interim measures including an order to grant Francine immediate provisional access to the Netherlands.

On 25 March 1994 the Acting President of the Regional Court held that the Stichting Francine terug lacked the required standing but found the applicants' application admissible. However, he rejected the application as ill-founded. The Acting President held that Francine or her legal representative should apply for a provisional residence visa in the normal way. He did not find it established that it was unreasonable to require her to await the decision on this application in Zaïre.

38. On 31 March 1994 Bata Nsona applied to the Minister for Foreign Affairs, via the head of the local police, for a provisional residence visa for Francine (section 1 of the Aliens Ordinance and section 7 of the Sovereign

Ordinance (Souverein Besluit) of 12 December 1813 - see paragraph 57 below).

39. On 17 August 1994 the Deputy Minister declared the administrative appeal against the refusal of Bata Nsona's application for a residence permit for Francine (see paragraph 34 above) well-founded and annulled the decision of the head of police. Bata Nsona was given three months to arrange for the appointment of a guardian for Francine; once that was done, the application would once more be considered.

40. On 30 August 1994 an official of the Netherlands Embassy visited Francine at the home of Mr Mbemba and Ms Bakangadio, where she was still living, and found her in good health and better spirits than in January.

41. On 5 September 1994 the applicants' lawyer lodged an appeal with the Administrative Division (Sector Bestuursrecht) of the Hague Regional Court against the Deputy Minister of Justice's decision of 17 August (see paragraph 39 above), seeking a decision that Francine should be allowed to await the outcome of the application proceedings for a residence permit in the Netherlands.

42. Bata Nsona's application for a provisional residence visa for Francine (see paragraph 38 above) was refused on 29 September 1994.

43. The case of Francine continued to occasion considerable interest in the press throughout 1994. Questions were asked about it in Parliament on several occasions.

D. Subsequent developments

44. Francine arrived in the Netherlands a second time on 12 January 1995, again without a provisional residence visa. The Government state that they made enquiries as to her situation in Zaïre. She was allowed to await the outcome of these in the Netherlands.

45. It is common ground that on 24 January 1995 the Schiedam District Court forwarded Bata Nsona's application to be appointed as Francine's temporary guardian and another person to be appointed as temporary co-guardian (see paragraph 20 above) to the Rotterdam District Court for the reason that Francine now lived within the jurisdiction of the latter court.

The application was granted by the Rotterdam District Court on 27 June 1995.

46. The Government state that on 21 September 1995 the Deputy Minister of Justice decided, partly in Francine's interests, no longer to oppose her residence in the Netherlands and to instruct the Rotterdam head of police to invite her to apply for a residence permit for the purpose of "residence in the foster family of Bata Nsona".

Such a permit was applied for on 15 November, granted on 1 December and issued on 15 December.

47. On 5 February 1996 the applicants withdrew their appeal against the judgment of the President of the Regional Court (see paragraph 29 above) as far as the merits of the case were concerned, maintaining only their claim for costs. On the same date they withdrew their appeal against the decision of the Deputy Minister of Justice (see paragraph 41 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The admission of aliens and rights of residence

1. General

48. The following is a description of the regime governing the admission of aliens to Netherlands territory applying, at the time of the events complained of, to aliens in general. Binding rules were, and are, laid down in the Aliens Act (Vreemdelingenwet), the Aliens Ordinance (Vreemdelingenbesluit) and the Aliens Schedule (Voorschrift Vreemdelingen).

49. Until 1 January 1994, the Government's policy was defined in the 1982 Aliens Circular (Vreemdelingencirculaire 1982) and the 1984 Border Guarding Circular (Grensbewakingscirculaire). The competent tribunals (see paragraphs 69-72 below) have consistently held that it was incompatible with general principles of good governance (algemene beginselen van behoorlijk bestuur) to deviate from the policy rules set out in these documents to the detriment of an alien.

50. The Aliens Act was extensively amended by the Act of 23 December 1993 (Staatsblad (Official Gazette) 1993, no. 707) which came into force on 1 January 1994. To accommodate these amendments a new Aliens Circular was issued, the 1994 Aliens Circular (Vreemdelingencirculaire 1994).

51. Special regimes, not relevant to the present case, applied to citizens of the European Union or of the Benelux member States, to nationals of certain other States (not including Zaïre) under bilateral treaties, and to refugees as defined in Article 1 A of the Geneva Convention of 28 July 1951 relating to the Status of Refugees (United Nations Treaty Series - UNTS - no. 2545, vol. 198, pp. 137 et seq.) and Article 1 of the Protocol relating to the Status of Refugees of 31 January 1967 (UNTS no. 8791, vol. 606, pp. 267 et seq.).

52. Under section 6 (1) of the Aliens Act, to be allowed access to the Netherlands an alien had to qualify for admission - that is, either fulfil the requirements of section 8 of the Aliens Act (see paragraph 54 below), or possess a residence or settlement permit (see paragraphs 58 and 63 below) -

and hold a valid passport or equivalent identity document containing a visa if a visa requirement applied (see paragraph 55 below).

53. An alien who was refused access to Netherlands territory had to leave the country as soon as possible and could, if necessary, be forcibly removed. If the alien had arrived on board a ship or an aircraft belonging to a shipping company or airline, the alien could be removed by placing him or her on board an outward bound ship or aircraft belonging to the same company or airline (section 7 of the Aliens Act).

2. Visa requirements

54. Under section 8 of the Aliens Act taken together with section 46 of the Aliens Ordinance, aliens who, upon entering the country, had complied with the required formalities at the border were admitted if and for so long as they conformed with the Aliens Act and delegated legislation, had sufficient means to cover the cost of living in the Netherlands and of the return journey, and did not threaten public peace, public order or national security. The right to admission based on section 8 was a temporary right based directly on the law and therefore not conditional on the grant of any permit. However, in principle, a visa was required (see paragraph 55 below) and the duration of the right was limited: to the period of validity of the visa, or to three months in the case of those aliens not subject to visa requirements.

55. Subject to certain exceptions not relevant to the present case, to be granted access to the Netherlands aliens had to hold a valid passport containing a transit visa (transitvisum), valid for up to three days, or a travel visa, valid for up to three months (section 41 (1) of the Aliens Ordinance).

56. To obtain access to the Netherlands with a view to remaining for more than three months, aliens who had not already been granted a residence permit must hold a valid passport containing a provisional residence visa (section 41 (1) of the Aliens Ordinance). A provisional residence visa was valid for a period of up to six months (section 8 of the Aliens Act).

57. A provisional residence visa could be applied for abroad, through a diplomatic or consular representative, or in the Netherlands, via the head of the local police. Applications were decided on by the Minister for Foreign Affairs (section 1 of the Aliens Ordinance and section 7 of the Sovereign Ordinance of 12 December 1813) after consultation with the Minister of Justice. Applications for such a visa were considered according to the same criteria as those applying to applications for a residence permit, since such a visa would only be issued if the alien concerned was expected to be granted such a permit.

3. The residence permit

58. Aliens wishing to reside in the Netherlands for longer than three months (see paragraph 54 above) had to hold a residence permit (section 9 of the Aliens Act). Such a permit was applied for to, and granted by, the Minister of Justice (section 11 (1) of the Aliens Act). It was valid for up to one year and renewable (section 24 of the Aliens Schedule).

59. A residence permit could be applied for either in the Netherlands (through the head of the local police - section 52 of the Aliens Ordinance) or abroad (through a diplomatic or consular representative). The application had to be submitted by the alien him- or herself or, if he or she was a minor, by his or her legal representative (section 28 (4) of the Aliens Schedule).

60. The decision to grant a residence permit was delegated by the Minister of Justice to the head of the local police in certain cases, including cases where the alien applying for a residence permit already held a provisional residence visa.

In principle, a residence permit was refused an alien who did not already hold a provisional residence visa (1982 Aliens Circular, Chapter A4, para. 3.3; 1994 Aliens Circular, Chapter A4, para. 5.3).

61. A residence permit could be made subject to restrictions (section 11 (2) of the Aliens Act).

62. An alien holding a valid residence permit was allowed to re-enter Netherlands territory after having left it.

4. The settlement permit

63. The Minister of Justice could grant a settlement permit (vergunning tot vestiging) (section 13 of the Aliens Act); such a permit was normally granted only after the alien had been legally resident in the Netherlands for five consecutive years.

After such an initial period, a settlement permit would be granted unless there was no reasonable certainty that the alien would be able to meet the costs of living, or unless he or she had committed serious breaches of public peace or public order or constituted a serious threat to national security.

5. Relevant policy

64. Given the situation obtaining in the Netherlands with regard to population size and employment, government policy was, and remains, aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens were only granted admission for residence purposes if:

a) the Netherlands were obliged under international law to do so, as in the case of nationals of European Union and Benelux member States and refugees covered by the Geneva Convention relating to the Status of Refugees; or

b) this served "essential interests of the Netherlands" (wezenlijk Nederlands belang), e.g. economic or cultural interests; or

c) there were "cogent reasons of a humanitarian nature".

In addition, aliens who, under this policy, were eligible for admission were in principle expected to have sufficient means at their disposal to cover the costs of living and not to threaten public peace or public order or national security.

These were general rules which did not apply in the same way to all categories of aliens, specific criteria having been developed applicable to certain categories (1982 Aliens Circular, Chapter A4, para. 5.1.1.1; 1994 Aliens Circular, Chapter A4, paras. 4.1.2 to 4.1.4).

65. Specific criteria applied to the admission of aliens in connection with the reunification or establishment of families involving spouses, partners or close relatives of Netherlands nationals or aliens holding settlement or residence permits. Under these criteria, it was possible that admission could be granted for the purpose of reuniting or establishing a family even if the applicable conditions had not all been met, if there were "cogent reasons of a humanitarian nature" (1982 Aliens Circular, Chapter B19, paras. 1.1 and 2.5; 1994 Aliens Circular, Chapter B1, para. 1.3).

66. Specific conditions also applied to the admission of foreign foster children, i.e. minors under 18 years of age who were not Netherlands nationals, and who were, or were intended, to be cared for in a family other than that of the parents in such a way that the carers in fact replaced the parents. The applicable rules distinguished two categories, namely children taken into a foster family with a view to adoption and others. The present case concerns the latter category (1982 Aliens Circular, Chapter B18, para. 3.1; 1994 Aliens Circular, Chapter B3, para. 3.1).

The recognised motive for taking on a foster child in this way was a moral obligation of the prospective foster parents vis-à-vis the child, the prospective foster parents normally being close relatives (grandparents, brothers, sisters, aunts, uncles). Additional conditions included the following:

a) in principle, the prospective foster parents to be a married couple;

b) the circumstances to be such that the child could not be cared for by close relatives living in the country of origin except with great difficulty. In principle, this condition would not be met if the child was resident with his or her parents in his or her country of origin in circumstances which, although they reflected less affluence than was enjoyed in the Netherlands, could be considered normal by the standards of the country in question;

c) the prospective foster parents to prove themselves able to provide proper care and upbringing, and to stand surety for the costs caused by the child’s stay and if necessary his or her return journey;

d) documentary evidence to be submitted that the child's parents or legal representative, and if necessary the national authorities of the child's country of origin, consented to the child's staying with the prospective foster parents;

e) a medical certificate to be submitted from which it appeared that the child was not suffering from a dangerous infectious disease, nor from a physical or mental disease or deficiency likely to have long-term effects;

f) the child's passage to the Netherlands to have been arranged in a responsible way and a provisional residence visa, if required, to have been granted.

However, even if these conditions were met, this possibility was not normally open.

67. Until 1 January 1994, an application for a residence permit for a minor could be filed by the prospective foster or adoptive parents, whether or not they were the minor's legal representatives (1982 Aliens Circular, Chapter B18, para. 2.3.1).

As of that date, the person making such an application in respect of a minor had to be the minor's legal representative. If the person applying for a residence permit on behalf of a minor was not the minor's legal representative, three months were allowed to provide for the minor's legal representation. That done, the application for a residence permit would be considered (1994 Aliens Circular, Chapter A4, para. 6.1.2.2).

68. The Government's policy with regard to children arriving at Schiphol Airport who had been refused access appears from a reply by the then Deputy Minister of Justice, Mr A. Kosto, to questions asked by members of parliament about the present case (see paragraph 43 above).

If refugee status was claimed, the child was accommodated in the Netherlands and allowed to await the outcome of proceedings.

If no refugee status was claimed, arrangements were made for the child to be returned. If the child had arrived in the company of an adult, he or she was offered the opportunity to accompany the child on the return journey. Otherwise, the Ministry of Justice, acting in consultation with the Ministry of Foreign Affairs if necessary, would make arrangements for the child to be accompanied on the journey and met in the country of origin. If the child could not be removed immediately, he or she was placed in the care of the Royal Military Constabulary and accommodated in the Schiphol Airport Hotel.

It appeared from the same reply that during the second half of 1993 access was initially refused to twenty-three minors, fifteen of whom were sent back to where they came from. The other eight were subsequently admitted.

6. Legal remedies

a) Refusal of a transit visa, travel visa or provisional residence visa

69. An administrative appeal may be lodged with the Minister for Foreign Affairs (sections 31 and 33d of the Aliens Act).

A further appeal lies to the Administrative Division of the Hague Regional Court (section 8:1 of the General Administrative Law Act, section 33a of the Aliens Act). No further appeal is allowed (section 33e of the Aliens Act).

70. If the party seeking review is a minor, he or she has to be represented by a legal representative (wettelijke vertegenwoordiger - see paragraphs 73 and 76 below).

b) Refusal of a residence permit

71. An administrative appeal against a refusal of a residence permit, or against the imposition of limiting conditions, may be filed with the Minister of Justice (section 31 of the Aliens Act).

A further appeal lies to the Administrative Division of the Hague Regional Court (section 8:1 of the General Administrative Law Act, section 33a of the Aliens Act). The procedure is the same as that outlined in paragraphs 69 and 70 above.

(c) Refusal at the border of access to Netherlands territory

72. An alien who was refused access either at the border or, having arrived by sea or air, at a port or an airport, could bring summary proceedings against the State before the President of the Regional Court. The claim had to be based on the proposition that the refusal constituted a tort (onrechtmatige daad). If the President of the Regional Court accepted that proposition, he could provisionally order that the alien be granted access pending a decision by the competent administrative authorities with regard to an application for a provisional residence visa or a residence permit.

A hearing date was set by the President on an application by the alien’s lawyer.

The bringing of summary proceedings did not in itself have suspensive effect and the plaintiff was not normally allowed to await the outcome of such proceedings in the Netherlands (1984 Border Guarding Circular, Chapter A6, para. 4.5.5).

B. Legal representation of a minor

1. The Civil Code

73. Minors are defined in Netherlands law as persons who have not yet reached the age of 18 and who are not, and have not been, married (Article 1:233 of the Civil Code). They cannot independently perform legal acts (rechtshandelingen) except in so far as the law determines otherwise (Article 1:234 para. 1); to do so they must normally be represented by a legal representative.

74. The determination whether a foreign national is a minor or not is normally made with reference to that person's national law (see the judgment of the Supreme Court of 1 May 1963, Netherlands Law Reports - Nederlandse Jurisprudentie, NJ - 1964, no. 287).

75. A minor's parents are normally his legal representatives (Article 247 para. 1).

76. If, for whatever reason, the parents cannot act as such, a guardian and a co-guardian (toeziende voogd) must be appointed (Articles 1:279 and 1:295 of the Civil Code). In cases not involving the divorce of the minor's parents or the annulment of their marriage, or the removal of authority from a parent or guardian for reasons of incompetence or abuse, the competent court is the District Court (Articles 1:295, 1:307 para. 1, 1:309).

The District Court appoints a guardian and a co-guardian of its own motion or on an application by the minor's relatives, the Child Care Board (Raad voor de Kinderbescherming), the child's debtors or other interested persons (Article 1:299).

77. The determination whether a minor who has a foreign nationality is legally represented is normally made with reference to the law of the State of the minor's habitual residence (Article 2 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (see paragraph 81 below), applied by analogy).

78. A temporary guardian and co-guardian may be appointed, inter alia, if it is unclear whether the minor's parents are alive or whether there is a guardian or if their whereabouts are unknown (Article 1:297).

79. In the above cases, the competent District Court is that within whose district the minor is domiciled or has his or her habitual residence, or, if the minor does not habitually reside in the Netherlands, the District Court of The Hague (Articles 957 and 966a of the Code of Civil Procedure - Wetboek van Burgerlijke Regtsvordering).

However, if the minor is not a Netherlands national, the Netherlands courts must decline jurisdiction if the case has insufficient connection with the Netherlands legal order (onvoldoende aanknoping met de rechtssfeer van Nederland - at the relevant time, Article 429c para. 11 of the Code of Civil Procedure).

2. The Convention concerning the powers of authorities and the law applicable in respect of the protection of infants

80. The Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants of 5 October 1961 (UNTS no. 9431, vol. 658, pp. 143 et seq.) - to which the Netherlands is a party - defines "infants" (mineurs in the French text, which is authentic) as "any person who has that status, in accordance with both the domestic law of the State of his nationality and that of his habitual residence" (Article 12).

81. Article 1 of the Hague Convention provides that the judicial or administrative authorities of the State of the habitual residence of an "infant" have power to take measures directed to the protection of his or her person or property. In so doing they apply their own law (Article 2).

However, Article 3 provides that a relationship subjecting the "infant" to authority which arises directly from the domestic law of the State of the "infant"'s nationality shall be recognised in all the contracting States, including the State of the "infant"'s habitual residence.

82. The Netherlands Supreme Court (Hoge Raad) has construed Article 3 of the Hague Convention in such a way that it does not prevent the Netherlands authorities - if the Netherlands are the State of the "infant"'s habitual residence - from taking what measures are necessary for his or her protection and from applying their domestic law (see its judgments of 1 July 1982, NJ 1983, no. 201, and 18 November 1983, NJ 1984, no. 343).

PROCEEDINGS BEFORE THE COMMISSION

83. Bata Nsona and Francine Nsona applied to the Commission on 25 January 1994. They relied on Articles 3, 8 and 13 of the Convention (art. 3, art. 8, art. 13), alleging that Francine's removal from the Netherlands, and the conditions under which it took place, constituted inhuman treatment and violated their right to respect for family life and that they had no effective remedy before a national authority available to them. They also relied on Article 6 of the Convention (art. 6), complaining that they had been denied access to a tribunal.

84. On 6 July 1994 the Commission declared the application (no. 23366/94) admissible in so far as it concerned Articles 3, 8 and 13 (art. 3, art. 8, art. 13) and inadmissible for the remainder. In its report of 2 March 1995 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 3 (art. 3) as regards the first applicant (twenty votes to four), that there had been no violation of Article 8 (art. 8) (twenty-two votes to two), and that there had been no violation of Article 13 (art. 13) (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[3].

FINAL SUBMISSIONS TO THE COURT

85. The applicants' representative, speaking at the Court's hearing, concluded that Articles 3 and 8 of the Convention (art. 3, art. 8) had been violated. As to Article 13 (art. 13) he said that he had no further remarks to make and that he relied on the decision of the Court.

The Government concluded their memorial by expressing the opinion that there had been no violation of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

86. The applicants alleged that the removal of Francine from the Netherlands to Zaïre, and the conditions under which it was carried out, constituted "inhuman treatment", contrary to Article 3 of the Convention (art. 3), which provides:

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

Neither the Commission nor the Government shared this view.

A. Arguments before the Court

1. The applicants

87. The applicants alleged that Francine - who at that time was only 9 years old - had been removed from the Netherlands to Switzerland in the company of a total stranger, who moreover had disappeared without trace from Zürich Airport. She had then been sent on from there to Zaïre on her own.

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

In addition, the Netherlands Government had failed to provide for a responsible person to pick her up at the airport in Kinshasa, thus exposing her to the risk of falling into the hands of persons who might not have her best interests at heart. Although admittedly Francine had been received properly, that was in no way due to the actions of the Netherlands authorities.

This situation was aggravated by the length of time which Francine's ordeal had taken. It had begun on 29 December 1993, when Francine was refused access to the Netherlands. It had ended no sooner than 7 January 1994, the date on which she had arrived in Kinshasa, after which she had remained in the hands of the immigration authorities for another day.

Bata Nsona's refusal to accompany Francine back could not be criticised. Bata Nsona had arrived in the Netherlands in 1989, claiming refugee status; the Government had granted her a residence permit on humanitarian grounds in 1992, which was relatively quick. In the applicants' submission this implied recognition that Bata Nsona herself ran a real risk of inhuman or degrading treatment or punishment if she were forced to return to Zaïre. Moreover, in the present case she would have been bearing a Zaïrean passport which the Netherlands authorities themselves had found to have been tampered with.

The applicants claimed that they could not be held responsible for having caused the situation to arise by failing to apply for a provisional residence visa for Francine while the latter was still in Zaïre. It was not possible for them to do so, since Bata Nsona was not Francine's guardian; nor could she apply for guardianship as long as Francine remained resident in Zaïre.

2. The Government

88. The Government denied that Francine's removal to Zaïre had exposed her to any danger of inhuman or degrading treatment. Her position was the same as that of any other Zaïrean citizen who had not been involved in activities aimed at the overthrow of the Zaïrean Government.

89. As to the way in which Francine's removal was effected, the Government drew attention to the fact that she had appeared at the border without a visa and that an attempt had been made to bring her into the Netherlands on a forged or falsified passport. If the applicants had followed the normal immigration procedure, it would have been unnecessary for the Netherlands authorities to refuse Francine access at the border.

Secondly, Bata Nsona had been offered the opportunity to accompany Francine back to Zaïre. This she had ultimately refused to do. The immigration authorities had then asked Ms M.M. to escort Francine back; Ms M.M. had likewise been refused access to the country and had been travelling together with Bata Nsona and Francine. Ms M.M. had in fact escorted Francine until Francine's journey was interrupted in Zürich at the request of the applicants' lawyer.

Finally, on 6 January 1994 - the day on which Francine left Zürich for Kinshasa - the Netherlands Ministry of Foreign Affairs had tried to arrange, via the Netherlands Embassy, for Francine to be met at the airport. On 7 January the Netherlands Embassy had asked the Red Cross to assume responsibility for Francine. This request was withdrawn when it emerged that arrangements had been made by Swissair.

90. The Government admitted that the conditions of Francine's return to Zaïre had entailed a certain hardship and that greater care should have been taken to ensure that Francine was accompanied on the journey back. However, the Government were of the view that the case was not such as to engage the responsibility of the Netherlands under Article 3 (art. 3).

3. The Commission

91. The Commission accepted that Francine's removal to Zaïre might have exposed her to some hardship but not to the risk of treatment proscribed by Article 3 (art. 3).

On the other hand, the Netherlands Government had failed to investigate Francine's personal situation in Zaïre and had moreover failed to ensure her safety upon her return. Given the fact that Francine was a 9-year-old child allegedly without any living relatives in her country of origin, these were measures which the Government might have been expected to take before removing her. However, this failure to take appropriate action had not caused such hardship as to violate Article 3 (art. 3).

B. The Court's assessment

1. General principles

92. The applicable principles which emerge from the Court's case-law are the following:

a) States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 of the Convention (art. 3), to control the entry, residence and expulsion of aliens (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

b) Expulsion - or removal - by a Contracting State of a non-national may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or shewas returned (see, mutatis mutandis, the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103).

c) Since the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (or, as in the present case, the removal); the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion (or removal). This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of the applicants' fears (see, mutatis mutandis, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 30, para. 76).

d) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see, among other authorities, the above-mentioned Cruz Varas and Others judgment, p. 31, para. 83).

2. The refusal to allow Francine access to Netherlands territory

93. Francine and Bata Nsona arrived at Schiphol Airport on 29 December 1993. Although Bata Nsona had a residence permit, Francine did not; nor did she have any kind of visa which would have entitled her to access to the Netherlands (see paragraph 18 above). The entry of Francine as Bata Nsona's child in the latter's passport appeared to be forged (see paragraphs 15, 54 and 55 above).

It must therefore be recognised that the Netherlands authorities were in principle entitled to refuse Francine access to the country provided that such refusal was not inconsistent with the obligations of the respondent State under the Convention.

3. The way in which Francine's removal was effected

94. After Francine was refused access to the Netherlands, she was taken to the Schiphol Airport Hotel. She stayed there, under the supervision of the Royal Military Constabulary, until her removal was effected on 31 December 1993 in the afternoon (see paragraphs 18 and 24 above).

95. On 30 December 1993 the Netherlands authorities offered Bata Nsona the opportunity to accompany Francine on a flight back to Zaïre, on a ticket provided by Swissair. She initially accepted but later changed her mind (see paragraphs 19 and 21 above).

96. Before the Court, the applicants drew attention to the fact that Bata Nsona had arrived in the Netherlands in 1989 claiming refugee status. In 1992 she had been granted a residence permit on humanitarian grounds, which according to the applicants reflected recognition by the authorities that Bata Nsona would be in real danger if forced to return to Zaïre.

Be that as it may, the fact remains that she arrived on the same flight as Francine, travelling under her own name and on a Zaïrean passport that had apparently been issued in Kinshasa the previous day (see paragraph 15 above).

Nor has any evidence been put forward to support the vague suggestion that Bata Nsona might suffer ill-treatment at the hands of the Zaïrean authorities for the reason that the entry of Francine in her passport was irregular.

In these circumstances the separation of Francine and Bata Nsona cannot be imputed to the respondent State.

97. After Bata Nsona had refused to accompany Francine back to Zaïre, the Netherlands authorities asked another adult to do so (see paragraph 25 above). Before the domestic courts the applicants denied that the person in whose company Francine arrived in Zürich was Ms M.M. but before the Court they no longer did so.

On the other hand, the applicants stated before the Court that Bata Nsona and Ms M.M. were strangers. They denied that copies of documents relating to Ms M.M. were found in Bata Nsona's luggage. The Commission's file, however, contains a copy of a note by an officer of the Royal Military Constabulary attesting to the fact that such copies were in fact found there (see paragraph 16 above). In these circumstances the Court accepts that the authorities could reasonably assume that there existed a relationship between Ms M.M. and Bata Nsona sufficient to justify entrusting the escorting of Francine back to Kinshasa to Ms M.M.

98. Francine and Ms M.M. travelled together as far as Zürich. Whether Ms M.M. flew on to Kinshasa or absconded, as the applicants allege (see paragraph 25 above), the fact is that Francine was allowed to remain at Zürich Airport until 6 January at the request of the applicants' lawyer (see paragraph 27 above), who must therefore bear part of the responsibility for the length of Francine's ordeal if not for the fact that she travelled unaccompanied from then on.

99. Francine's seven-day journey back to Kinshasa must have been a distressing experience. She was however in the hands of the Netherlands authorities for as long as she was at Schiphol Airport and in a Swissair nursery while she was in Zürich. In any event it has not been suggested that Francine sustained any damage, however slight, to her mental or physical health.

On the facts of the case, the Court finds that the way in which Francine's removal was effected did not constitute treatment of such a nature as to

make it "inhuman or degrading" as these expressions are to be understood in the context of Article 3 (art. 3).

4. The risk to which Francine was exposed upon return to Zaïre

100. This aspect of the case revolves around the allegation that the Government did not take sufficient account of the possibility that Francine might not be taken proper care of upon her return to Zaïre. It was not alleged that Francine had anything to fear from the Zaïrean authorities.

101. When she arrived at Kinshasa Airport on 7 January 1993, Francine was met by a business relation of Swissair, who turned her over to the Zaïrean immigration authorities (see paragraphs 31 and 32 above). The following day she was taken to the home of Mr Mbemba and Ms Bakangadio, with whom she had stayed before travelling to the Netherlands (see paragraph 32 above).

On 6 January the Netherlands authorities made an unsuccessful attempt to arrange through the Netherlands Embassy in Kinshasa for Francine to be met. On 7 January the Embassy asked the Red Cross to assume responsibility for Francine. This request was withdrawn when it emerged that other arrangements had been made (see paragraphs 31 and 32 above).

102. Given the fact that arrangements were made by Swissair for Francine to be met at Kinshasa Airport and that these proved adequate, the Court is of the opinion that there is insufficient ground for reproaching the Netherlands Government for not having acted with due diligence.

5. Conclusion

103. The most striking features of the case are the haste with which the Netherlands authorities gave effect to their decision to remove Francine from the Netherlands and their apparent willingness to hand over all responsibility for her welfare as soon as she had left Netherlands territory to others (Ms M.M. and especially Swissair). In a case involving a 9-year-old girl, such an attitude is certainly open to criticism, as the Government in fact admitted (see paragraph 90 above).

Nevertheless, in the circumstances of the present case the Netherlands cannot be held responsible for treating Francine in such a way as to warrant a finding that she has been the victim of "inhuman or degrading treatment" or for exposing her to the danger thereof.

There has accordingly not been a violation of Article 3 (art. 3).

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

A. The Government's preliminary objection

104. The Government stated that since Bata Nsona had been appointed temporary guardian of Francine (27 June 1995 - see paragraph 45 above), and since Francine had been granted a residence permit to live in the Netherlands as Bata Nsona's foster child (1 December 1995 - see paragraph 46 above), the relationship between Bata Nsona and Francine had been recognised by law.

In the Government's contention, this had "deprived the applicants' complaints in respect of Article 8 (art. 8) of any substance whatever, and ... they [could] no longer be regarded as victims in this regard".

105. The events relied on by the Government occurred after the Commission adopted its report (2 March 1995 - see paragraph 84 above). They therefore could not have been invoked at an earlier stage of the proceedings and there is no estoppel.

106. The word "victim" in the context of Article 25 of the Convention (art. 25) denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 50 (art. 50). Consequently, a measure by a public authority reversing or mitigating the effect of the act or omission alleged to be in breach of the Convention in principle deprives such a person of his status as a victim only where the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, such breach (see, among many other authorities, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 18, para. 34).

107. It is true that the Rotterdam District Court's decision of 27 June 1995 appointing Bata Nsona as Francine's temporary guardian and the grant of a residence permit to Francine on 1 December 1995 put an end to the situation complained of by the applicants. However, it does not appear that these decisions were intended to put an end to, and afford redress for, any violation of the Convention; they did not reverse or compensate for any of the measures which led to the applicants' separation between 31 December 1993 and 12 January 1995 (see, mutatis mutandis, the Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 17, para. 33). Indeed, far from acknowledging a violation, the Government maintained before the Court that no breach of Article 8 (art. 8) had taken place.

The preliminary objection must therefore be dismissed.

B. The merits of the complaint

108. The applicants alleged that Francine was prevented from establishing "family life" with her only surviving relative, contrary to Article 8 of the Convention (art. 8), 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."

Neither the Government nor the Commission accepted this allegation.

1. Arguments before the Court

a) The applicants

109. According to the applicants, family life, or at least a beginning of family life, existed between them at the time of the events complained of. They stated that Bata Nsona was Francine's closest surviving relative, being the sister of Francine's mother Ndombe Nsona. The applicants' family ties were in their view sufficiently proved by the record of Bata Nsona's interview with the immigration authorities in 1989 (see paragraph 11 above), in which her statement was recorded to the effect that at that time she had a sister called Ndombe, and by the handwritten document claimed to be Ndombe Nsona's will (see paragraph 12 above).

b) The Government

110. The Government stated that the Netherlands authorities had been confronted from the outset with uncertainty as to whether, and in what way, Francine was related to other persons involved in the case. The applicants had themselves contributed to this uncertainty by attempting to pass Francine off as Bata Nsona's daughter (see paragraph 15 above).

Before travelling to the Netherlands, Francine had lived for the most part with Mr Mbemba and Ms Bakangadio. It had been claimed that they were relatives of a business associate of Francine's late father but it had also been suggested that they might even be her parents. Mr Mbemba and Ms Bakangadio had actually claimed to be unaware of Bata Nsona's very existence, and a fortiori of any request made to her by Francine's mother (see paragraph 13 above). Moreover, no death certificate was ever produced for either of Francine's parents (see paragraph 10 above).

According to the Government, there had been no family life between Francine and Bata Nsona "in a form protected by Article 8 of the Convention (art. 8)".

c) The Commission

111. The Commission confined itself to observing that when Francine arrived in the Netherlands, she was falsely claimed to be Bata Nsona's child (see paragraph 15 above). It also considered the allegation that Francine was in fact Bata Nsona's niece to be unsubstantiated. There had therefore, in its opinion, been no interference with the applicants' right to respect for their family life.

2. The Court's assessment

112. Upon arrival at Schiphol Airport the applicants presented a Zaïrean passport in the name of Bata Nsona, apparently issued the previous day, in which Francine had been entered as her child. When this entry was found by the Royal Military Constabulary to be apparently forged, the applicants admitted that Francine was in fact not Bata Nsona's daughter and claimed instead that she was her niece (see paragraph 15 above). Such has been their claim ever since.

113. In the Court's opinion, whatever the true situation, the applicants could reasonably have been expected to disclose it to the Netherlands immigration authorities immediately upon arrival. Instead they resorted to deceit. The Netherlands authorities cannot be blamed, once this was discovered, for refusing to accept allegations unsupported by evidence.

114. In the circumstances of the present case no interference with the applicants' right to respect for their family life can be imputed to the respondent State.

There has accordingly been no violation of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

115. In their application to the Commission, the applicants also relied on Article 13 of the Convention (art. 13).

In their letters of 28 June and 19 July 1995 referring the case to the Court under Article 48 of the Convention (art. 48) (as amended in respect of the Netherlands by Article 5 of Protocol No. 9 (P9-5)), the applicants stated that they wished to confine the scope of the case to the alleged violations of Articles 3 and 8 of the Convention (art. 3, art. 8).

116. The Court does not find it necessary on this occasion to give a general ruling on the question whether it is permissible for an applicant to limit a referral to the Court to some of the issues on which the Commission

has stated its opinion (see, mutatis mutandis, the Loizidou v. Turkey (preliminary objections) judgment of 23 March 1995, Series A no. 310, pp. 20-21, para. 54).

This is because in any event neither the Commission nor the respondent Government have offered any argument on the question whether there has been a violation of Article 13 (art. 13), and the Court sees no need to consider it of its own motion.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there has been no violation of Article 3 of the Convention (art. 3);

2. Dismisses unanimously the Government's preliminary objection in respect of Article 8 of the Convention (art. 8);

3. Holds by eight votes to one that there has been no violation of Article 8 of the Convention (art. 8);

4. Holds unanimously that it is not necessary to examine whether there has been a violation of Article 13 of the Convention (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 November 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the dissenting opinion of Mr De Meyer is annexed to this judgment.

R.B.
H.P.

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

The risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which a person is returned[1] is not the only circumstance in which removal of a foreign national may give rise to an issue under Article 3 of the Convention (art. 3).

What gives rise to such an issue in the present case is the Netherlands authorities' "haste"[2] to remove a 9-year-old girl, without taking sufficient care in examining her rather uncertain personal and family circumstances[3] and handing over "all responsibility for her welfare as soon as she had left Netherlands territory to others"[4].

This was not merely an "attitude" which was "open to criticism"[5], but was above all, in my opinion, treatment that it is difficult to consider human.

Admittedly, no serious harm seems to have befallen the child so summarily removed, and she was allowed to join the other applicant one year later. So much the better. But that does not retrospectively excuse what happened.

I also consider, for the same reasons, that there was an infringement of both applicants' right to respect for their private and family life.

The authorities' doubts about the nature of the ties between Francine and Bata Nsona were serious[6]. But because of the girl's age they should have considered the applicants' case rather more thoroughly, even though the latter, for reasons known only to themselves, had "resorted to deceit" on arrival[7].

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[1] See paragraph 92 of the judgment.
[2] See paragraph 103 of the judgment.
[3] See paragraphs 10 to 13, 15 and 28 of the judgment.
[4] See Ibid.paragraph 103 of the judgment.
[5] Ibid.
[6] See the paragraphs of the judgment cited in note 3.
[7] See paragraphs 112 and 113 of the judgment.