CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25424/05
by Mohammed RAMZY
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 27 May 2008 as a Chamber composed of:

Josep Casadevall, *President*,
Elisabet Fura-Sandström,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 15 July 2005,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by Governments of Lithuania, Portugal, Slovakia and the United Kingdom and the comments submitted by the following non-governmental organisations: the AIRE Centre, Interights (also on behalf of Amnesty International Ltd., the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists, and Redress), Justice and Liberty,

Having deliberated, decides as follows:

THE FACTS

1. The applicant claims to be Mohammed Ramzy, an Algerian national who was born in 1982. He is currently staying in the Netherlands, where he is known to the authorities under this and ten other identities. He is represented before the Court by Mr M. Ferschtman and Mr M.F. Wijngaarden, both lawyers practising in Amsterdam, and Ms B.J.P.M. Ficq, a lawyer practising in Haarlem. The Netherlands Government ("the Government") are represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties and derived from public documents, may be summarised as follows.

The applicant's first and second asylum requests

3. On 30 January 1998, after having been apprehended by the Flushing brigade of the Royal Military Constabulary (*Koninklijke Marechaussee*) whilst he was attempting to leave for the United Kingdom in a lorry, the applicant applied for asylum in the Netherlands. During his interview by the Netherlands immigration authorities, the applicant stated that he had largely been brought up in an orphanage in Algeria, that he had never known his natural parents and that he had spent a short period with foster parents who gave him the name Ramzy. The applicant explained that he had left Algeria given the general unsettled and dangerous situation there. He had not been involved in any political activities against the Algerian authorities. He further claimed that he had been abused in the orphanage and that, a long time before leaving Algeria, he had been approached by the Islamic fundamentalist movement FIS (*Front Islamique du Salut*). The applicant did not want to divulge any further details about this claim.

4. As the applicant did not hold any travel documents and had not immediately applied for asylum upon his arrival in the Netherlands, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's asylum request on 7 October 1998. The applicant did not avail himself of the possibility to appeal this decision, which thus became final.

5. On 9 September 1999, the applicant filed a second asylum application, submitting that he could not return to Algeria because young people were being killed there, that he had no one in Algeria any more and that he wished to build a new life in the Netherlands. He further stated that he had never had any problems with the Algerian authorities.

6. On 14 September 1999, the Deputy Minister dismissed this second asylum request as a repeat application based on similar grounds to those relied upon in a previous asylum application that had been rejected in a final

decision. The applicant unsuccessfully challenged this decision in appeal proceedings. The final decision on the second asylum application was taken on 6 October 1999 by the Regional Court (*arrondissementsrechtbank*) of The Hague sitting in Zwolle. The applicant continued to reside illegally in the Netherlands.

Domestic intelligence reports

7. On 19 December 2001, the Netherlands National Security Service (*Binnenlandse Veiligheidsdienst* – "BVD") sent an official report (*ambtsbericht*) to the national public prosecutor responsible for combating terrorism (*landelijk officier van justitie terrorismebestrijding*), part of which reads as follows:

> "In the exercise of the statutory task of the BVD, the following has appeared from reliable sources:
>
> 1. As regards J. (as yet no further personal data are known) it has been established that he forms part of a network of extremist Muslims and *inter alia* maintains contacts with members of the so-called *Groupe Salafiste pour la Prédication et le Combat*, GSPC. He has also in the recent past played a facilitating role in channelling through Islamist fighters from the United Kingdom to training camps in Afghanistan and to international areas of holy war, the so-called 'jihad' (Chechnya, Afghanistan). For this purpose, J. arranges forged travel documents.
>
> 2. J. has also organised the journey to Afghanistan of one of the persons who on 9 September 2001 carried out a suicide attack on the former army commander Massoud of the Northern Alliance in Afghanistan.
>
> 3. It has been established that J. was in Afghanistan or Pakistan on 17 September 2001. From there, he played a role in the organisation of a journey of another radical Muslim with the aim of collecting money in European mosques for the benefit of the jihad.
>
> 4. It has been established that J. has regularly been in Belgium over the past weeks. During that period he was looking for a forged passport in order to travel on that passport to Iran having Afghanistan as his final destination. J. travelled to the Netherlands on 18 December 2001 in order to obtain a forged travel document."

8. On 22 April 2002, the Head of the BVD sent a further official report to the national public prosecutor responsible for combating terrorism. This report reads in its relevant part:

> "In the framework of its statutory task, the BVD is investigating a network active in the Netherlands which is associated with Islamic terrorist organisations. It concerns the *Groupe Salafiste pour la Prédication et le Combat* (GSPC); an organisation that works from the same ideological basis as the Al Qaeda network. The GSPC is an Algerian extremist Islamic organisation of which it is generally known that it has prepared and carried out attacks in Algeria and elsewhere.
>
> The part of this network which is active in the Netherlands is in particular involved in providing material, financial and logistical support and in propagating, planning and actually using violence for the benefit of the international jihad. The members of this network understand jihad as the armed battle in all its forms against all enemies of

Islam, including the (for them) unacceptable governments in the Middle East and the United States [of America]. It appears from the investigation conducted by the BVD that the part of this network which is active in the Netherlands is implicated in closely interwoven activities which complement and reinforce each other and which serve the same goal, namely the waging of jihad. The most important activities are the following:

The network is active in assisting in the entry [into the Netherlands], housing and transit of persons having actively participated in jihad. The members of the network provide these persons with (forged) identity papers, money and shelter. These persons possibly include fighters coming from an area where an armed conflict is ongoing. It is not excluded that at the addresses cited below [of the persons belonging to the part of the network active in the Netherlands] persons as referred to above are also being sheltered.

The network is active in recruiting young men in the Netherlands for effectively conducting jihad. To this end, these young men are incited to prepare for martyrdom and they are enabled materially, financially and logistically to leave for a battle scene. As an example, one can think of Kashmir where earlier this year two young Dutch men of Moroccan origin were killed. In this context a battle scene must be interpreted broadly, including areas where there is an armed conflict between different parties, but also terrorism.

The part of this network which is active in the Netherlands finances its own activities with proceeds from trading in and exporting hard drugs. It must be emphasised that it has appeared to the BVD that the trade in and export of hard drugs as well as the forcing into submission of those involved in the trade and transport are religiously sanctioned. This means that the proceeds of the trade in and export of hard drugs are used for the commonly subscribed goal of jihad, and that disobedience is labelled as apostasy and severely punished. In this context, the BVD knows that a member of this network who has embezzled a quantity of drugs is regarded as an apostate and is currently searched for by members of this network active in the Netherlands. It appears from recorded telephone conversations that violence will be used against this person. It appears from the terminology used that there is a serious risk of liquidation.

Lastly it must be noted that these activities take place in an organisational setting. Facilitation, falsification, recruitment, financing and liquidation for the benefit of jihad always take place in mutual consultation and coordination between members of this network. The activities of the network have been continuing in any event from 2001 to date.

Investigations have disclosed that part of this network is active in the Netherlands and that the following persons form part of this network:

1. ... alias D. ...;

2. ... alias O. ...;

3. ... alias S. ...;

4. M. ...

5. [the applicant]

6. ... alias Taher ...

All the above-cited persons do not have Netherlands citizenship and do not have any legal residence status in the Netherlands. The persons in this network dispose of a submachine gun and one or more handguns.

Ad 1:

D. has sheltered and provided J. with forged identity papers. J. forms part of the above-cited GSPC and organised the journey to Afghanistan of one of the persons who on 9 September 2001 carried out a suicide attack on the former army commander Massoud of the Northern Alliance in Afghanistan. D. was aware of J.'s involvement in this [operation]. During his flight from the Belgian judicial authorities, J. stayed in a safe house of D.'s, namely at [address in the Netherlands]. At the request of the Belgian authorities, J. was arrested in the Netherlands on 19 December 2001 and extradited. At the moment of his arrest, J. was travelling under the following identity ....

D. provides, together and in association with O. and S., facilities to a number of supporters and members of the network, who have not yet been further identified. There are strong indications that these persons have been involved or will become involved in violent Islamic jihad. To this end, D arranges forged identity papers for these persons in an organised association with O., S., [the applicant] and [Taher] and other persons unknown to us.

D. is involved, together and in association with O. and S., in the planning and execution of a fatwa (which the persons concerned understand as a sanction imposed under Islamic law by prominent clergymen) issued against a courier of the network, named F. This involvement consists *inter alia* of actively searching for this person in order to confront him with his undesirable behaviour before sanctions are carried out by members of the network. It appears from recorded telephone conversations that violence will be used against this person. It appears from the terminology used that there is a serious risk of liquidation.

There are indications that D. uses his authority to recruit and indoctrinate youngsters in order to conduct violent jihad. To this end D. disposes of video cassettes and other propaganda material.

Ad 2:

O. is involved in the Netherlands in the organisation, direction and carrying out of drug transportation for the purposes of financing the network and its activities. O. has, together and in association with S., twice organised the transport of a number of kilograms of cocaine from the Netherlands to Italy. ...

Ad 5:

[The applicant] arranges, in an organised association with D., forged identity papers for supporters and members of the network. There are strong indications that these persons have already been involved or will become involved in violent Islamic jihad.

Ad 6:

[Taher] arranges, in an organised association with D., forged identity papers for supporters and members of the network. There are strong indications that these persons have already been involved or will become involved in violent Islamic jihad."

9. In a subsequent official report of 24 April 2002, the Head of the BVD informed the national public prosecutor responsible for combating terrorism of the mobile telephone number that was being used by the applicant.

10. On 29 May 2002, pursuant to the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten*), the BVD was succeeded by the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst* – "AIVD").

The criminal proceedings against the applicant

11. On 24 April 2002, in the context of a criminal investigation by the National Prosecutor's Office (*Landelijk Parket*) into an extremist Islamic organisation, opened on the basis of information obtained from the BVD, a number of houses in different cities in the Netherlands were searched. As a result of these searches, ten persons were arrested, four of whom were taken into custody. Five others were released after questioning and one other person was placed in aliens' detention for expulsion purposes (*vreemdelingenbewaring*). The applicant, who had not been present in any of the houses searched, was not among the group of persons arrested. According to a press release issued on 24 April 2002 by the National Prosecutor's Office, it was believed that the four persons taken into custody formed part of the *Groupe Salafiste pour la Prédication et le Combat* (GSPC) and had been involved in providing logistical support to the international jihad by providing from the Netherlands (forged) identity papers, money and shelter to jihad combatants. The press release further stated that those taken into custody were Algerian nationals and that about ten forged passports had been seized during the searches conducted.

12. In a fax message of 26 April 2002, apparently prompted by the press release of 24 April 2002, the Ambassador of Algeria in the Netherlands requested the National Prosecutor's Office to provide further information about the investigation. On 2 May 2002, the National Public Prosecution Service replied that any such request should be directed to the Netherlands Ministry of Foreign Affairs. No further action was undertaken by the Algerian Embassy in the Netherlands.

13. On 12 June 2002, the applicant was arrested in the Netherlands and detained on remand on suspicion of, *inter alia*, participation in (the activities of) a criminal organisation pursuing the aims of aiding and abetting the enemy in the conflict opposing, on the one hand, the United States of America, the United Kingdom and their allies – including the Netherlands – and, on the other, Afghanistan (under Taliban rule until January 2002) and/or the Taliban and their allies (Al-Qaeda and/or other pro-Taliban combatants) and which organisation was further involved in drug-trafficking, forgery of (travel) documents, providing third persons with forged (travel) documents, and trafficking in human beings.

14. The basis for the suspicions against the applicant and the others was formed by official reports that had been drawn up by the BVD/AIVD, the content of telephone conversations that had been intercepted by the

BVD/AIVD, and books, documents, video and audio tapes that had been found and seized in the course of searches carried out.

15. The applicant and eleven co-suspects were subsequently formally charged and summoned to appear before the Rotterdam Regional Court in order to stand trial. In its judgment of 5 June 2003, following public trial proceedings that had attracted considerable media attention, the Rotterdam Regional Court acquitted the applicant of all charges, finding that these had not been legally and convincingly substantiated, and ordered the applicant's release from pre-trial detention.

16. The Rotterdam Regional Court held that the BVD/AIVD official reports submitted by the prosecution could not be used in evidence, as the Head and Deputy Head of the AIVD – who had been examined by the investigation judge as well as before the Regional Court – and the national public prosecutor responsible for combating terrorism had refused to give evidence about the origins of the information set out in these official reports, invoking their obligation to observe secrecy under the 2002 Intelligence and Security Services Act whereas, in accordance with a decision of 2 May 2003, the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*) and the Minister of Justice (*Minister van Justitie*) had not released them from that obligation in the event of their being called as witnesses in the criminal proceedings in issue. As a result, the defence had not been given the opportunity to verify in an effective manner the origins and correctness of the information set out in these official reports. The Regional Court considered that there was no basis in law for taking another approach, to the effect that the strictness of evidentiary rules would depend on the seriousness of the offence of which a person was suspected. Consequently, although it acknowledged that the obligation of secrecy at issue was certainly justified in cases concerning national security and found that the public prosecutor had not unlawfully used the material supplied by the BVD/AIVD in the determination of the question whether there was a serious suspicion of an offence and in the decision to arrest the applicant, the Regional Court concluded that these BVD/AIVD reports could not be used in evidence against the applicant. The Regional Court did allow in evidence telephone conversations intercepted by the BVD/AIVD as the defence had been given the opportunity to verify their content.

17. The prosecution initially lodged an appeal against this judgment but withdrew it on 6 September 2005, before the trial proceedings on appeal had commenced. According to a press release issued on 6 September 2005 by the Public Prosecution Service (*Openbaar Ministerie*), this decision was taken in view of new legislative developments, namely the Act on Terrorist Crimes (*Wet Terroristische Misdrijven*) – rendering *inter alia* recruitment for [Islamic] armed struggle a criminal offence – having already entered into force [on 10 August 2004] but without retroactive effect, and the

advanced stage of adoption by Parliament of the Bill on the Protected Witnesses Act (*Wetsvoorstel voor de Wet Afgeschermde Getuigen*) providing for the possibility of using official reports of the AIVD in evidence.

The proceedings on the applicant's third asylum application, the decision to impose an exclusion order on him, and the applicant's placement in aliens' detention

18. Immediately after his release from pre-trial detention on 5 June 2003, the applicant was apprehended by the aliens' police (*vreemdelingenpolitie*) and placed in aliens' detention for expulsion purposes. On the same day, he filed a third application for asylum in the Netherlands. On 18 June 2003, the applicant was interviewed by immigration officials in relation to this new asylum application.

19. On 24 June 2003, the applicant was informed of the intention (*voornemen*) of the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie* – "the Minister") – as well as the reasons for this intention – to reject his third asylum application. By submissions of 10 and 15 July 2003 to the Minister, the applicant commented on this intention, submitting *inter alia* that in the case of Z. – one of his co-accused in the Rotterdam trial – the Algerian authorities had questioned this person's father and brother about Z.'s whereabouts and activities, and had given them a warrant for Z.'s arrest. According to an appended ruling given on 13 June 2003 by the provisional-measures judge of the Regional Court of The Hague sitting in Haarlem, in connection with Z.'s application for asylum in the Netherlands, this claim had been rejected for having remained unsubstantiated and the alleged destruction of this arrest warrant by Z.'s brother was found unconvincing.

20. On 21 July 2003, pursuant to Article 59 § 4 of the 2000 Aliens Act (*Vreemdelingenwet*), the applicant was released from aliens' detention as no decision had been taken by the Minister on his third asylum application within 42 days. The applicant was ordered to leave the Netherlands.

21. On 26 February 2004, using a forged Dutch passport, the applicant travelled by air from Cologne (Germany) to Istanbul (Turkey) where he applied for asylum. The Turkish authorities refused to take his asylum application into consideration and, on 27 February 2004, sent him back to Germany, where on 8 March 2004 he applied for asylum under the name which was given in the forged passport and which he had not used previously. On 14 May 2004, under the provisions of the Dublin Convention of 15 June 1990, the German authorities requested the Netherlands to accept responsibility for the applicant's asylum application. On 16 June 2004, the Netherlands authorities accepted that responsibility and, on 15 July 2004, the applicant was transferred to the Netherlands, where he was immediately placed in aliens' detention.

22. On 14 July 2004, the AIVD drew up an individual official report (*individueel ambtsbericht*) on the applicant, which reads:

> "It has appeared from [an] investigation[s] by the AIVD, that [the applicant] had the intention to become engaged once again in violent jihad. The AIVD understands that violent jihad represents the armed struggle in all its forms against all enemies of Islam.
>
> [The applicant] has been arrested on 12 June 2002 after the issuance of an AIVD official report (reference 1830636/01 of 22 April 2002) to the national public prosecutor responsible for the fight against terrorism in which he was designated as a member of a network who was in particular involved in material, financial and logistical support and in propagating, planning and effectively using violence for the benefit of the international violent jihad. This led to a court case in May/June 2003 in which [the applicant] was acquitted. The public prosecution department intends to lodge an appeal against this judgment.
>
> For violent jihad purposes and having Iraq as [his] ultimate destination, [the applicant] attempted in February 2004 to travel to Turkey via Germany. He was apprehended in Turkey and sent back to Germany where he will be held in aliens' detention until 15 July 2004. On 15 July 2004, the German authorities will hand him over to the Netherlands authorities.
>
> It has appeared that [the applicant's] arrest has not induced him to change his views as regards the, in his perception, Islamic duty of active participation in violent jihad.
>
> The AIVD considers that [the applicant] poses a threat to national security."

23. On 21 July 2004, immigration officials conducted an additional interview with the applicant in relation to his third asylum application, in which he declared, *inter alia*, that his friend Taher, one of his co-accused in the Rotterdam trial, had disappeared after having returned to Algeria. The applicant had heard this from unspecified friends and acquaintances. On 5 August 2004, he was notified of the Minister's fresh intention to reject his asylum application, on which the applicant filed comments in reply on 19 and 20 August 2004.

24. On 23 August 2004, following the AIVD official report of 14 July 2004, the applicant was interviewed by a senior official of the police in his place of residence in connection with a proposal to impose an exclusion order (*ongewenstverklaring*) on him. During this hearing, the applicant declared *inter alia* that for reasons of common knowledge about the situation there he did not wish to return to Algeria, that he knew that he could not stay in the Netherlands, that he had no reasons to remain in the Netherlands and that he had no objections to moving to an Islamic country.

25. On 25 August 2004, the Minister rejected the applicant's third asylum application. The applicant was further ordered to leave the Netherlands within 24 hours and informed that an appeal would not have suspensive effect as regards his expulsion from the Netherlands. On 26 August 2004, the applicant filed an appeal to the Regional Court of The Hague as well as a request for an interim measure, namely an injunction on his expulsion pending the determination of his appeal.

26. By decision of 14 September 2004 and mainly on the basis of the content of the official reports of 22 April 2002 and 14 July 2004, the Minister imposed an exclusion order on the applicant. The Minister held that the applicant posed a threat to national security and that imposing an exclusion order on him was in the interests of the Netherlands' international relations.

27. On 22 September 2004, the applicant filed an objection (*bezwaar*) against this decision with the Minister. He further requested the Regional Court of The Hague to extend the scope of his request for an interim measure of 26 August 2004 in that the injunction requested would also cover the duration of the proceedings on his objection against the decision to impose an exclusion order on him.

28. On 2 November 2004, the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Haarlem granted the applicant's request for an injunction and ordered that he was not to be expelled pending the determination of his appeal of 26 August 2004 against the refusal to grant him asylum. The provisional-measures judge further suspended the Minister's decision of 14 September 2004 to impose an exclusion order on the applicant.

29. On 10 November 2004, the Minister filed an appeal against the ruling of 2 November 2004 – in so far as it related to the suspension of the decision of 14 September 2004 – with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*), and requested the President of the Administrative Jurisdiction Division to order an interim measure.

30. On 16 November 2004, the applicant was heard before an official board of inquiry (*ambtelijke commissie)* on his objection of 22 September 2004 against the decision to impose an exclusion order on him. During this hearing, the applicant denied that he had formed part of an Islamic extremist network, denied that he had intended to travel via Turkey to Iraq, and denied ever having undertaken any actions which could have undermined the Netherlands State. He pointed out *inter alia* that he had been acquitted of the criminal charges brought against him, and that there was no evidence for the danger he allegedly posed for the Netherlands' national security. He further stated that, if returned to Algeria, he would have problems with the Algerian authorities, who knew everything about him. His friend Taher had gone to Algeria where he had been arrested immediately. Although the applicant stated that he knew what Taher was being accused of, he did not offer any further details. When asked about the existence of concrete indications that the Algerian authorities would persecute him, the applicant stated that the Algerian authorities suspected that there was a Salafist movement in the Netherlands that was providing financial support to groups in Algeria. He had had contacts with members of that group because he had seen these persons in the mosque. The AIVD also had that information and

had investigated this group. The applicant further stated that for him it was clear that he would immediately be arrested if he returned to Algeria, as the Netherlands had made known certain suspicions for which he would certainly be arrested. He did not trust the Algerian authorities.

31. On 19 November 2004, by way of an interim measure as requested by the Minister on 10 November 2004, the President of the Administrative Jurisdiction Division lifted the suspension of the decision to impose an exclusion order on the applicant.

32. By judgment of 23 December 2004, following a hearing held on 2 December 2004, the Regional Court of The Hague sitting in Haarlem upheld the applicant's appeal of 26 August 2004, quashed the Minister's negative decision of 25 August 2004 on the applicant's third asylum application, and ordered the Minister to take a fresh decision on the matter. This ruling, in its relevant part, reads as follows:

> "2.13. The court will first assess whether [the applicant] has substantiated that the Algerian authorities have become aware of the suspicions that have arisen as to his involvement in a terrorist organisation and of the associated criminal proceedings that were taken against him. ...
>
> 2.15. The court finds, and this point is not in dispute, that the Rotterdam jihad trial has been given a great deal of attention in the national and international media. The court hearing in this trial was of a public nature. It is considered to be generally well-known that on a national and international level, in any case since September 2001, increasing attention has been given to the fight against (international) terrorism. The Netherlands security service and security services of other countries are striving to achieve a greater level of cooperation and to play an increasingly active role in the context of combating terrorism. Of particular importance in this case is the so-called European-Mediterranean Agreement of December 2001 through which an association was established between the European Community and its Member States on the one hand, and the Democratic People's Republic of Algeria on the other. This agreement devotes attention to *inter alia* "cooperation in the field of justice and internal affairs, in particular through institution-building and consolidating the rule of law, and this in particular in the field of visas, illegal immigration and the fight against terrorism and organised crime". In the court's opinion, the above-mentioned attention given to the jihad trial, in combination with current activities on the part of national and international authorities aimed at combating terrorism, entail that it has been sufficiently established that the criminal proceedings that were taken against [the applicant] and the suspicions held against him in these proceedings have become known to the Algerian authorities. There is no question of the Algerian authorities only possibly being aware of them. The fact that in two articles published [in a Netherlands national daily newspaper] on 20 May 2003 ..., [the applicant] was not referred to by his full personal details, does not mean that the Algerian authorities have not become aware of [the applicant's] personal details [in another manner than through] the national media. This leads to the conclusion that [the Minister] cannot reasonably have adopted the view that [the applicant] merely based his assertion on assumptions and conjecture as far as the Algerian authorities' awareness of his suspected involvement in a terrorist organisation was concerned. ...
>
> 2.16 Assuming that the Algerian authorities are aware of the suspicions as to [the applicant's] involvement in a terrorist organisation, the next pertinent question is

whether [the applicant] runs a real risk of being subjected to treatment referred to in Article 3 of the Convention if he returns to Algeria. ...

2.20. The court is of the opinion that it has been established, in view of the content of [the official country assessment report on Algeria, issued in December 2003 by the Netherlands Ministry of Foreign Affairs], that [the applicant] upon his return [to Algeria] will be questioned at the border about his stay in the Netherlands. This questioning and the awareness of the Algerian authorities of the [the applicant's] suspected involvement in terrorist activities mean that there is a real risk of [the applicant's] being detained and exposed to treatment within the meaning of Article 3 of the Convention. The suspicions that have arisen against [the applicant] relate to suspected involvement in an Islamic terrorist organisation and, according to the official country assessment report, there is a risk of torture and ill-treatment in particular for persons who are suspected of participating in, or supporting, armed Islamic groups.

Amnesty International's annual report for 2004, which is referred to in this official country assessment report, also states that this risk applies to these persons in particular. ...

[The Minister's] assertion that the official country assessment report does not permit of the conclusion that treatment proscribed by Article 3 occurs always and under all circumstances cannot be endorsed by the court. The court finds that the suspicions that have arisen against [the applicant] and the criminal proceedings that have been taken as a result, when considered together with the official country assessment report and the report by Amnesty International, mean that there is a real risk and not just a mere possibility of a violation of Article 3 of the Convention.

2.21. During the hearing [of 2 December 2004], [the Minister] stated that, even if the existence of a risk of treatment prohibited under Article 3 had to be assumed and, consequently, [the applicant] was [eligible for a residence permit for the purposes of asylum under Article 29 § 1 (b) of the 2000 Aliens Act], [the Minister] would not grant a residence permit. In that case, [the Minister] would make use of his discretionary power as laid down in Article 29, and refuse to grant a residence permit in connection with the threat to national security.

2.22. The court finds that, in the present proceedings, [the Minister's] opinion that [the applicant] represents a risk to national security does not form a part of the dispute and it will therefore not comment on it.

2.23. In view of the impugned decision, the court finds that the refusal to grant a residence permit for asylum for a definite period, for the reasons set out in that decision, is not supported by sufficiently decisive grounds."

On 20 January 2005, the Minister lodged an appeal against this ruling with the Administrative Jurisdiction Division.

33. In a decision of 11 February 2005, following a hearing on 6 January 2005, the Administrative Jurisdiction Division quashed the decision of 2 November 2004 of the provisional-measures judge in so far as it suspended the decision to impose an exclusion order on the applicant. It found that, although pursuant to section 37 § 2 (c) of the Council of State Act (*Wet op de Raad van State*) no appeal lay against a decision of the provisional-measures judge within the meaning of section 8:84 § 2 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), this part of

the decision of 2 November 2004 – which entailed a cessation of the legal effect of the decision to impose an exclusion order on the applicant, thus creating consequences as regards the legal basis for the applicant's placement in aliens' detention and the lawfulness of his stay in the Netherlands – had not been taken on the basis of a request to this effect by the applicant in respect of which the Minister had had an opportunity to present arguments but was a decision taken on the provisional-measures judge's own motion. Concluding that this part of the decision had thus been taken in breach of due process and fundamental principles of law, the Administrative Jurisdiction Division agreed to examine the Minister's appeal, which it subsequently considered well-founded.

34. On 22 February 2005, the applicant filed a new request for an interim measure with the Regional Court of The Hague, requesting that the Minister's decision of 14 September 2004 to impose an exclusion order on him be suspended. This request was dismissed on 1 April 2005 by the provisional-measures judge of the Regional Court of The Hague sitting in Haarlem.

35. On 17 May 2005, the applicant lodged an appeal with the Regional Court of The Hague against the continuation of his placement in aliens' detention. In the course of the hearing on this appeal, held on 30 May 2005 before the Regional Court of The Hague sitting in Groningen, it was submitted on behalf of the Netherlands State that it was intended – as soon as the Administrative Jurisdiction Division had determined the Minister's appeal of 20 January 2005 – for a high-level delegation of the Netherlands Ministry of Foreign Affairs to discuss the applicant's case with the Algerian authorities, that a date for this meeting had already been scheduled but that the applicant would not be presented to the Algerian authorities before the determination of the appeal of 20 January 2005.

36. On 3 June 2005, the Regional Court of The Hague sitting in Groningen rejected the applicant's appeal of 17 May 2005. It held that the applicant's placement in aliens' detention continued to be justified in that there remained sufficient prospects for expulsion within a reasonable time. In reaching this finding, the court took into account the fact that an exclusion order had been imposed on the applicant, and that he had not undertaken any steps capable of shortening his placement in aliens' detention by providing information for the purposes of establishing his identity and nationality, also bearing in mind the fact that he had used aliases.

37. On 6 July 2005, the Administrative Jurisdiction Division accepted the Minister's appeal of 20 January 2005, quashed the impugned judgment of 23 December 2004 and dismissed the applicant's appeal of 26 August 2004 against the negative decision on his third asylum application. It held, in so far as relevant:

> "The [applicant] has never been granted a Netherlands residence permit. He based his [asylum] application, rejected in the above-cited decision of 25 August 2004, on the claim that he must now fear that, in view of the criminal trial proceedings taken against him, the Algerian authorities have become aware of the suspicions having arisen against him in the Netherlands as to his involvement in a terrorist organisation.
>
> Unlike the Regional Court, [the Administrative Jurisdiction Division considers that] even if such awareness had to be assumed to exist, the Minister did not have to find – noting what has been stated in respect of Algeria in the official report of the Minister for Foreign Affairs of December 2003 – that the applicant had therefore established that, in the event of expulsion, he would run a real risk of being subjected to treatment within the meaning of Article 3 [of the Convention]. Also in the light of what [the applicant] has submitted in general terms about the Algerian authorities' attitude towards terrorism, the information contained in the official report does not prompt that conclusion.
>
> The [applicant] has failed to adduce, let alone substantiate, any facts and circumstances relating to him personally that could lead to the conclusion that such treatment would await him if he were expelled to Algeria. In this context, he has only made a mere reference to the suspicion against him and to the resulting criminal proceedings, as well as speculation about the possible consequences thereof in the event of his return to Algeria. It was not for the Minister to demonstrate that this alleged risk did not in fact exist. The appeal succeeds."

No further appeal lay against this decision.

38. On 15 July 2005, the applicant lodged the present application with the Court. On the same date and at the applicant's request, the Acting President of the Third Section of the Court decided to indicate to the respondent Government under Rule 39 of the Rules of Court that the applicant should not be removed to Algeria until further notice.

39. On 21 July 2005, the applicant filed an appeal with the Regional Court of The Hague on grounds of the Minister's failure to determine in a timely manner his objection of 22 September 2004 against the decision to impose an exclusion order on him.

40. In a judgment given on 2 August 2005, following proceedings on a fresh appeal against the applicant's continued placement in aliens' detention, the Regional Court of The Hague concluded that the detention continued to be justified in that there remained sufficient prospects for his expulsion within a reasonable time.

41. On 31 August 2005, the Minister rejected the applicant's objection of 22 September 2004 against the decision to impose an exclusion order on him. Referring to the AIVD individual official report on the applicant of 14 July 2004, the Minister held that this decision had been taken on correct and sufficient grounds, as he posed a danger to national security and as this order was furthermore in the interest of international relations.

42. On 12 September 2005, the Regional Court of The Hague sitting in Amsterdam informed the applicant and the Netherlands State that it would consider the applicant's appeal of 21 July 2005 as an appeal against the Minister's decision of 31 August 2005. Already on 2 September 2005, the

applicant had also requested the Regional Court to order an interim measure to the effect that the exclusion order of 14 September 2004 be suspended.

43. On 5 September 2005, the applicant lodged an appeal with the Regional Court of The Hague against his continued placement in aliens' detention. In its judgment of 15 September 2005, the Regional Court of The Hague sitting in Leeuwarden – noting the time spent by the applicant in aliens' detention, the interim measure under Rule 39 of the Rules of Court indicated on 15 July 2005 and the uncertainty as to the date when the Court would examine the merits of the application lodged by the applicant – concluded that there were no prospects for the applicant's expulsion from the Netherlands within a reasonable time. Consequently, it accepted the applicant's appeal, ordered his release from aliens' detention and awarded him an amount of 2,660 euros (EUR) in compensation for the time he had spent in aliens' detention after 9 August 2005. The applicant was released on the same day.

44. On 17 October 2005, the provisional-measures judge of the Regional Court of The Hague sitting in Amsterdam suspended the exclusion order pending the determination of the applicant's appeal against the Minister's decision of 31 August 2005. The judge held that the Minister had failed to comply with the obligation to ascertain – before taking the decision to impose the exclusion order at issue – whether the conclusions drawn in the AIVD official report were sufficiently supported by the underlying material. The judge rejected the Minister's argument that this requirement did not apply to individual official reports drawn up by the AIVD and, in this context, noted that section 87 of the Intelligence and Security Services Act 2002 provided the Minister with the possibility of gaining access to underlying material and that, for this purpose, a covenant had been entered into in 2003 between the Minister and the AIVD. The judge therefore concluded that, as the Minister had failed to check the conclusions drawn in the AIVD individual official report, the applicant's interest in obtaining a suspension of the exclusion order pending the determination of his appeal against this order outweighed the Minister's interest.

45. On 17 November 2005, a hearing on the applicant's appeal was held before the Regional Court of The Hague sitting in Amsterdam. On 22 December 2005 – the parties having consented to the appeal being determined also on the basis of that material – the Regional Court was given access to the material underlying the AIVD individual official report of 14 July 2004 without that material being disclosed to the applicant.

46. In a judgment of 10 March 2006, the Regional Court of The Hague sitting in Amsterdam rejected the applicant's appeal against the Minister's decision of 31 August 2005. It noted that – under section 67 § 1 (c) of the Aliens Act 2000 (*Vreemdelingenwet*) – an exclusion order could be imposed on an alien if he constituted a danger to public order or national security and did not lawfully reside in the Netherlands; that – under section 67 § 1 (e) of

the Aliens Act 2000 – an exclusion order could be imposed on an alien in the interest of the international relations of the Netherlands; that – under section 67 § 3 of the Aliens Act 2000 – an alien against whom an exclusion order had been issued was barred from any residence rights; and that section 6.5 (c) of the Aliens Decree 2000 (*Vreemdelingenbesluit*) provided that in any event an exclusion order could be issued against an alien under section 67 § 1 (b) or (c) of the Aliens Act 2000 if the alien – not lawfully residing in the Netherlands – constituted a danger to national security. It considered that, as the impugned exclusion order had been issued of the Minister's own motion, it was for the Minister to establish the facts and circumstances on which the order was based. The exclusion order at issue was based on the AIVD individual official report of 14 July 2004, as well as on the AIVD official reports relating to the applicant of 22 and 24 April 2002. In this respect, the Regional Court considered that, where the Minister based a decision on an individual official report, such a report was to be regarded – according to the constant case-law of the Administrative Jurisdiction Division – as an expert opinion (*deskundigenbericht*) drawn up for the Minister for the purposes of the latter's exercise of his powers. To this end, this expert opinion had to provide information in an impartial, objective and clear manner, indicating – to the extent that this was possible and safe (*verantwoord*) – the sources from which the information had been derived. If those requirements were met, the Minister was allowed – in the decision-making process – to rely on that information as being correct, unless there were concrete indications to doubt its correctness or completeness. The Regional Court accepted that, as regards (individual) official reports drawn up by the AIVD, the sources of the information contained therein were not indicated, given the special position of the AIVD and the necessity to protect its sources, although it held that in certain cases a further investigation could be called for. To the extent that the applicant had disputed the information on which the Minister had based the decision to impose the exclusion order, the Regional Court considered that, apart from the unsubstantiated and unconvincing allegation that he had wished to settle in Turkey to find some rest, the applicant had not gone beyond a mere denial of the facts set out in the individual official report. It held that, in these circumstances, the Minister could in all reasonableness and without a further investigation have found that the official report provided information in a clear manner and based the exclusion order on it. Furthermore, having been granted access, with the parties' consent, to the information and documents underlying the AIVD official report of 14 July 2005 without that information and documents being disclosed to the applicant, the Regional Court concluded that this material could support the AIVD conclusion that the applicant constituted a danger to national security and that, consequently, the Minister had been entitled to impose the exclusion order for this reason.

47. In so far as the applicant claimed that he, if returned to Algeria, would have to fear treatment contrary to Article 3 of the Convention, the Regional Court noted the findings of the Administrative Jurisdiction Division on this point in its decision of 6 July 2005 and held that it had not been argued and that it had not appeared that, since 6 July 2005, new facts and circumstances had arisen prompting a different finding. This conclusion was not altered by the fact that, on 15 July 2005, the President of the Court had indicated an interim measure under Rule 39 of the Rules of Court, as this did not yet entail a finding by the Court that the applicant's expulsion to Algeria would be contrary to his rights under Article 3 of the Convention.

48. On 18 September 2006 the Administrative Jurisdiction Division of the Council of State – which, in application of sections 8:29 and 8:45 of the General Administrative Law Act in conjunction with section 87 of the 2002 Intelligence and Security Services Act and with the applicant's permission, had also been given access to the undisclosed material underlying the official reports of 22 April 2002 and 14 July 2004 without that material being disclosed to the applicant – rejected the applicant's appeal against the Regional Court's judgment of 10 March 2006 and upheld the impugned judgment. The Division held, *inter alia*, as follows:

> "2.3.2. It thus appears from the official report [of 14 July 2004] in an objective, impartial and clear manner on what facts and circumstances the AIVD has based the conclusion that the applicant constitutes a danger to national security, in particular the intention to participate in violent jihad in Iraq. This conclusion is, without further explanation, not incomprehensible. Citation of the source or sources on which the official report is based had to be avoided for reasons of confidentiality of that/those source(s). However, [the official report] offered [the applicant] sufficient clues for addressing – in so far as there was a reason for so doing – the content [of the official report] and to demonstrate that it contained partly or fully incorrect or incomplete facts.
>
> The arguments which [the applicant] has put forward against the conclusion of the official report cannot be regarded as a concrete indication to doubt the accuracy or completeness thereof. The Minister could therefore base the decision of 31 August 2005 on the official report without a further investigation of the underlying material. ... After having taken notice of [that underlying material], the Administrative Jurisdiction Division – like the Regional Court – sees no reason for holding that the investigation on which the official report is based was lacking in due care or cannot support the conclusion of the official report.
>
> 2.4. [The applicant further complains that] the Regional Court, by not having found a violation of Article 13 taken together with Article 3 [of the Convention] as regards the impossibility for [the applicant] or a third person on his behalf to consult the documents underlying the official report, failed to appreciate the non-compliance [in his case] with the requirement of 'adversarial proceedings' flowing from [the Court's findings in the cases of *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002) and *Haliti v. Switzerland* ((dec.), no. 14015/02, 1 March 2005)].
>
> 2.4.1. Like the Regional Court, the Administrative Jurisdiction Division has the possibility under section 8:29 of the General Administrative Law Act of consulting the documents underlying the official report which have not been disclosed to [the

applicant] and in that manner can assess the Minister's considerations made on the basis of that material. Like the Regional Court, the Administrative Jurisdiction Division has availed itself of this possibility. It cannot be concluded from [the Court's findings in the cases of *Al-Nashif* and *Haliti*] that there are 'adversarial proceedings' [in the sense which this notion has been given in the Court's case-law] only when the applicant is allowed access to the documents underlying the official report, or a third person on his behalf is given the opportunity, after having been given access to these documents, to react to factual findings of the judge. There is therefore no ground for holding that the Regional Court was wrong to find no violation of Article 13 in conjunction with Article 3 of the Convention. ...

2.5.1. It cannot be deduced [from the mere fact that an interim measure under Rule 39 of the Rules of Court was indicated on 15 July 2005] that [the applicant] will run a real risk of being subjected to treatment in violation of Article 3 [of the Convention]. As the 'interim measure' only constitutes a temporary obstacle to the applicant's possible expulsion to Algeria, the Regional Court was correct in considering that it did not prompt a deviation from the finding made in the decision [given on 6 July 2005] of the Administrative Jurisdiction Division that the refusal to grant [the applicant] asylum did not entail [exposing him to] a real risk of treatment proscribed by Article 3."

No further appeal lay against this decision.

The applicant's request for access to the information on which the AIVD official report of 14 July 2004 was based

49. On 12 October 2005, the applicant requested the Minister of the Interior and Kingdom Relations – under the provisions of the Government Information (Public Access) Act (*Wet Openbaarheid van Bestuur*) – to grant him access to the material on the basis of which the AIVD's report on him of 14 July 2004 had been drawn up. On 21 December 2005, the applicant was informed that, in accordance with section 4:5 of the General Administrative Law Act, his request would not be taken into consideration as he had failed to submit an identity document.

50. On 27 January 2006, the applicant filed an objection against this decision with the Minister of the Interior and Kingdom Relations, who rejected it on 20 March 2006. The Minister of the Interior and Kingdom Relations noted that – under section 47 § 1 of the 2002 Intelligence and Security Services Act – anyone could request to be granted access to personal data held on him/her; that – pursuant to section 47 § 3 of this Act – the identity of such a petitioner had to be adequately established; and that – according to the Explanatory Memorandum to the Act – this required the submission of an identity document by the petitioner. As the documents submitted by the applicant in support of his request for access were not documents sufficient for establishing the identity of a person as defined in section 1 § 1 of the Compulsory Identification Act (*Wet op de Identificatieplicht*), the Minister of the Interior and Kingdom Relations held that the decision not to take the applicant's request for access into consideration had been taken rightfully and on correct grounds.

51. On 10 July 2007, the Regional Court of The Hague upheld the applicant's appeal against the Minister's decision of 20 March 2006, quashed that decision and ordered the Minister to take a fresh decision on the applicant's objection. The Regional Court rejected the Minister's argument that, pursuant to the provisions of section 47 of the 2002 Intelligence and Security Services Act, a petitioner's identity could only be demonstrated by way of a valid identity document. Noting that section 47 § 3 of that Act sought to prevent unauthorised access to personal data by a third person, the Regional Court held that it could in all reasonability be asked of the Minister, who had had an official report on the applicant drawn up, to determine – on the basis of material already submitted by the applicant and, if need be, additional information to be supplied by the applicant – whether any reasonable doubt could arise as to whether the applicant was indeed the person to whom the data in question related.

52. On 7 August 2007, the Minister appealed that ruling before the Administrative Jurisdiction Division. The Minister further requested the President of the Administrative Jurisdiction Division to order an interim measure to the effect that, pending the outcome of the appeal proceedings, the Minister would not have to act on the impugned judgment of 10 July 2007.

53. On 11 October 2007, the President of the Administrative Jurisdiction Division rejected the request for an interim measure, holding – on a provisional basis and without prejudice or binding effect as regards the merits of the appeal – that the Minister had no pressing interest in obtaining the interim measure requested.

54. The proceedings on the merits of the Minister's appeal of 7 August 2007 are currently still pending before the Administrative Jurisdiction Division.

Proceedings on the Netherlands authorities' request to the Algerian authorities in the Netherlands to issue a laissez-passer to the applicant for expulsion purposes

55. On 9 August 2001, after apparently having noted that the applicant had not left the Netherlands voluntarily after the rejection of his second asylum application, the Netherlands aliens police (*vreemdelingenpolitie*) requested the Return Facilitation Unit (*Unit facilitering terugkeer* – "UFT") of the Immigration and Naturalisation Department of the Ministry of Justice to request the Algerian consular authorities in the Netherlands to issue a laissez-passer in the name of Mohammed Ramzy for the purposes of the applicant's expulsion to Algeria. On 2 October 2001, the applicant was presented in person at the Algerian mission in the Netherlands and the latter indicated that the application for a laissez-passer would be examined.

56. On 20 October 2002, the applicant having been arrested in the Netherlands on 12 June 2002 in the meantime, the Algerian authorities

informed the UFT that the applicant was not known in Algeria under the name Mohammed Ramzy.

57. On an unspecified date and in the light of new documents made available by the applicant, the UFT sent a second request for a laissez-passer in the name of Mohammed Ramzy to the Algerian authorities. After the applicant's presentation in person on 26 October 2004, the Algerian authorities agreed to investigate the new request. The UFT sent reminders to the Algerian mission on 9 November 2004, 7 December 2004 and 11 January 2005, each time in the form of a general reminder of all such outstanding cases. On 14 February 2005, the Algerian authorities informed the UFT again that no such person under the name of Mohammed Ramzy was known in Algeria. An informal meeting in May 2005 between officials of the Netherlands Ministry of Foreign Affairs and officials of the Algerian Embassy in the Netherlands did not alter the outcome of the request for a laissez-passer for the applicant.

58. On 12 July 2005, the Netherlands authorities presented the applicant in writing to the Algerian authorities under the name of "X." Only a letter with new information was sent to the Algerian authorities, namely a copy of the birth certificate of "X.". In accordance with the customary practice, the letter further stated that the person concerned had previously been presented under the name Ramzy. The Algerian authorities again agreed to investigate the request, and the UFT sent general reminders on 19 July 2005, 2 August 2005, 30 August 2005 and 13 September 2005. On 16 August 2005, the UFT had also enquired into the progress of this specific case. On 26 September 2005, the Algerian authorities informed the UFT that the person concerned was known by the name of "X." and was an Algerian national. They subsequently issued a laissez-passer in this name. To date, this laissez-passer has not been used by the Netherlands authorities.

The AIVD official report of 13 November 2006

59. On 13 November 2006 the AIVD drew up a new official report on the applicant, which reads:

> "In the framework of the exercise of its statutory task, the General Intelligence and Security Service holds information from reliable sources from which it appears that Mohammed Ramzy alias ... alias ...., born on ... 1982 or on ... 1975 in... (Algeria) is staying or has stayed in Algeria after the issuance of the official report of 14 July 2004 with the reference 2199459/01."

B. Relevant domestic and international law, practice and other material

1. Asylum proceedings

60. Until 1 April 2001, the admission, residence and expulsion of aliens were regulated by the 1965 Aliens Act (*Vreemdelingenwet*). Further rules

were laid down in the Aliens Decree (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applied to proceedings under the 1965 Aliens Act, unless indicated otherwise in this Act.

61. On 1 April 2001, the 1965 Aliens Act was replaced by the 2000 Aliens Act. On the same date, the Aliens Decree, the Regulation on Aliens and the Aliens Act Implementation Guidelines were replaced by new versions based on the 2000 Aliens Act. Unless indicated otherwise in the 2000 Aliens Act, the General Administrative Law Act continued to apply to proceedings on requests by aliens for admission and residence.

62. One of the changes brought about under the 2000 Aliens Act is that the final decision on an asylum request is now taken by the Administrative Jurisdiction Division and no longer, as was the situation under the 1965 Aliens Act, by the Regional Court of The Hague. What has remained unchanged is that judicial review by the Regional Court and the Administrative Jurisdiction Division in administrative law appeal proceedings only addresses whether the administrative authority concerned has exercised its administrative powers in a reasonable manner and whether this authority could reasonably have taken the impugned decision (*marginale toetsing*).

63. Under section 29 of the 2000 Aliens Act, an alien is eligible for a residence permit for the purposes of asylum if, *inter alia*,

- he or she is a refugee within the meaning of the Convention relating to the Status of Refugees of 28 July 1951, or
- he or she has established that he or she has well-founded reasons to assume that he or she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment if expelled to the country of origin.

64. Section 4:6 of the General Administrative Law Act provides that an applicant must adduce newly emerged facts or altered circumstances (*nieuw gebleken feiten of veranderde omstandigheden*) if a new request is filed following a decision in which the original request is, either totally or partially, rejected. When no such facts or altered circumstances have been adduced, the administrative authority may reject the new request with reference to the decision on the original request. Section 4:6 thus embodies the *res iudicata* principle in administrative law. Nevertheless, an exception has been made in this particular area of the law, in that an alien may adduce exceptional facts and circumstances relating to him or her personally, on the basis of which the new request may be assessed outside the framework of section 4:6. In the case of a repeat asylum application in which the risk of treatment contrary to Article 3 of the Convention is also invoked, an assessment by the court outside the framework of section 4:6 is therefore possible.

2. Exclusion orders

65. Under section 67 § 1 of the 2000 Aliens Act, an exclusion order can be imposed on an alien if, *inter alia*:

- he or she poses a threat to public order or national security and does not lawfully reside in the Netherlands; and/or
- this is in the interest of the international relations of the Netherlands.

66. An exclusion order entails a ban on residing in or visiting the Netherlands. An exclusion order may be revoked, upon request, if the alien concerned has been residing outside the Netherlands for a period of ten years (section 68 of the 2000 Aliens Act).

67. An exclusion order can be challenged in administrative law appeal proceedings under the terms of the General Administrative Law Act. Such appeal proceedings do not have an automatic suspensive effect.

68. Section 197 of the Criminal Code (*Wetboek van Strafrecht*) provides that an alien who stays in the Netherlands while he or she knows that an exclusion order has been imposed on him or her commits a criminal offence punishable by up to six months' imprisonment or a fine of up to 4,500 euros.

3. The General Administrative Law Act

69. Section 8:27 § 1 of this Act reads:

> "Parties who have been summoned to appear ... before the court ... are obliged to appear and to provide the information requested. The parties' attention is drawn to this [obligation] as well as to section 8:31."

70. Section 8:29 of the Act provides:

> "1. Parties who are obliged to submit information or documents may, when there are substantial reasons for so doing, refuse to provide information or submit documents, or inform the court that it alone may take cognisance of the information or documents.
>
> 2. Substantial reasons shall in any event not apply to a public administration body in so far as the obligation exists, pursuant to the Government Information (Public Access) Act, to grant requests for information contained in documents.
>
> 3. The court shall decide whether the refusal or limitation on taking cognisance as referred to in the first paragraph is justified.
>
> 4. Should the court decide that such refusal is justified, the obligation shall not apply.
>
> 5. Where the court decides that the restriction on taking cognisance is justified, it may, with the permission of the other party, give a ruling on the basis of, among other elements, the information or documents concerned. If permission [by the other party] is withheld, the case shall be referred to another bench."

71. Section 8:31 of the Act reads:

> "If a party fails to comply with the obligation to appear, to provide information, to submit documents or to cooperate in an investigation [commissioned by the court from an expert appointed by the court] within the meaning of section 8:47 § 1, the court may draw therefrom the inferences which it sees fit."

72. Section 8:45 of the Act, in so far as relevant, reads:

"1. The court may request the parties and others, within a period fixed by the court, to provide written information and to submit documents held by them.

2. Administrative public bodies shall be obliged, also when they are not a party to the proceedings, to comply with a request within the meaning of the first paragraph. Section 8:29 shall apply by analogy. ..."

4. The Netherlands intelligence and security services

73. An overview of the relevant domestic law and practice as regards the Netherlands intelligence and security services is set out in the Court's decision on admissibility in the case of *Brinks v. the Netherlands* (no. 9940/04, 5 April 2005).

74. Pursuant to section 15 of the Intelligence and Security Services Act 2002, the Heads of the intelligence and security agencies are to ensure the secrecy of data eligible for classification as confidential, the secrecy of sources eligible for classification as confidential from which data have been obtained, and the safety of persons with whose cooperation data are collected.

75. Section 87 of the Intelligence and Security Services Act 2002 reads:

"1. In administrative law proceedings concerning the application of this Act or the Security Screenings Act (*Wet Veiligheidsonderzoeken*) in which Our Minister concerned ... is obliged by the court under section 8:27, 8:28 or 8:45 of the General Administrative Law Act to provide information or to submit documents, section 8:29 §§ 3-5 of that Act does not apply. If Our Minister ... informs the court that only the court may take cognisance of, respectively, information or documents [requested by the court], the court may only with permission of the other party give judgment based also on such information or documents. If Our Minister concerned refuses to provide information or to submit documents, section 8:31 of the General Administrative Law Act shall remain applicable.

2. If Our Minister is required to submit documents to the court, consultation of the documents concerned shall be sufficient. In no circumstances may a copy be made of the documents concerned."

5. The Government Information (Public Access) Act

76. Section 3 §§ 1 and 3 of this Act reads:

"1. Anyone may submit a request for information contained in documents about a public administration matter to a public administration body or to an institution, service or company working under the responsibility of a public administration body.

3. A request for information shall be granted subject to the provisions of sections 10 and 11 [of this Act]."

77. Section 10 § 1 (b) of the Act states:

"No information shall be made available under this Act in so far as this: ...

(b) might undermine the security of the State;"

78. Proceedings under the Government Information (Public Access) Act are governed by the provisions of the General Administrative Law Act.

6. Procedure followed for obtaining a laissez-passer for effective removal purposes

79. In the case of an alien who has been denied a residence permit, who has not left the Netherlands voluntarily within the time-limit fixed for this purpose and who holds no travel documents, the Netherlands aliens police submit an application for a laissez-passer for the alien concerned to the Return Facilitation Unit (*Unit facilitering terugkeer* – "UFT") of the Immigration and Naturalisation Department of the Ministry of Justice.

80. The UFT prepares the presentation of the alien concerned, either in person or in writing, to the authorities of the country to which the alien will be removed. A personal presentation consists of an interview with a staff member of the receiving country's representation, the aim being to establish the alien's identity and nationality. After this meeting, the authorities of the receiving country indicate whether they will examine the application for a laissez-passer. A personal presentation may be replaced by a presentation in writing. In such a case, the authorities of the receiving country are sent a letter – containing all information on the alien's identity known to the Netherlands authorities, such as his/her full name, date and place of birth, and any available information on parents and other relatives – asking these authorities to provide a laissez-passer.

81. Once the authorities of the receiving country have agreed to examine an application for a laissez-passer, the UFT sends regular reminders to these authorities, requesting the results of the investigation. Some reminders may concern an individual case while others may be couched in more general terms, requesting the results of all outstanding applications.

7. Official country assessment report on Algeria of the Netherlands Ministry of Foreign Affairs

82. The most recent official country assessment report on Algeria, which was drawn up in June 2005 by the Netherlands Ministry of Foreign Affairs states *inter alia* as follows:

> "[after Algeria gained its independence in 1962], the *Front de Libération Nationale* (FLN), which had played a leading role in the struggle for independence, rapidly obtained a power monopoly. The first President Ahmed Ben Bella, founder of the FLN, was removed by a non-violent *coup d'état* in 1965. Power was taken over by a Revolutionary Council, consisting of 26 army officers and presided over by the former Minister of Defence Boumedienne who became the new President. In the subsequent years, he established a centralist and socialist economic order based on oil proceeds and achieved a considerable increase in prosperity.

After Boumedienne's death in 1978, Chadli Bendjedid came to power. He was a declared opponent of his predecessor's socialist policy. He left more room for private initiative and a market economy was gradually introduced.

In 1990, free local and provincial elections were held for the first time. The large amount of attention devoted to the FLN on state television led a great number of parties to boycott these elections. With 54.2% of the votes, the *Front Islamique du Salut* (FIS) obtained an overwhelming victory. The FIS advocated a society based on Islamic law (sharia). ...

President Chadli promised the FIS that anticipated national elections would be held. In December 1991, after a year of political violence, the first round of parliamentary elections took place. The FIS obtained 47.5% of the votes cast, thus obtaining 188 of the 430 seats in parliament with prospects of obtaining an absolute majority in the second round of the elections.

In order to prevent this, the army intervened in January 1992. Parliament was dissolved and President Chadli was replaced by a five-member *Haut Conseil d'Etat* (HCE) presided over by Mohammed Boudiaf, one of the FLN founders. The second round of elections was annulled and the FIS banned. The FIS leaders Abbas Madani and Ali Benhadj were arrested, tried and sentenced to twelve years' imprisonment. Other FIS leaders fled abroad. In addition, the state of emergency was declared which, to date, has remained in force. The dissolution of the FIS and subsequent measures, such as the internment of FIS-militants in camps and suppression of sympathisers, led to radicalisation and fragmentation of the Islamic opposition. Six years of violence with terrorist, bloody attacks – comparable to a civil war – in which well over 150,000 persons died followed.

Six months after having taken up office, Boudiaf was killed in an attack. He was succeeded as HCE president by the FLN-hardliner Ali Kafi. After the expiry of the HCE mandate in January 1994, the former general Liamine Zéroual was appointed Head of State. In 1997 parliamentary elections were held again, for the first time since 1991. On account of a disagreement with the highest echelons of the army, Zéroual announced in 1998 that he would step down and that presidential elections were to be held the following year. These elections took place on 15 April 1999. After all other candidates had withdrawn the day before the elections, the only remaining candidate, Adbelaziz Bouteflika, won the elections and became the new President of Algeria, which function he holds to date.

An attempt to end hostilities was contained in the plan for national reconciliation, initiated by President Bouteflika in June 1999, the so-called *Concorde Civil*. The *Concorde Civile* was approved by an overwhelming majority of the population and gave militants of Islamic groups, who had not been involved in bloodshed, until 13 January 2000 to report themselves to the authorities and thus become eligible for an amnesty. Persons responsible for murders were excluded from the amnesty.

The *Armée Islamique du Salut* (AIS), often referred to as the armed wing of the FIS, was the only sizeable group that integrally complied with the call to participate in the *Concorde Civile*. The two other main armed groups, the *Groupes Islamiques Armés* (GIA) and the *Groupe Salafiste pour la Prédication et le Combat* (GSPC) indicated that they would continue the fight. However, a considerable number of individuals did seize this opportunity to turn their back on the GIA or GSPC and to return to normal life.

On the eve of the expiry of the deadline of the *Concorde Civile*, a presidential decree was issued on 10 January 2001 which – contrary to the spirit of the *Concorde*

Civile – provided for the release of several thousands of Islamic militants who had already been convicted and who were serving their sentence. Amongst them were many who had been responsible for massacres.

On 30 May 2002, parliamentary elections were held. ... [due to a boycott of two parties with a large electorate in Kabylia] ... the national voters' turnout was 47% ... The FLN won the elections with 199 seats. On 10 October 2002, local elections were held. Again (some of) the political parties in Kabylia called for a boycott. The FLN was returned as the largest party, at both local and provincial level.

The year 2003 was, politically, mainly characterised by the build-up to the presidential elections in April 2004. At an extraordinary FLN party congress ... Ali Benflis – until May 2003 Prime Minister of Algeria and fearsome rival of Bouteflika – was proclaimed official candidate of this party. Eventually, Bouteflika was elected for a second presidential term on 8 April 2004. ...

Several bodies are responsible for security and public order in Algeria. ... the army, the *Armée Populaire Nationale* (APN), which is deployed *inter alia* for combating terrorism, consists of 127,500 men of whom about 75,000 are conscripts. The *Direction Génerale de la Sûreté Nationale* (DGSN) is the national police force. The *Sûreté Nationale* (police) falls under the control of the Ministry of the Interior and comprises about 110,000 men. At provincial level, the provincial governor is responsible for the police. ... [apart from investigating crime and maintaining public order] the police is also deployed in combating terrorism. The DGSN also comprises the riot police, known as the *Compagnies Nationales de Sécurité* (CNS) and the *Police Judiciaire* (PJ) which deals with judicial preliminary investigations in criminal cases. The *Gendarmerie Nationale* counts 60,000 men and is answerable to the Ministry of Defence. The *gendarmerie* is responsible for police tasks in rural areas. The *gendarmerie* is also deployed in combating terrorism. ...

Special anti-terror units (*Groupes d'Intervention Spéciaux*; GIS) consist of [a total of] about 20,000 specially selected persons from the police and gendarmerie. Members of these units operate relatively autonomously ....

The most important intelligence agencies are the *Sécurité Militaire* (SM) and the *Direction du Renseignement et de la Sécurité* (DRS). The latter is responsible for maintaining internal security and counterespionage. Little more is known about these two agencies. ...

Since the FIS was banned in 1992, the security situation in Algerian has been characterised by regular repetitive attacks and massacres, often accompanied by brute force. The various armed Islamic groups are to a great extent responsible for this violence. Part of the violence can also be ascribed to ordinary banditry in which the perpetrators (often under the guise of Islamic ideals) seek to enrich themselves by force of arms. ... Since the end of the nineties accusations have also been voiced against the police and army, who are in charge of combating Islamic violence, to the effect that they are responsible for part of the atrocities or in some cases at least have allowed them to occur by turning a blind eye. ...

Since 1999, the security situation has noticeably improved in comparison with the previous decade. Since that year, the violence has become significantly less intense than it was in the nineties. In 2000, 2001 and 2002, the number of violent incidents was comparable with the number for 1999, the year with the lowest number of victims since the start of the battle. During the reporting period, a further decrease of the number of victims of lethal violence has been noted. In 2004, the average weekly number of persons killed was 12. In 2003, this figure was still 25 and 35 in 2002. In

1997, when the situation was at its worst, this number amounted to 220 deaths per week. During the reporting period, the percentage of civilians amongst the victims has also shown a decrease. Increasingly often, it is officials of the law enforcement agencies and the army who become the victims of violence. ...

In the security situation in Algeria a number of armed Islamic groups play an – albeit relatively small – role. The role played by the AIS and the *Ligue Islamique de la Dawaa et du Djihad* (LIDD) is finished since both groups were dissolved in 2000. In the reporting period, successful actions by the security services ensured that terrorist cells and leaders were eliminated, and terrorist groups have thus become weakened. A summary overview of the groups still existing is set out below.

The GIA, established in 1992, is a collection of armed groups, who strive to establish an ideal Islamic state. The GIA belongs to the so-called takfirists, which means that they claim to have the right to excommunicate and kill every Muslim who, according to their standards, does not comply with Islamic doctrine. In July 2004, the GIA announced that their leader 'Abou Tourab' would be replaced by Nouredine Boudiafi. However, Boudiafi was shot in December 2004 by Algerian security troops in Chlef. A successor has not yet been appointed. The organisation only has 6070 active members, on account of which the GIA can now be regarded as the most weakened terrorist organisation of Algeria.

The GSPC has emanated from the GIA after a break-up that started in 1995 and which led to the official establishment of the GSPC on 14 September 1998. The GSPC found that the GIA strategy of indiscriminately considering everyone a target went too far. Like the GIA, the GSPC is also more a collection of local militias than an organisation with a clear structure. Since the beginning of 2005, a rift has been taking place within the GSPC. Some wish to down weapons and – in the prospect of the amnesty arrangement – prepare themselves for a normal life, whilst others wish to continue the fight and conclude pacts with other (fragmented) terrorist groups. The total number of fighters is officially said to amount to about 400. Other sources speak about 1,100 active terrorists. It is a fact that, since the leader Hassan Hatab was murdered in 2004 and the foreman 'le Para' extradited by Libya in October 2004, the GSPC struggles with internal leadership problems which do not help the organisation and considerably weaken its objectives (an Algerian Islamic State). Nevertheless, the GSPC continues to form a threat, having a strong presence in the remote mountainous areas of Kabylia and a network of supporting groups in Europe.

The GSPC is included in the United States' list of terrorist organisations. The Algerian authorities and some observers suggest links between the GSPC and Al Qaeda. To date, no concrete evidence for this has been found. ...

The Constitution guarantees the freedom to travel within Algeria, to leave the country and to emigrate. ... Controls at airports and harbours as well as at official border crossings are strict. At the border, upon entry to and departure from Algeria, persons must complete a form with questions relating to personal data and travel destination. On flights to Algeria such forms are already distributed during the flights. Male nationals eligible for military service are in addition required to show a document indicating that they have obtained a stay of their military service or that they have already completed it. Leaving the country illegally is not punishable under Algerian law. ... An illegal stay in another country is also not punishable under Algerian law. Persons returning to Algeria after having illegally left the country are, however, questioned at the border by the police about the reason for their illegal departure and illegal stay abroad. In general, such questioning takes at most some

hours. No cases are known in which torture or ill-treatment occurred during such questionings. ...

The state of emergency declared in 1992 is still in force. On the basis of the state of emergency, the Ministry of the Interior and the provincial governors subordinate to the Minister have far-reaching powers. They can detain anyone who threatens public order and security. In the nineties, when the activities of the armed Islamists and the combating thereof were at their most intense, arbitrary arrests without any preliminary criminal investigation occurred. Since 1999, such arbitrary arrests have hardly occurred any more and arrests are exclusively made within the framework of a criminal investigation. ...

By law, anyone detained has a right to contact family and friends immediately. The maximum duration of detention on remand from arrest until the first appearance before a judge and access to a lawyer is 48 hours [section 51 of the Algerian Code of Criminal Procedure, as amended on 26 June 2001]. ... In case of suspicion of terrorist or subversive activities the duration of detention on remand can, after written permission of the public prosecutor, be prolonged to a maximum of twelve days. Under [section 51 of the Code of Criminal Procedure], criminal proceedings can be brought against officials responsible for exceeding this period. To date, no cases are known in which such criminal proceedings have been brought.

The authorities often only acknowledge a detention once the person concerned has appeared before a judge or has been released; until such time relatives remain unaware of the whereabouts of the person concerned. Pursuant to the Constitution, suspects may not be kept in incommunicado detention for longer than 48 hours. During the reporting period, the security agencies mostly respected this 48-hour limit. According to Amnesty International [Report 2004; Algeria], secret detentions unacknowledged by the authorities still occur. ...

Ill-treatment and torture by police and army officials are prohibited under the Constitution but still continue to occur, albeit not systematically and certainly not to the extent as was the case in the nineties.

The risk of torture and ill-treatment exists in particular for persons who are suspected of participation in or support for armed Islamic groups.

Sometimes arrests take place in such a hard-handed manner that they may be regarded as ill-treatment of the suspect. The major part of the known cases of torture and ill-treatment occurred during detention on remand. Suspects only become entitled to a lawyer when they are brought before an investigating judge and not during the preceding detention period.

The most used method of torture and ill-treatment is the placing over the mouth of a cloth drenched in soiled water or chemicals, thus causing suffocation. The reason for this being that this method does not leave any physical traces. Other methods such as hitting and electric shocks also regularly occurred during the reporting period.

In recent years, human rights have formed an integral part of the training of police and *gendarmerie* officials. In most cases, this training is given in cooperation with foreign – in particular French – police. Such trainings have also taken place during the reporting period. According to well-established foreign observers, a proper training of police officials, including good knowledge of human rights, is currently being given the highest priority by Algerian police chiefs. Detention centres where suspects are held on remand are also inspected from time to time by public prosecutors.

In October 2004 a number of amendments to the Algerian Criminal Code were approved by the president. One of the most important changes is that torture is now a criminal offence. Police or security officials who commit torture face a prison sentence of a maximum of three years. However, during the reporting period no cases concerning such criminal proceedings were reported. ...

Providing support to or participation in armed Islamic groups such as the GIA and the GSPC will be criminally prosecuted. However, in practice the *Concorde Civile* and the amnesty proclaimed in 1999 are still in force. This entails that persons who have been involved in any way with armed groups can count on a full amnesty and rehabilitation in civil society if they report voluntarily to the authorities and hand in their weapons.

During the reporting period the president also repeatedly declared that the door remained open for repentant terrorists. In his speech of 1 November 2004, he declared that he was in favour of an official prolongation of the amnesty arrangement. In early 2005, Bouteflika proposed to enact a general amnesty act in the context of national conciliation in the summer of 2005. This would lead to both Islamic fighters and members of security agencies getting the chance of picking up normal life again without running the risk of being tried in the future. Although many view the amnesty arrangement as an ideal solution for turning the black page in the bloody history of Algeria, the proposal has also received criticism from organisations actively devoted to the thousands of disappeared persons.

International human rights organisations such as Amnesty International, Human Rights Watch and the International Commission of Jurists have also warned that such an amnesty deprives victims and their relatives of the right to the truth, justice and compensation. ... It is in any event not possible for 'repenters' abroad to turn to the Algerian authorities in the country where they are residing for the purposes of obtaining an amnesty. ...

In so far as is known, persons who have applied for asylum abroad and who, after having been denied asylum, return to Algeria, are not arrested merely on account of the fact that they applied for asylum abroad. Arrest on account of political activities abroad only occurs when overt activities directed against the Algerian State are involved. ... However, providing logistical support from abroad to organisations prohibited in Algeria does, if this becomes known to the Algerian authorities, lead to criminal prosecution.

The scope of the above-mentioned amnesty arrangement, in practice still in force, does not go so far (any more) as to enable 'repenters', who have been involved in armed Islamic actions or in the support thereof and who reside abroad, to apply to the Algerian authorities [in their country of residence] for an amnesty and subsequently return unhindered to Algeria. It is not known whether persons have in the past reported to Algerian representations abroad for this purpose.

Algerian nationals who return to Algeria after having been denied asylum in another country are often questioned upon entering Algeria in order for their identity to be established and to verify whether there are any pending criminal proceedings against them or any requirement to do military service. It may happen that persons are held for several days. In so far as is known, in recent years there have been no cases known to any European country of former asylum seekers having been ill-treated or tortured upon their return to Algeria ..."

C. Relevant international material

1. Council of Europe material on terrorism

83. The Council of Europe has produced three international treaties relating to the fight against terrorism, namely:

- the European Convention on the Suppression of Terrorism of 27 January 1977 (ETS 90), which entered into force on 4 August 1978 and which is designed to facilitate the extradition of persons having committed acts of terrorism, and the Protocol of 15 May 2003 amending this Convention (ETS 190) which has not yet entered into force;

- the European Convention on the Prevention of Terrorism of 16 May 2005 (ETS 196), which has not yet entered into force and which seeks to increase the effectiveness of existing international texts on the fight against terrorism and to strengthen member states' efforts to prevent terrorism; and

- the European Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism of 16 May 2005 (ETS 198), which has entered into force on 1 May 2008 and which is designed as an update and extension of the European Convention on laundering, search, seizure and confiscation of the proceeds from crime of 8 November 1990 (ETS 141) by taking into account the fact that not only can terrorism be financed through money laundering from criminal activity, but also through legitimate activities. This Convention of 16 May 2005 has entered into force on 1 May 2008.

84. Article 4 § 2 of the Protocol amending the European Convention on the Suppression of Terrorism states:

> "The text of Article 5 of the Convention shall be supplemented by the following paragraphs:
>
> '2 Nothing in this Convention shall be interpreted as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to torture; ...'"

85. Article 21 § 2 of the European Convention on the Prevention of Terrorism provides:

> "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment."

86. Furthermore, on 11 July 2002 the Committee of Ministers of the Council of Europe adopted a set of guidelines on human rights and the fight against terrorism. These guidelines consist of seventeen principles – derived from various international legal and political texts and the Court's case-law – specifying the limitations which States are to respect in their efforts to combat terrorism.

87. Point IV of the guidelines, entitled "Absolute prohibition of torture", reads:

> "The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."

88. Point XII § 2 of the guidelines states:

> "It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion."

2. Algerian Charter for Peace and National Reconciliation

89. In a referendum held on 29 September 2005, a vast majority of the population of Algeria approved a Charter for Peace and National Reconciliation (*Charte pour la Paix et la Réconciliation Nationale*) proposed by the Algerian Government. Under the terms of this Charter, the text of which was published on 15 August 2005 in issue 55 of the Official Gazette (*Journal Officiel*) of Algeria, judicial proceedings will be extinguished against persons:

- who have surrendered themselves to the Algerian authorities after 13 January 2000, the statutory time-limit for effects under the "Concorde Civile";
- who now put an end to their armed activities and surrender the arms in their possession to the authorities, with the exception of those involved in collective massacres, rapes and bombings in public places;
- who are wanted either in Algeria or abroad and who have decided to give themselves up voluntarily to the competent Algerian authorities, with the exception of those involved in collective massacres, rapes and bombings in public places;
- who are involved in terrorist support networks and who have decided to disclose their activities to the competent Algerian authorities; or
- who have been convicted in absentia, with the exception of those involved in collective massacres, rapes and bombings in public places.

90. The Charter further provides for a pardon for persons already convicted and imprisoned for supporting terrorism; and for persons already convicted and imprisoned for acts of violence other than involvement in collective massacres, rapes and bombings in public places. It also provides for a commutation and remission of sentence for all other individuals in respect of whom a final sentence has been passed or wanted persons for whom the extinguishment of judicial proceedings or pardons cited above does not apply.

91. On 27 February 2006, Algeria's cabinet of ministers under the presidency of President Bouteflika approved Ordinance no. 06-01 on the implementation of the Charter for Peace and National Reconciliation. This Ordinance contains both substantive and procedural rules. On the same date, Presidential Decrees nos. 06-93, 06-94 and 06-95 were issued, containing further, more detailed rules. The Ordinance and Presidential Decrees were published in the Algerian Official Gazette of 28 February 2006.

3. Country Assessment Reports on Algeria

92. The Country of Origin Information Report "Algeria", issued on 2 November 2007 by the United Kingdom Home Office, states that – according to an open letter sent on 23 June 2005 to the United Kingdom Prime Minister by Human Rights Watch – in Algeria, Morocco, Jordan, and Tunisia, persons suspected of terrorist activity or labelled as such are specifically targeted for abusive treatment, including torture. Research by Human Rights Watch and Amnesty International, and detailed assessments by the United States Department of State, all demonstrate the very real risks of sending persons labelled as terrorism suspects back to these countries.

93. In the Amnesty International interim report of 25 May 2005 on a fact-finding mission in Algeria from 6 to 5 May 2005, it is stated *inter alia*:

> "Despite the recent inclusion of torture as a criminal offence in the Penal Code and the reduction in allegations of torture and ill-treatment by the police and gendarmerie, the organisation has received a significant number of allegations about such abuses by officers of the Département du Renseignement et de la Sécurité (DRS), Department of Information and Security. These allegations include detention of the accused in places impossible for them to know the location of, and torture, including beatings and the torture known as chiffon. The delegation questioned the authorities about the fact that it could find no mention of these abuses in the medical reports written by the doctors responsible for examining detainees in these centres. If these allegations are confirmed, such breaches of duty would constitute grave violations of medical ethics. ...
>
> In addition, the use of torture to obtain confessions constitutes a flagrant violation of international instruments to which Algeria is a party, such as the Convention against Torture. Similarly, judges have the duty to initiate investigations into any allegations of torture that come to their attention. However, as far as the organisation's delegation can establish, no such inquiry has been made into DRS officers' activities in this regard."

94. The 2007 Country Report on Human Rights Practices (Algeria), issued on 11 March 2008 by the United States Department of State reads *inter alia*:

> "Most of the terrorist attacks during the year were attributed to the Salafist Group for Preaching and Combat (GSPC), which allied itself to Al-Qa'ida in September 2006 and changed its name in January to Al-Qa'ida in the Islamic Maghreb (AQIM). ....
>
> Articles 34 and 35 of the constitution and articles 263 and 263 bis-1 of the penal code prohibit torture and other cruel, inhuman, or degrading treatment or punishment;

however, NGO and local human rights activists reported that government officials employed such practices and that the members of the military intelligence service's Department of Information and Security (DRS) frequently used torture to obtain confessions.

The penal code criminalizes torture; government agents can face prison sentences of up to 10 to 20 years for committing such acts, based on a December 2006 modification to the law. However, impunity remained a problem.

Human rights lawyers maintained that torture continued to occur in DRS detention facilities, most often against those arrested on 'security grounds.' The Amnesty International Report 2007 reported detainees were 'beaten, tortured with electric shocks, suspended from the ceiling, and forced to swallow large amounts of dirty water, urine, or chemicals ... Reports of torture and ill treatment were not known to have been investigated.' In July 2006 Amnesty International (AI) published a report on torture by the secret military police, which concluded that the security forces continued to benefit from impunity.

During the year the government permitted the International Committee of the Red Cross (ICRC), the UNDP, and the Red Crescent Society to visit regular, nonmilitary prisons. ICRC visits were in accord with standard modalities. The government denied independent human rights observers visits to military and high-security prisons and detention centers. In August a British delegation along with experts from the European Commission visited prisons run by the justice ministry's penitentiary administration. According to press reports, one British expert who had visited two prisons said that prisons did not meet international standards for medical care and recreational activities."

4. *Judgment of 30 July 2007 of the Court of Appeal of England and Wales in the case of* MT and Others v. the Secretary of State for the Home Department *[2007] EWCA Civ 808*

95. In these United Kingdom proceedings three Algerian nationals – referred to as MT, RB and U – each challenged a decision of the Secretary of State to deport them to Algeria on the ground that their deportation was conducive to the public good because they were a danger to national security. The Special Immigration Appeals Commission ("SIAC"; for further details see *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 35-38, 16 February 2000) rejected their appeals and concluded that there were no substantial grounds for believing that the appellants would be exposed to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment contrary to article 3 of the Convention if returned to Algeria. The appellants appealed this decision before the Court of Appeal.

96. In its judgment of 30 July 2007, the Court of Appeal accepted the appeals brought and remitted the case to the SIAC. Its conclusions read as follows (references omitted):

"ii) [MT] did not challenge SIAC's conclusion that he is a danger to national security. His challenge was to the conclusion that there is no real risk of his being ill-treated contrary to article 3 of the Convention if he is returned to Algeria. SIAC's conclusion was that [MT] would be entitled to rely upon article 9 of the Ordonnance

[no. 06-01]. In our view, the process which led SIAC to reach that conclusion was not fair to him. The correct course is to remit [MT's] case to SIAC in order to consider the Secretary of State's alternative case that it would in any event be safe to send him back to Algeria. SIAC did not give detailed consideration to that question in MT's case. ...

iv) As to RB, we have rejected his appeal against SIAC's decision that he is a danger to national security in a closed judgment given today, although we have remitted the matter to SIAC on a point of form. As to his case that SIAC erred in law in concluding that there were no substantial grounds for concluding that, if returned to Algeria, he would face a real risk of treatment contrary to article 3 or 6 of the Convention, we have concluded, on the basis of the open material, that SIAC made no such error of law. However, for reasons set out in our closed judgment, and on the case as a whole, we are persuaded that the case should be remitted to SIAC for further consideration.

v) In the case of U, he did not challenge the Secretary of State's decision that he was a threat to national security. The issue before SIAC was whether there were substantial grounds for concluding that, if returned to Algeria, he would face a real risk of treatment contrary to articles 3, 5 or 6 of the Convention. SIAC held that there were not. U challenged that decision. We consider that, so far as the open evidence is concerned, SIAC's overall conclusion is justified (on the facts found), namely that, in deporting U, the United Kingdom will not be in breach of its Convention obligations. However, having also considered the closed evidence and the arguments addressed to us by the special advocates, we cannot express the same degree of confidence. We have been shown closed evidence which is capable of undermining SIAC's overall conclusion. We do not say that this evidence does in fact undermine its conclusion, only that it is capable of doing so. We do not consider that SIAC has dealt adequately, in its closed judgment, with some of the salient points raised by the special advocates. SIAC has not adequately explained why it concluded that the closed evidence did not undermine the conclusion it had reached in its open judgment. Accordingly, we allow U's appeal and remit his case to SIAC for it to reconsider the closed evidence and the effect, if any, it has upon the conclusion in its open judgment.

In the result, each of these cases must be remitted to SIAC for further consideration. This raises the question how that consideration will be carried out. That is of course a matter for SIAC but we wish to make it clear that we are not remitting each case to the same constitution of SIAC that heard each before. For understandable reasons each constitution was different. However, each of the cases raises questions which relate to the assurances given by the Algerian government to the United Kingdom government with regard to people returned to Algeria. In these circumstances, it seems to us to be desirable, if at all possible, for the cases now to be considered together (or perhaps one after the other) by the same constitution."

COMPLAINTS

97. The applicant complained that, if expelled to Algeria, he would be exposed to a real risk of treatment contrary to Article 3 of the Convention. According to the applicant, the Algerian authorities are aware of the nature of the suspicions having arisen against him in the Netherlands, whilst various reports on Algeria confirm that, in particular, persons suspected of

involvement with Islamic extremism risk ill-treatment and/or torture at the hands of the Algerian authorities.

98. He further complained under Article 13 in conjunction with Article 3 of the Convention that – as a result of not having been granted access to the material underlying the official reports on the basis of which an exclusion order had been imposed – he had been denied the right to effective adversarial proceedings and therefore did not have an effective remedy in respect of the exclusion order.

THE LAW

99. The applicant complained that his removal to Algeria would expose him to a real risk of being subjected to treatment proscribed by Article 3 of the Convention. He further complained under Article 13 in conjunction with Article 3 of the Convention that he did not have an effective remedy in respect of the exclusion order imposed on him.

Article 3 of the Convention reads as follows:

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

Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Arguments of the parties

1. The respondent Government

100. The Government submitted that they acknowledged and had no desire to challenge the absolute nature of Article 3 of the Convention, and that the Netherlands authorities would never knowingly and wilfully expose anyone to treatment contrary to this provision either within the Netherlands jurisdiction or outside this jurisdiction as in the case, for instance, of extradition or expulsion, if the person concerned had argued persuasively that there were good grounds on which to fear that he or she would be subjected to treatment contrary to Article 3.

101. Emphasising that, under the Court's case-law, a mere possibility of ill-treatment was not in itself sufficient to give rise to a breach of Article 3 in an extradition or expulsion case, the Government argued that it was the applicant who had to demonstrate convincingly that there were substantial grounds for believing that he, if removed to Algeria, would run a real and personal risk of being subjected to treatment prohibited by Article 3 and that

it was not for the Netherlands Government to offer evidence proving that the applicant would not be exposed to such a risk.

102. The Government pointed out that the alleged risk of the applicant's being subjected to treatment contrary to Article 3 upon returning to Algeria on account of his involvement in the so-called Rotterdam jihad trial had been examined extensively in the proceedings on his third asylum application. In these proceedings, the Minister had considered that – given the contents of the applicant's case file, which included BVD/AIVD reports in which he was designated a threat to national security owing to involvement in terrorist activities – a rigorous examination was necessary as to whether the applicant had convincingly demonstrated that there were substantial grounds for assuming that he would run a real and personal risk of being subjected to treatment within the meaning of Article 3 in Algeria. In the final decision given in these proceedings on 6 July 2005 by the Administrative Jurisdiction Division, it was concluded that the applicant had failed to demonstrate the existence of such a real and personal risk. It was held that he had done no more than simply refer to the suspicions against him and the ensuing trial in the Netherlands and offer speculation about the possible consequences thereof upon his return to Algeria. As he had failed to adduce any facts or circumstances relating directly to his own personal situation that would lead one to conclude that he would be subjected to treatment in breach of Article 3 if expelled to Algeria, he had thus failed to demonstrate convincingly that this was the case.

103. The Government considered that the risk claimed by the applicant was purely speculative, both as to the question whether the Algerian authorities were aware of the suspicions having arisen against him in the Netherlands and the question whether, in consequence of those suspicions, he would be subjected to treatment contrary to Article 3 in Algeria. Even assuming that the applicant was known to the Algerian authorities, not a single concrete fact had been adduced by the applicant capable of supporting his claim that the Algerian authorities viewed him as an object of suspicion. The problems allegedly encountered in Algeria by the applicant's co-accused Taher and the alleged questioning by the Algerian authorities of relatives of another co-accused Z. had, to date, remained wholly unsubstantiated, and the question whether the name Mohammed Ramzy had been made public during the Rotterdam trial was of little consequence since the applicant had used eleven known aliases in his dealings with various national and international bodies. As the applicant had not adduced, let alone substantiated, any facts or circumstances pertaining to him personally that could lead to the conclusion that he would run the risk of being subjected to treatment contrary to Article 3 if expelled to Algeria, the Government were of the opinion that he had presented too insubstantial a case for his fears to be accepted as justified.

104. In the Government's view, the mere fact that the applicant was involved in criminal proceedings in the Netherlands – in which he was acquitted – did not provide sufficient grounds for assuming that he was viewed with suspicion by the Algerian authorities whereas, in the light of the BVD/AIVD information, the Netherlands had an undeniable interest in the applicant's expulsion, partly with a view to protecting society. In this context, the Government underlined the need to adhere strictly to the criterion laid down by the Court that an applicant must submit evidence that he or she *personally* has a well-founded fear of being subjected to treatment contrary to Article 3 in the country of origin. Adhering strictly to this burden of proof was, in the Government's opinion, all the more important in cases like the present one, where national security interests were at stake, as in such cases the positive obligation of a Contracting State under Article 2 of the Convention also came into play, namely the duty to take all reasonable preventive action to protect its residents from life-threatening situations, as held by the Court in the case of *Osman v. the United Kingdom*, judgment of 28 October 1998 (*Reports of Judgments and Decisions* 1998-VIII, p.3159, § 116).

105. Invoking "the imperative duty of States to protect their population against possible terrorist acts" mentioned in the Preamble to the Guidelines on Human Rights and the Fight against Terrorism adopted on 11 July 2002 by the Committee of Ministers of the Council of Europe and a similar consideration expressed in the Preamble to the Council of Europe's Guidelines on the Protection of Victims of Terrorist Acts – adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 – the Government considered that this positive obligation doctrine fully applied to life-threatening situations arising from a terrorist threat.

106. The Government further submitted that, although they did not, as a matter of principle, rule out the use of diplomatic assurances in expulsion cases under any circumstances, they had no intention of entering into any negotiations on diplomatic assurances with the Algerian authorities concerning the applicant or any other individual for that matter. In the Government's view, such negotiations should preferably be preceded by the establishment of a proper institutional and legal framework. As the topic of diplomatic assurances was currently the subject of an intense debate in the international community, the Government considered that the question whether diplomatic assurances were acceptable had not been sufficiently determined.

107. In any event, the Algerian authorities had never, either formally or informally, shown an interest in the applicant and they had never made any comment about him either on their own initiative or in response to the applications for a laissez-passer for him. In view of the content of the AIVD official report of 13 November 2006, the Government submitted that this

only showed once again that the applicant had no reason to fear treatment contrary to Article 3 of the Convention in Algeria.

108. As regards the applicant's complaint under Article 13 in conjunction with Article 3 of the Convention, the Government submitted in the first place that, under domestic law, a national appellate court could take AIVD documents into account in its judgment only with the appellant's consent. As in the instant case the applicant had given his consent for the domestic appeal courts to have access to the material underlying the exclusion order, he had waived his rights in relation to any potential violation of the Convention arising from the fact that he did not himself have access to those underlying documents.

109. The Government further submitted that the applicant, in respect of his complaint that his removal to Algeria would expose him to a risk of treatment in violation of Article 3 of the Convention, did have an effective remedy of which he had availed himself, namely by applying for asylum, a procedure which had entailed a thorough examination of this issue. Moreover, the applicant and his counsel had not had insufficient access to the complete case file in those proceedings. Furthermore, in the separate proceedings on the exclusion order the applicant had had the right, which he had in fact exercised, to raise this complaint in judicial review proceedings before an independent tribunal.

110. In the Government's view, the complaint raised under Article 13 related more directly to the rights of the defence and the right to adversarial proceedings, that is to say, rights guaranteed by Article 6 of the Convention, which was not, however, applicable to proceedings on asylum or exclusion orders.

111. Emphasising the importance of confidentiality with respect to the underlying operational intelligence, the Government were of the opinion that the statutory manner of proceeding complained of, namely to allow – with the appellant's consent – disclosure of material underlying an AIVD official report to the domestic appeal courts, without that material being disclosed to the appellant, met the requirements of Article 13 of the Convention.

2. The applicant

112. The applicant – pointing out that he had been detained in the Netherlands from 15 July 2004 to 15 September 2005 – stated that he had not been back to Algeria, as contended by the Government, and neither was he there now. According to the applicant, the AIVD information set out in its official report of 13 November 2006 had stemmed from an intelligence service using non-transparent methods and dubious sources, had remained wholly unsubstantiated and, in any event, was incorrect.

113. The applicant emphasised that his need for protection under Article 3 of the Convention stemmed from his having been tried in the

Netherlands on suspicions based on involvement in terrorism and participation in violent jihad and on the persistent AIVD allegations of his ongoing commitment to this cause despite his acquittal in those criminal proceedings. As regards his identity, the applicant submitted that it was not in dispute that it was under the name of Mohammed Ramzy that the criminal proceedings had been conducted against him and that the BVD/AIVD reports had been drawn up. Consequently, the Algerian authorities would receive him as the person to whom the stigma of "terrorism suspect connected to the GSPC and Al Qaeda" applied.

114. The applicant refuted the Government's contention that there were no substantial grounds for believing that he would be exposed to a real and personal risk of being subjected to treatment in breach of Article 3 in Algeria. According to the applicant, the Government – unlike the Regional Court of The Hague sitting in Haarlem when on 23 December 2004 it upheld the applicant's appeal against the Minister's negative decision on his third asylum application – had refrained from addressing the substance of the evidence, in particular the correlation between the various elements which could not but lead to the conclusion that the Algerian authorities were aware of the terrorism and jihad related suspicions against him as a result of which a real risk of ill-treatment had to be assumed to exist in view of the available information on the treatment in Algeria of suspects of Islamic terrorism.

115. In this context, the applicant submitted that, according to the Netherlands domestic official country assessment reports, rejected asylum seekers who were returned to Algeria were subjected to interrogation; that the Rotterdam jihad trial had received wide national and international coverage and that both his Algerian nationality and his name had been explicitly mentioned in two Associated Press articles of 28 October 2002 on the Rotterdam jihad trial; that this trial had *inter alia* focussed specifically on his alleged membership of the GSPC, an Algerian extremist terrorist organisation; that according to reports drawn up by the Swiss Refugee Council and the AIVD, foreign secret services – including Algerian – monitored asylum seekers and migrant groups from their countries; that since May 2005 an EU Euro-Mediterranean Agreement with Algeria was in force which provided for an "exchange of information on terrorist groups and their support networks in accordance with international and national law"; that in its ruling of 23 December 2004 the Regional Court of The Hague sitting in Haarlem had found that the applicant had sufficiently established that the suspicion against him of involvement in terrorism had or must have become known to the Algerian authorities; and – referring to the proceedings on his appeal of 17 May 2005 before the Regional Court of The Hague sitting in Groningen – that a high-level delegation of the Netherlands Ministry of Foreign Affairs had discussed the applicant's case with the Algerian authorities with a view to his deportation to Algeria.

116. The applicant felt, given the insistence of the respondent Government on the threat which he allegedly posed to national security, that it was highly implausible that in their contacts with the Algerian authorities, either by the above-cited high-level delegation of the Ministry of Foreign Affairs and/or through contacts between the national security services of both countries, the Netherlands authorities would not have communicated this information to the Algerian authorities.

117. As the Algerian authorities had thus to be regarded as being aware of the nature of the suspicions having arisen against him in the Netherlands and, consequently, would view him as a suspect of terrorism linked to the GSPC, the applicant submitted that it had been sufficiently established that there existed a real risk of him being subjected to treatment contrary to Article 3 in Algeria. The applicant further argued that the recently established amnesty arrangement under the terms of the Algerian Charter for Peace and National Reconciliation was of no relevance for the assessment of this risk in his case, as the amnesty scheme under the Charter was based on a voluntary surrender to the Algerian authorities by a person who admitted to having been involved in (providing support for) Islamic terrorist activities. Given that he denied the allegations that he had had anything to do with (Islamic) terrorism, which had also been his constant position in the criminal proceedings against him in the Netherlands, or that he had committed crimes in respect of which an amnesty could be granted, the applicant considered that the Algerian authorities would regard him as a recalcitrant terrorist suspect.

118. Although acknowledging that the various material relied on by him did not mention him personally but contained information of a more general nature on the treatment in Algeria of persons who, like himself, were suspected of involvement in Islamic terrorism, the applicant considered that there was nothing more that he could reasonably have been expected to submit in substantiation of the risk claimed by him and that it could not be said that the assessment of his claims by the Netherlands authorities had been conducted with the necessary rigorous scrutiny.

119. As to the Government's arguments based on national security considerations, the applicant submitted that his third asylum application had not been rejected for this reason, and that the threat he allegedly posed to national security formed the object of still pending domestic proceedings.

120. He further submitted on this point that, to date, he had not been given an opportunity to defend himself against the general, abstract and vague allegations of the AIVD which had been accepted by the Minister for Immigration and Integration without an assessment of their reliability, veracity and accuracy, whilst he himself had never been given access to the material underlying the AIVD reports. Consequently, these allegations against him were left in the twilight zone of unverifiable national security-service findings. It was clear from the domestic decision-making process on

his third asylum application and the position adopted by the Government in the present proceedings before the Court that the Government attached more weight to national security concerns than to a proper assessment of the risk to which he would be exposed if removed to Algeria. Referring to the Court's findings in the cases of *Chahal v. the United Kingdom* (judgment of 15 November 1996, *Reports* 1996-V, p. 1855, §§ 79-80), and *Ahmed v. Austria* (judgment of 17 December 1996, *Reports* 1996-VI, pp. 2206-07, §§ 40-41), the applicant argued that this approach contradicted the absolute nature of the protection under Article 3 of the Convention in expulsion cases and the principle that the activities of the person concerned, however undesirable or dangerous, could not be a material consideration.

121. The applicant argued that, in the assessment of the question whether the expulsion of a person would expose him or her to a real and personal risk of treatment contrary to Article 3, there was no room for balancing, on the one hand, the interest of the person concerned in not being exposed to such a risk and, on the other, the interest of the expelling Government – as part of their positive obligations under Article 2 – in protecting the lives of their citizens, since such an approach would lead to the dilution of the absolute nature of the prohibition under Article 3 of the Convention.

122. As to his complaint under Article 13 of the Convention, the applicant refuted the Government's argument that he should be seen as having waived his right under this provision to adversarial proceedings through which to contest the documents and information underlying the impugned AIVD report. He submitted that he had never voluntarily waived his right to adversarial proceedings. If he had not given permission to disclose this underlying material to the Regional Court and the Administrative Jurisdiction Division, negative inferences might have been drawn against him and these judicial bodies would have based their findings on the AIVD report concerned, considering that it was undisputed by the applicant.

123. The applicant maintained that the proceedings in which he had challenged the exclusion order could not be regarded as an effective remedy within the meaning of Article 13 taken together with Article 3. Not only did the Minister fail to carry out his own examination of the facts and circumstances upon which the AIVD had designated him as a threat to national security, in that the Minister did not go beyond the AIVD assertions for the purpose of verifying whether the applicant did in fact represent a danger for national security or public order warranting the issuance of an exclusion order, but furthermore – in the subsequent judicial review procedure before the Regional Court and the Administrative Jurisdiction Division – the applicant remained uninformed of the facts supposed to constitute the evidence, as a result of which he also remained

unable to contest those facts whilst the exclusion order granted the Netherlands authorities an immediate entitlement to remove him to Algeria.

124. Pointing out that he had never relied on Article 6 of the Convention in his submissions, the applicant stated that the asserted right to adversarial proceedings in relation to an exclusion order based on national security considerations was based on the Court's case-law dealing with these issues under Article 13 as set out *inter alia* in its judgments in *Al-Nashif v. Bulgaria*, (no. 50963/99, 20 June 2002) and *Musa and Others v. Bulgaria* (no. 61259/00, 11 January 2007).

B. Third-party interveners

1. Comments submitted jointly by the Governments of Lithuania, Portugal, Slovakia and the United Kingdom

125. The Governments of Lithuania, Portugal, Slovakia and the United Kingdom observed that in the *Chahal* case (cited above, § 81) the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures.

126. The Governments observed in that connection that whilst Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention, the Court had held in the above-mentioned *Chahal* case that Article 3 required examination of whether such assurances would achieve sufficient practical protection. As had been shown by the opinions of the majority and the minority of the Court in that case, identical assurances could be interpreted differently. Furthermore, it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond reasonable doubt, since it was frequently impossible to use confidential sources or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement provided only partial protection.

127. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights.

According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 § 1 (f) of the Convention authorised the arrest of a person "against whom action is being taken with a view to deportation...", and thus recognised the right of States to deport aliens.

128. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

129. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

130. In the light of the foregoing considerations, the intervening Governments argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in the *Chahal* case (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations had to influence the standard of proof required of the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned had to prove that it was "more likely than not" that he

would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

2. Comments submitted by the AIRE Centre

131. In their comments, the AIRE Centre drew attention to a number of declarations, resolutions and other pronouncements made by the various bodies of the Council of Europe other than the Court which, taken together, formed a consensus that made clear that a State party to the Convention could not remove an individual regardless of the threat he or she posed once it had been established that his or her *refoulement* would lead to a real risk of that individual being exposed to treatment prohibited by Article 3 of the Convention.

132. Pointing out that all Council of Europe Member States were also parties to the International Covenant on Civil and Political Rights ("ICCPR"), the AIRE Centre further referred to General Comments and case-law of the Human Rights Committee, which had been established by the United Nations under the First Optional Protocol to the ICCPR. From this material it was apparent that the Human Rights Committee unambiguously considered as absolute the ban on expulsion of individuals to face treatment that might violate Article 7 of the ICCPR, which provision contained a prohibition of torture and cruel treatment or punishment.

133. Finally, the conclusion that the rule prohibiting expulsion to face torture or ill-treatment constituted a rule of customary international law had been drawn by many distinguished publicists in academic literature as well as by a multitude of international bodies. Thus, the AIRE Centre submitted, the rule was binding on all States, even those which were not a party to any international agreement. The rule had arguably also attained the status of *jus cogens*, meaning that it had become a peremptory, non-derogable norm of international law.

3. Comments submitted jointly by Amnesty International Ltd., the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists, Interights and Redress

134. These interveners focused on the principle of *non-refoulement* as enshrined in various instruments and interpreted by international courts.

135. As to the nature and degree of the risk of torture or ill-treatment that triggered the *refoulement* prohibition, the interveners *inter alia* referred to the case-law of the Committee against Torture, according to which, in the assessment of the question whether an individual was personally at risk, particular attention was paid to any evidence that he or she belonged, or was

perceived to belong, to an identifiable group which in the receiving country had been targeted for torture or ill-treatment. Organisational affiliation was a particularly important factor in cases where the individual belonged to a group which had been designated as a "terrorist" or "separatist" group, threatening the security of the State and for this reason targeted for particularly harsh forms of repression. In such cases, the prohibition of *refoulement* could come into play even if there was no evidence that the person concerned had been ill-treated in the past or had been personally sought by the authorities of the State of return, or when the general human rights situation in that country had improved. Instead, the Committee against Torture focused on the assessment of how the State in question treated members of these groups and whether sufficient evidence had been provided that that State would believe the particular individual to be associated with the targeted group. In this latter context, the nature and profile of the individual's activities in his or her country of origin or abroad, as well as the amount of publicity surrounding his or her case, were particularly important factors.

136. Because of the specific nature of torture or ill-treatment, it had been generally recognised by the Strasbourg Court and other tribunals that the burden of proof could not rest with the person alleging it alone, the more so as the person concerned and the State did not always have equal access to the evidence. It had therefore been considered sufficient for the individual to make out an "arguable" or "*prima facie*" case of the risk of torture or ill-treatment for the *refoulement* prohibition to be triggered, with a subsequent burden on the expelling State of refuting that claim.

137. The view, as acknowledged by the Court in the case of *Chahal* (cited above), that diplomatic assurances did not suffice to offset an existing risk of torture was shared by a growing number of international human rights bodies and experts. According to the interveners, no "compensating measures" could affect the peremptory *jus cogens* nature of the prohibition against torture, and the obligations to prevent its occurrence, which were plainly unaffected by bilateral agreements.

4. Comments submitted jointly by Liberty and Justice

138. These interveners stressed the unconditional nature of Article 3 of the Convention, meaning that the prohibition of *refoulement* to ill-treatment applied regardless of the behaviour displayed, or activities engaged in, by the individual concerned. The Strasbourg Court had consistently subscribed to this view; it had been replicated in other international and regional human rights instruments; and had been confirmed by national as well as international tribunals such as, for instance, the Supreme Court of New Zealand, the Committee against Torture, the UN Human Rights Committee and the Inter-American Commission on Human Rights.

139. National security concerns being merely examples of the consequences of possible activities of the individual, alleged terrorist activity which might give rise to such concerns was thus not qualitatively different from any other undesirable, dangerous or criminal conduct. Accordingly, in assessing whether or not the removal of a person would expose him or her to treatment contrary to Article 3 in the receiving country, there was no room either for taking into account the fact, nature or degree of the national security threat posed by the person concerned or for a balancing exercise in which national security concerns were weighed against the risk of ill-treatment. Different means of countering a national security threat were available to States, without it being necessary to resort to removal to torture or other ill-treatment.

140. Any change in this approach would amount to a dilution of a fundamental human right in the name of the fight against terrorism and would ultimately have a long-term corrosive effect on democratic values and the Convention as a whole.

C. The Court's assessment

141. The Court considers, in the light of the parties' submissions and the third-party comments, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. Consequently, the Court concludes that the application cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Santiago Quesada
Registrar

Josep Casadevall
President