In the case of Bouchelkia v. France (1),

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

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr A. Spielmann,
Mrs E. Palm,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr B. Repik,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 24 October 1996 and 22 January 1997,

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

Notes by the Registrar

1. The case is numbered 112/1995/618/708. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 23078/93) against the French Republic lodged with the Commission under Article 25 (art. 25) by Mr Hadi Bouchelkia, an Algerian national, on 25 October 1993.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention (art. 8).

2. In response to the enquiry made in accordance with Rule 33

para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). On 8 January 1997 the President granted the applicant legal aid (Rule 4 of the Addendum to Rules of Court A).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 8 February 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr A. Spielmann, Mrs E. Palm, Mr R. Pekkanen, Mr F. Bigi, Mr M.A. Lopes Rocha, Mr L. Wildhaber, and Mr B. Repik, (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr R. Macdonald and Mr F. Gölcüklü, substitute judges, replaced Mr Bigi, who had died, and Mr Pekkanen, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 14 June 1996 and the Government's memorial on 21 June 1996. On 15 July 1996 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

On 23 September 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 October 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Lapouzade, administrative court judge,
on secondment to the Legal Affairs Department,
Ministry of Foreign Affairs, Agent,
Mrs F. Doublet, Head of the Comparative and
International Law Office, Ministry of the
Interior and of Regional Development, Counsel;

(b) for the Commission

Mr D. Sváby, Delegate;

(c) for the applicant

Mr L. Dörr, of the Strasbourg Bar, Counsel.

The Court heard addresses by Mr Sváby, Mr Dörr and Mr Lapouzade.

6. On 14 December 1996 Mr Bouchelkia was detained with a view to his removal to Algeria. Relying on Rule 36 of Rules of Court A, he made a request for execution of the deportation order to be suspended.

On 18 December 1996 the President decided not to grant that request.

AS TO THE FACTS

I. Circumstances of the case

7. Mr Hadi Bouchelkia was born on 25 February 1970 at Bechloul (Algeria) and came to France in 1972 with his mother and his elder brother under the arrangements for family reunion. His mother and nine brothers and sisters live in France. In 1986 he met a woman of French nationality whom he married on 29 March 1996. They had a daughter born on 22 February 1993, in respect of whom he made a formal declaration of paternity on 3 December 1993.

A. The criminal proceedings (procédure criminelle)

8. When a minor, the applicant was charged with rape with violence and theft in respect of offences committed on 18 March 1987.

He was taken into custody at Colmar Prison on 23 March 1987 but escaped with a fellow prisoner on 14 April 1987, for which he was sentenced to four months' imprisonment.

9. On 31 May 1988 the Haut-Rhin Juvenile Assize Court found him guilty of the offences of which he was accused. Finding that there were mitigating circumstances, it sentenced him to five years' imprisonment. Mr Bouchelkia was released on 2 May 1990 after obtaining remission of sentence.

B. The deportation proceedings

1. The deportation order

10. On 11 June 1990 the Minister of the Interior, to whom the matter had been referred by the Prefecture of Meurthe-et-Moselle on 27 April 1990, made the following order against the applicant:

> "Having regard to section 26 of Ordinance no. 45-2658 of 2 November 1945, as amended, concerning the conditions of entry and residence of aliens in France,
>
> Whereas Bouchelkia Hadi or El Hadi born on 25 February 1970 at Bechloul (Algeria) committed a rape on 18 March 1987 while threatening his victim with a weapon,
>
> Whereas on account of his conduct his deportation is an absolute necessity for public safety,
>
> Whereas he has just been released,
>
> Whereas he should, in consequence, be removed from French territory as a matter of extreme urgency,
>
> On a proposal by the Prefect of Meurthe-et-Moselle,
>
> IT IS HEREBY ORDERED AS FOLLOWS
>
> Article 1: the above-named person is enjoined to leave France,
>
> Article 2: the Prefect of Police and the Prefects are instructed to serve and execute this order."

That order was served on 9 July 1990 and executed on the same day and the applicant, who was then aged twenty, single and had no children, was deported to Algeria.

11. On 17 July 1990 counsel for Mr Bouchelkia applied to the Strasbourg Administrative Court for an order quashing the deportation measure and, on 31 July 1990, for an order staying its execution.

It was argued in the applications that it had not been established in Mr Bouchelkia's case that it was a matter of extreme urgency or absolute necessity to deport him for reasons of public safety since the order had been made two months after his release from prison and the offences could not be regarded as being of particular gravity for the purposes of the statutory provision. He also relied on Article 8 of the Convention (art. 8).

2. The application for a stay of execution

12. On 16 October 1990 the Court dismissed the application for a stay of execution in the following terms:

"...

None of the grounds relied on by Mr Bouchelkia in support of the application for judicial review of the deportation order made by the Minister of the Interior on 11 June 1990 appears, on the basis of the case file before the court, to justify quashing that order; it follows that the applicant's application for a stay of execution of that order is unfounded;

..."

13. On 31 May 1991, the Conseil d'Etat upheld, in the same terms, the decision dismissing the application.

3. Application for judicial review of the deportation order

(a) In the Strasbourg Administrative Court

14. In its judgment of 21 October 1990 dismissing the application, the court gave the following grounds for its decision:

"The submission based on error of law:

Criminal offences committed by an alien cannot, by themselves, justify in law deportation and do not under any circumstances exempt the authority concerned from its obligation to determine, on the basis of all the circumstances of the case, whether the alien's presence in France is liable to constitute a serious threat to public order.

The documents on the case file do not reveal any failure by the Minister of the Interior to have regard to all the factors relating to the applicant's conduct and the various aspects of his situation in determining whether or not his presence in France constituted a serious threat to public order. It follows that this first submission, based on an error of law, must be rejected.

The submission based on Article 8 of the Convention (art. 8)

...:

Under Article 8 (art. 8) of the European Convention referred to above: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

The applicant relies on Article 8 of the Convention (art. 8) in order to argue that the impugned decision does not comply with the aforementioned provisions; the general principles governing the right to a normal family life do not preclude the Minister of the Interior from exercising the power conferred on him by section 26 of the Ordinance of 2 November 1945, as amended. It follows that there is no alternative but to reject this ground.

The submission based on manifest error:

Section 26 of the Ordinance of 2 November 1945, as amended, provides: 'In cases of extreme urgency and by way of derogation from sections 23 to 25, deportation may be ordered where it constitutes an absolute necessity for the security of the State or public safety.'

The documents on the case file show that Mr El Hadi Bouchelkia was sentenced to five years' imprisonment for rape committed while threatening his victim with a weapon; the fact that the order was made two months after the applicant's release from prison does not, in itself, mean that the question of his deportation is not urgent, regard being had to the gravity of the offences. Thus, the Minister of the Interior could have considered, without committing a manifest error, that Mr Bouchelkia's deportation constituted an absolute necessity for public safety and that it was a matter of extreme urgency. It follows that the ground based on manifest error must be rejected.

In the light of the foregoing, the application made by Mr Bouchelkia must be rejected."

(b) In the Conseil d'Etat

15. On 23 June 1993 the Conseil d'Etat upheld the judgment in the following terms:

"...

The documents on the case file show that Mr Bouchelkia committed a rape while threatening his victim with a weapon; for that offence he was sentenced to five years' imprisonment. It follows that the Minister was entitled in law to consider that Mr Bouchelkia's deportation constituted an absolute necessity for public safety. As he had recently been released, it was also a matter of extreme urgency at the date of the impugned order.

Regard being had to the seriousness of the offence committed by the applicant, that measure did not amount to an excessive interference in his family life. In these circumstances, the measure was not taken in violation of the aforementioned Article 8 (art. 8).

It does not appear from the documents on the case file that the Minister, in making the impugned order for Mr Bouchelkia's deportation (which states the reasons of fact and law relied on), failed to carry out a full review of the circumstances of the case.

It follows from all the above that Mr Bouchelkia fails in his claim that in the impugned judgment the Strasbourg Administrative Court had wrongly dismissed his application to have the Minister of the Interior's order of 11 June 1990 requiring him to leave France set aside.

..."

4. The applications to have the deportation order rescinded

16. The applicant made two applications to the Minister of the Interior to have the deportation order of 11 June 1990 rescinded.

17. On 12 December 1991 the Minister of the Interior dismissed the first application, made on 21 October 1991, in these terms:

"...

I note that in its judgment of 31 May 1991 the Conseil d'Etat dismissed the application to quash the Strasbourg Administrative Court's judgment dated 16 October 1990 in which [the] application for a stay of execution of the ministerial deportation order made against [Mr Bouchelkia] was dismissed.

In addition, taking into account the seriousness of the offences committed by the applicant and his conduct whilst in custody, it is impossible for me to grant [his] request. The deportation order of 11 June 1990 must stand.

..."

18. The second application made on 3 November 1995 is currently pending before a board set up in accordance with section 24, as amended, of the Ordinance of 2 November 1945 (see paragraph 22 below).

C. Criminal proceedings (procédure correctionnelle) for insulting a public official and illegally staying in France

19. Mr Bouchelkia, who returned to France illegally in 1992, was arrested at Colmar on 6 April 1993 on charges of insulting a police officer, obstructing a police officer in the execution of his duty and illegally entering and staying in France. On 13 April 1993 the Colmar Criminal Court sentenced him to five months' imprisonment and ordered that he be banned from re-entering France for three years. It ordered that he remain in custody.

20. On appeals by the applicant and the prosecution, the Colmar Court of Appeal allowed the applicant's appeal against sentence. In its judgment delivered on 11 August 1993, it gave the following reasons:

"With respect to the sentence

The custodial sentence imposed by the court below is a penalty

that is proportionate to the seriousness of the offences when the mitigating circumstances are taken into account, adapted to his character and in accordance with the requirements of protecting public order.

On the other hand, regard being had to the circumstances in which the offences were committed and to the accused's character, the additional order forbidding him to re-enter France is an excessively severe penalty.

While this court cannot and does not wish to call into question the appropriateness of the deportation order of 11 June 1990, the accused's application for judicial review of which was dismissed by a judgment of the Conseil d'Etat on 23 June 1993, it observes that the accused arrived in France at the age of 2 and lives here with his mother and nine brothers and sisters, that he attended vocational training courses while imprisoned in connection with the criminal case which ended with the judgment of the Haut-Rhin Juvenile Assize Court, that he spent two years in Algeria where he has no ties or points of reference and that his companion has given birth to a child.

As the accused has made an application to have the deportation order rescinded, it would be inappropriate to take the option open to the court of forbidding him to re-enter France."

D. Subsequent changes in the applicant's situation

21. Mr Bouchelkia was arrested on 14 December 1996 and detained with a view to his removal to Algeria under the deportation order of 11 June 1990. He refused to leave and a compulsory residence order was issued against him.

On 20 December 1996 the Strasbourg Criminal Court convicted him of the offence of refusing to comply with a deportation order, but deferred sentence pending the European Court's judgment.

II. Relevant domestic law and practice

A. Deportation

22. In French law deportation is a public-order measure, not a criminal penalty (Constitutional Court decision no. 79-109, Droit constitutionnel 9 January 1980, Recueil Dalloz Sirey 1980, 249; Conseil d'Etat, 20 January 1988, Elfenzi, Actualité juridique Droit administratif 1989, 223; and Criminal Division of the Court of Cassation, 1 February 1995, Juris-Classeur périodique 1995, édition générale, II, 22463). It applies to aliens with a residence permit who live in France, but not to those who have entered illegally and against whom only a removal order may be made.

The deportation of aliens is governed by the provisions of the Ordinance of 2 November 1945 concerning the conditions of entry and residence of aliens in France. Section 1 of the Ordinance provides: "all persons who do not have French nationality, whether they have a foreign nationality or are stateless, shall be deemed to be aliens." The basic provisions of the Ordinance have been amended by, inter alia, Law no. 80-9 of 10 January 1980; Law no. 81-82 of 2 February 1981; Law no. 81-973 of 29 October 1981; Law no. 86-1025 of 9 September 1986; Law no. 89-548 of 2 August 1989; Law no. 91-1383 of 31 December 1991;

Law no. 93-1027 of 24 August 1993 and Law no. 93-1417 of 30 December 1993.

The Law of 10 January 1980 prescribed six grounds for deportation and substantially altered its role; deportation had been intended to guard against threats to public order, but it was now also used as punishment in certain cases where there had been a breach of the immigration rules.

That Law was rapidly replaced by Law no. 81-973 of 29 October 1981, in which the following two grounds for deportation were retained:

(i) the first, to which the ordinary rules of procedure applied, was where "an alien's presence on French territory constitute[d] a serious threat to public order" (sections 23 to 25);

(ii) the second, for which there was a special procedure, concerned "cases of extreme urgency [and] absolute necessity for the security of the State or public safety" (section 26).

That Law also prescribed the categories of aliens who could not be deported under the ordinary procedure and who were protected because of their age, the length of time they had spent in France, their family ties there, the services they had rendered and the fact that they had no criminal record.

The provisions relating to the definition of the protected categories, the substantive conditions and the safeguards provided under the ordinary procedure were alternately amended and restored by subsequent legislation.

In 1990 it was a prerequisite to instituting the ordinary procedure governed by sections 23 to 25 of the Ordinance of 2 November 1945 that "the alien's presence on French territory constitute[d] a serious threat to public order". Recourse to the special procedure used in the instant case required extreme urgency and an "absolute necessity for the security of the State or public safety".

1. Ordinary procedure

23. This procedure may properly be described as adversarial and applies where "the alien proves that he entered France legally and that he is the lawful holder of a residence permit" (section 24).

An aliens deportation board for the département must be consulted. Such boards are composed of the president of the tribunal de grande instance of the administrative capital of the département or a judge delegated by him, who acts as chairman, a judicial officer (magistrat) appointed by the general assembly of the tribunal de grande instance of the administrative capital of the département and an administrative court judge. Its hearings are held in public. In 1990 the Minister of the Interior had less discretion. Since Law no. 93-1027 of 24 August 1993, the board's opinion is no longer binding on the Minister.

2. Special procedure in cases of extreme urgency and absolute necessity for the security of the State or public safety

24. Deportation orders made to preserve public order are intended

to guard against - and not to punish - breaches of public order. With the sole exception of minors, no category of aliens is protected.

Under the special procedure none of the safeguards contained in the ordinary procedure are available. Thus, aliens are not informed in advance that their deportation is being considered, do not receive any special notification, are not given an opportunity to make representations and do not appear before the board; the board does not hold a meeting, not even in the alien's absence. No formal steps have to be taken before the deportation order is issued and the order does not have to contain reasons.

25. The condition relating to absolute necessity for the security of the State or public safety was introduced by the Law of 29 October 1981. It was replaced in the Law of 6 September 1986 by a requirement of "a particularly serious threat to public safety", but was reintroduced in the Law of 2 August 1989. According to the Minister of National Solidarity, who was jointly responsible for drafting the bill which became the 1981 Law, this type of deportation was only to apply to three categories of aliens: terrorists, spies and drug traffickers. Neither the Minister of the Interior nor the Conseil d'Etat have adopted that position; they have interpreted the condition much more widely. In practice section 26 also covers cases concerning violent and anti-social behaviour by an alien over a long period since the age of ten (Conseil d'Etat, 23 December 1987, Tahraoui, Recueil des arrêts du Conseil d'Etat ("Rec.") p. 430) and rape and indecent assault with violence or taking the victim by surprise (Conseil d'Etat, 24 May 1993, Igartúa Amondaraín, Rec. p. 163, and Conseil d'Etat, 23 June 1993, Bouchelkia, Droit administratif 1993, no. 412).

26. To the extreme urgency requirement, laid down as from 1945, a requirement of "absolute necessity for the security of the State and public safety" was added in 1981. Extreme urgency is in practice relied on to ensure that aliens who have been convicted by the criminal courts and are serving their sentence can be deported as soon as they are released. Its substance is assessed on a case-by-case basis by the Minister, subject to review by the administrative court.

For a long time the Conseil d'Etat ruled that the question whether there was any urgency itself came within the unfettered discretion of the Minister. From 1970 it interpreted the requirement so as to limit its application solely to cases where the deportation was to take place within a very short time (Conseil d'Etat, 16 January 1970, Mihoubi Tayeb, Rec. p. 25). It later found that the urgency requirement had been satisfied where the alien was due to be released shortly (Conseil d'Etat, 13 November 1985, Ministry of the Interior v. Barrutiabengoa Zabarte, Rec. p. 321), then held that it was lawful to use the procedure against an alien who had been released from prison several months before the deportation order was made (Conseil d'Etat, 24 June 1988, Hamade, Rec., tables, p. 933, and 8 April 1994, Zehar, Dalloz 1994), or who had obtained early release seven months before the issue of a deportation order (Conseil d'Etat, 3 February 1995, Kaouche, requête no. 145404, Droit administratif, May 1995, p. 10). It also accepted that the Minister could use the extreme urgency procedure where, in connection with a deportation initially commenced under the ordinary procedure, the board had expressed an opinion against deportation. The Conseil d'Etat held that practice to be lawful "provided that the requirements of section 26 were satisfied at the time the order was made" (Conseil d'Etat, 24 May 1993, Igartúa Amondaraín, Rec. p. 163).

3. Enforcement and effects of a deportation order

27. A deportation order issued by the Minister of the Interior remains in force indefinitely. Since 1986 such orders embody authority to execute and may be enforced without further order, using force if necessary.

28. In general, deportation is carried out without delay; however, the effects of the deportation order are not exhausted as a result of its execution.

Thus, deported aliens are precluded from returning to French territory for so long as the order has not been rescinded. If they do return, they are liable to the penalties applicable to cases of avoiding or attempting to avoid the execution of a deportation order and returning to France without leave to enter.

Furthermore, according to a circular issued by the Minister of the Interior on 8 February 1994 concerning the application of the Laws of 24 August and 30 December 1993, although the celebration of the marriage of an alien on French territory is not subject to any condition regarding the lawfulness of his stay, a prefect who is informed that the alien wishing to get married is in breach of the immigration rules may, before the wedding, make an order for his removal under section 22 of the Ordinance of 1945 and, after the ceremony, decide to expel him pursuant to that provision. The Conseil d'Etat has held that an order for removal could lawfully be made against an alien who was about to marry a French national (Conseil d'Etat, Judicial Division, 26 July 1991, Lazaar, requête no. 121849).

4. Judicial review of a deportation order

29. As deportation orders are not subject to any special regime, an application for judicial review may be made to the administrative court having territorial jurisdiction under the ordinary rules. Such applications have no suspensive effect and may therefore be accompanied by an application for a stay of execution even where the order has been enforced and the alien is outside France.

On 31 July 1996 (requête no. 149765), the Conseil d'Etat set aside a deportation order made against an Algerian who was born in France and had always lived there, on the grounds that:

> "... his close relatives live in France and some of them have French nationality. When the deportation order was made against him, he was the father of a child of French nationality and was married to a French national. In the circumstances of the case, although it has been shown that he has committed offences for which he has been sentenced to several terms of imprisonment (the most recent being a twelve-year sentence for armed robbery, burglary committed at night or with accomplices and theft) the impugned decision has nonetheless, regard being had to the applicant's conduct subsequent to his convictions for those offences and to the fact that he has no ties with any country other than France, interfered with the applicant's rights to respect for his private and family life in a way that was disproportionate to the aims with which it was taken."

5. Applications to have a deportation order rescinded

30. The alien concerned may, at any time, and as often as he chooses, apply for the deportation order to be rescinded.

Where the application is submitted less than five years "after the final execution of the deportation order", the Minister of the Interior is not subject to any specific procedural requirements in reaching his decision. If the application is submitted "after a period of five years ..., it may be rejected only after the opinion of the deportation board for the département has been sought; the alien may be represented before the board". Consultation is required even where the deportation order was made under the procedure for cases of extreme urgency. Since the Law of 24 August 1993 came into force, the board's opinion is no longer binding on the Minister.

The Conseil d'Etat had considered that a deportation order was executed on the date the alien left French territory and that, in consequence, even if he subsequently returned to France illegally, the five-year period ran from that date (Conseil d'Etat, 18 November 1988, Higoun, Rec. p. 415). However, section 28 bis, added to the Ordinance of 1945 by the Law of 24 August 1993, now prevents a deportation order being rescinded if the alien has not left France or if he has returned there illegally: "An application ... for the rescission of a deportation order ... submitted after the expiry of the time-limit for making an application for judicial review cannot be granted unless the foreign national resides outside France."

An application to which there has been no response within four months is deemed to have been rejected by the Minister of the Interior. Where the Minister of the Interior decides not to enforce a deportation order whilst at the same time refusing to rescind it, a compulsory residence order is made against the alien. If the alien continues to disturb public order, he may be deported. That constitutes a new decision, separable from the deportation order and in respect of which an application for judicial review may be made to the administrative court. In considering the application, the court examines the conduct of the alien during the period when his presence in France was tolerated. In reviewing the lawfulness of the measure the court therefore examines the position at the date of its judgment. However, a ground of appeal on the basis that the alien had mended his ways after the date of the order is ineffective (Conseil d'Etat, 27 November 1985, Hamza, Rec. p. 712).

The fact that a deportation order has been rescinded does not constitute leave to enter. If leave is sought, it may lawfully be refused.

B. Acquisition of French nationality

31. Article 21-27 of the Civil Code, which is relevant in this case, provides:

> "Subject to the provisions of Articles 21-7, 21-8 [concerning aliens born in France of foreign parents] and 22-1 [concerning the minor children of parents who have acquired French nationality], no one may acquire French nationality or be restored to that nationality if either (i) he has been convicted of a serious crime [crime] or other major offence [délit] harmful to the fundamental interests of the nation or of an act of terrorism or (ii) whatever the nature of the offence, if he has been sentenced to a term of imprisonment,

not suspended, of at least six months.

(Law no. 93-1417 of 30 December 1993) The same shall apply to a person who is the subject of a deportation order which has not been expressly set aside or rescinded or to a ban on re-entering French territory that has not expired.

(Law no. 93-1027 of 24 August 1993) The same shall apply to persons whose stay in France is unlawful under the laws and treaties relating to the residence of aliens in France."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Bouchelkia applied to the Commission on 25 October 1993. He complained of a violation of his right to respect for his private and family life as guaranteed under Article 8 of the Convention (art. 8).

33. The Commission (Second Chamber) declared the application (no. 23078/93) admissible on 22 February 1995. In its report of 6 September 1995 (Article 31) (art. 31), it expressed the opinion by nine votes to four that there had not been a violation of Article 8 of the Convention (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

34. In their memorial, the Government "request[ed] that Mr Bouchelkia's application be dismissed".

35. The applicant asked the Court to "find a violation of Article 8 of the Convention" (art. 8).

AS TO THE LAW

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

36. Mr Bouchelkia submitted that the deportation order made against him on 11 June 1990 infringed his right to respect for his private and family life. He relied on Article 8 of the Convention (art. 8), which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government and the Commission disputed that contention.

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

37. It must first be determined whether the applicant can claim to have a "private and family life" in France within the meaning of Article 8 para. 1 (art. 8-1).

38. As before the Commission, it was not contested by the Government that there had been an interference in the applicant's private and family life considered as a whole. Nevertheless, they argued before the Court that at the time the deportation order was executed, Mr Bouchelkia, a young single adult with no children, did not have a family life within the meaning of the Convention and only developed one after his illegal return to France. His companion, who had become his wife in March 1996, must have been aware that he was in France unlawfully; the applicant was not entitled now to rely on a situation created in disregard of the law. At the material time, the interference in the applicant's private life was therefore minor, regard being had to the circumstances justifying it.

39. Mr Bouchelkia argued that when considering his family life account had to be taken of his close relatives as well as of the family he had established with his wife. He had arrived in France at the age of 2 and, until his imprisonment, had lived with his mother, stepfather, four brothers and sisters and five stepbrothers and stepsisters born of his mother's remarriage. His relationship with his mother had remained particularly close even during his imprisonment and forced stay in Algeria. With the exception of his elder brother, all his brothers and sisters had French nationality. He had returned to France illegally with the sole objective of being reunited with the woman who had been his companion since 1986, with whom he had had a child in 1993 and whom he had married in 1996. His family life had been established unlawfully - but openly and with the knowledge of the authorities. In the applicant's submission, respect for private and family life had to extend also to his wife and daughter, both of whom had French nationality and could not follow him to Algeria because of the current situation in that country.

40. The Commission considered that the deportation order would jeopardise the continuation of Mr Bouchelkia's private and family life. In the Delegate's submission the family life which he had been able to build up after the deportation order could only be taken into account in relation to the proportionality of the interference. Were the deportation order to be executed again, that would constitute an interference in the current family life established between the applicant and his child of French nationality, which would be no different from that found in the case of Boughanemi v. France (judgment of 24 April 1996, Reports of Judgments and Decisions 1996-II).

41. The Court notes that the deportation order was made on 11 June 1990 and executed on 9 July 1990. It is with regard to the position at that time that the question whether the applicant had a private and family life within the meaning of Article 8 of the Convention (art. 8) falls to be considered. Mr Bouchelkia was at that point single and had no children. He only started his own family after the deportation order was made, thereby consolidating his family ties in France. At the time, he was still living with his original family and,since the age of 2, had lived in France where he had his main private and family ties. Like the Commission, the Court considers that the applicant's deportation in 1990 amounted to an interference with

his right to respect for his private and family life.

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

42. It is therefore necessary to determine whether the deportation in issue satisfied the conditions of paragraph 2 (art. 8-2), that is to say whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph (art. 8-2), and was "necessary in a democratic society" for the achievement of that aim or aims.

1. "In accordance with the law"

43. It is not contested that the deportation order made against Mr Bouchelkia was based on section 26 of the Ordinance of 2 November 1945 concerning the conditions of entry and residence of aliens in France, as amended. The Conseil d'Etat, moreover, ruled that it was lawful (see paragraph 15 above).

2. Legitimate aim

44. The Government and the Commission considered that the interference in issue had aims which were entirely compatible with the Convention, namely "the prevention of disorder or crime".

The Court comes to the same conclusion.

3. "Necessary in a democratic society"

45. The applicant argued that his private and family life, which henceforth included the family started since his return, could only be enjoyed in France. Having arrived at the age of 2 under the arrangements for family reunion, his culture was French as it was in France that he had received all his education before starting work. Since 1986 he had only returned to Algeria when forced to do so as a result of being deported, but did not speak or read Arabic, having learnt only the rudiments of Kabyle, which he could not write. Since the death of his grandparents in October 1982 and August 1985, he no longer had any close relatives apart from his uncle who had been unable to put him up after he had been deported, whilst his mother had provided for his needs from France. As for the offences which he had committed at the age of 17, the psychiatrists had noted his feelings of guilt and a tendency to depression. He had obtained full remission of sentence whilst in prison where he had attended vocational-training courses. There was therefore no risk of his reoffending, especially as he now had a new family home and a job in spite of the precariousness of his situation. Lastly, the other two criminal convictions were directly related to his situation as a prisoner and to his position as an illegal immigrant respectively.

46. The Commission considered that the seriousness of the offences committed by Mr Bouchelkia before and after the deportation order was made and the severity of the sentences passed against him were such that the needs of public order had to outweigh private and family considerations. The applicant had maintained fairly significant family ties in his country of origin and his Algerian nationality therefore reflected definite emotional and family links.

47. Adopting the Commission's analysis, the Government stressed the seriousness of the main offence. The subsequent behaviour of the applicant, who had additional convictions for escaping from prison and

obstructing a police officer in the execution of his duty, was proof that he was dangerous and held society's laws and codes in contempt. Mr Bouchelkia had real links with his country of origin, whose nationality, moreover, he possessed. He understood the language perfectly well, and had, on his own admission, enormously benefited from his stay in Algeria.

48. The Court reiterates that it is for the Contracting States to maintain public order in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. For that purpose they are entitled to order the expulsion of such persons convicted of criminal offences.

However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 (art. 8-1), be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, among other authorities, the following judgments: Beldjoudi v. France, 26 March 1992, Series A no. 234-A, p. 27, para. 74; Nasri v. France, 13 July 1995, Series A no. 320-B, p. 25, para. 41; Boughanemi judgment previously cited, pp. 609-610, para. 41; and C. v. Belgium, 7 August 1996, Reports 1996-III, p. 927, para. 31).

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

50. Like the Commission, the Court notes that Mr Bouchelkia, who was 20 years old, single and had no children when the deportation order was executed, maintained links at the material time with his country of origin of which he was a national and where close relatives of his lived. Neither the finding of the Colmar Court of Appeal in 1993 (see paragraph 20 above), nor the fact that the applicant now has a family life which did not exist in 1990, leads the Court to consider that the situation obtaining in 1990 should have been assessed otherwise at the relevant time.

51. Furthermore, the Court attaches great importance to the nature of the offence which gave rise to the deportation order. While it is true that the applicant was a minor aged 17 when he committed the serious crime (crime) of aggravated rape, that fact, the main relevance of which was to the Juvenile Court's decision as to sentence, does not in any way detract from the seriousness and gravity of such a crime.

52. The authorities could legitimately consider that the applicant's deportation was, at that time, necessary for the prevention of disorder or crime. The fact that, after the deportation order was made and while he was an illegal immigrant, he built up a new family life does not justify finding, a posteriori, that the deportation order made and executed in 1990 was not necessary.

53. Having regard to the above, the Court finds that a fair balance was struck between the relevant interests and that the decision to deport the applicant was not disproportionate to the legitimate aims pursued. There has therefore been no violation of Article 8 (art. 8).

FOR THESE REASONS, THE COURT

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 January 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mrs Palm is annexed to this judgment.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE PALM

I have voted for a violation of Article 8 of the Convention (art. 8) on the following grounds.

Like the majority of the Court, I consider that the deportation order in 1990 amounted to an interference with Mr Bouchelkia's right to respect for his private and family life. I also share the view that the deportation was in accordance with the law and had the legitimate aim of "prevention of disorder or crime".

However, I cannot agree with the majority's finding that the deportation was necessary. I find it in principle difficult to accept that a country can be justified under the Convention in expelling a second-generation migrant to his country of origin because of his behaviour when almost all his ties are with his new homeland. In my opinion there must be much stronger reasons than those advanced in the present case to justify such an action. As a rule, second-generation migrants ought to be treated in the same way as nationals. Only in exceptional circumstances should a deportation of these non-nationals be accepted.

Mr Bouchelkia was only 2 years old when he arrived in France with his mother and an elder brother under the arrangement for family reunion. His mother and nine brothers and sisters live in France. Since 1986 he has had a close relationship with a French woman whom he later married and with whom he now has a child. At the time of the deportation order he was 20 years old and had lived eighteen years in France where he had all his schooling and where he had worked. Since his grandparents' death in 1985 he has - besides an uncle - no close relatives in Algeria. He neither speaks nor reads Arabic.

Even if the crimes (rape and theft) that Mr Bouchelkia committed were of a serious nature, it must be borne in mind that he, at the time, was only 17 years old and that the Haut-Rhin Juvenile Assize Court found mitigating circumstances and sentenced him to five years' imprisonment.

Taking all these factors into account, I find it totally out of proportion to deport Mr Bouchelkia to Algeria. He has been convicted for the crimes he committed and he has served his sentence.

That should suffice just as it suffices for similar crimes committed by nationals.