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

GRAND CHAMBER

CASE OF ÜNER v. THE NETHERLANDS

(Application no. 46410/99)

JUDGMENT

STRASBOURG

18 October 2006

This judgment is final but may be subject to editorial revision.

In the case of Üner v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr B.M. ZUPANČIČ,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mr L. GARLICKI,
Mr E. MYJER,
Ms D. JOČIENĖ,
Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 5 April 2006 and on 30 August 2006,

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

PROCEDURE

1. The case originated in an application (no. 46410/99) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Ziya Üner ("the applicant"), on 4 August 1998.

2. The applicant was represented by Mr R. Dhalganjansing, a lawyer practising in The Hague. The Netherlands Government ("the Government") were represented by their Agent, Mrs J. Schukking, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of Article 8 of the Convention in that he had been excluded from the Netherlands following a criminal conviction.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). In a partial decision of 26 November 2002 a Chamber of that Section declared inadmissible the applicant's complaints under Articles 3 and 6 of the Convention, Articles 2 and 4 of Protocol No. 7 and Article 14 of the Convention taken in conjunction with Article 4 of Protocol No. 7, and adjourned its examination of the complaint under Article 8 of the Convention. By a decision of 1 June 2004 the Chamber declared the remainder of the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Second Section.

7. On 5 July 2005 a Chamber of that Section, composed of the following judges: Mr J.-P. Costa, *President*, Mr A.B. Baka, Mr L. Loucaides, Mr C. Bîrsan, Mr K. Jungwiert, Mrs W. Thomassen, Mr M. Ugrekhelidze, and also of Mrs S. Dollé, *Section Registrar*, delivered a judgment in which it held by a majority that there had been no violation of Article 8 of the Convention. The concurring opinion of the President, Mr Costa, and the dissenting opinion of Mr Baka were annexed to the judgment.

8. In a letter of 4 October 2005 the applicant requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted that request on 30 November 2005.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Mrs Thomassen, the judge elected in respect of the Netherlands at the time the former Second Section adopted its judgment in the present case, withdrew from sitting in the Grand Chamber (Rule 28). The Government subsequently agreed that Mr E. Myjer, the current judge elected in respect of the Netherlands, should sit in her place. Mr S.E. Jebens, who was prevented from sitting in the second deliberations, was replaced by the first substitute judge, Mr R. Maruste (Rule 24 § 3).

10. The Government, but not the applicant, filed a memorial on the merits. In addition, third-party comments were received from the German Government, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 (a)). The parties were invited to reply to those comments at the hearing (Rule 44 § 5).

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 5 April 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Mrs J. SCHUKKING, *Agent*,
Mr M. KUIJER and
Ms M.-L. VAN DONGEN, *Advisers*;

(b) *for the applicant*
Mr R. DHALGANJANSING *Counsel*.

The Court heard addresses by Mr Dhalganjansing, Mrs Schukking and Mr Kuijer as well as their partial replies to questions put by judges. Both parties requested, and were granted, permission to complete their replies in writing. Replies were received from the Government on 19 April 2006 and from the applicant on 19 April and 1 May 2006.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1969 and lived in Turkey until 1981.

13. The applicant came to the Netherlands with his mother and two brothers in 1981, when he was twelve years old, in order to join his father who had already been living there for ten years. He was granted a residence permit (*vergunning tot verblijf*) which he was required to renew at one yearly intervals until 1988, when he obtained a permanent residence permit (*vestigingsvergunning*).

14. On 18 January 1989 the applicant was convicted by the single-judge chamber of the Almelo Regional Court (*arrondissementsrechtbank*) of the offence of breach of the peace (*lokaalvredebreuk*), and fined 200 Netherlands guilders (NLG – 90 euros (EUR)). The same court convicted him on 30 May 1990 of a violent offence against the person, committed in public (*openlijke geweldpleging*), and sentenced him to a fine of NLG 350 (EUR 159) and a suspended term of imprisonment of two weeks.

15. In 1991 the applicant entered into a relationship with a Netherlands national. They started living together in or around June 1991. A son was born to the couple on 4 February 1992.

16. On 30 June 1992 the applicant was convicted by the Arnhem Court of Appeal (*gerechtshof*) of a violent offence against the person, committed in public, and sentenced to eighty hours of community service (in lieu of six months' imprisonment).

17. During the second pregnancy of the applicant's partner, the relationship began to suffer tensions. In order to alleviate the situation, the applicant moved out in November 1992, but remained in close contact with both his partner and his son. The pregnancy ended in a miscarriage.

18. On 16 May 1993 the applicant was involved in a dispute in a cafe. He pulled a loaded gun and shot a man, wounding him in the leg. Outside the cafe he then got into a fight with a friend of the injured man. He pulled a second loaded gun and shot him in the head. The man died. The applicant was convicted of manslaughter (*doodslag*) and assault (*zware mishandeling*) by the Arnhem Court of Appeal on 21 January 1994 and sentenced to seven years' imprisonment.

19. Whilst serving his prison sentence, from 17 May 1993 until 14 January 1998, the applicant took courses in computer skills, administration and accounting, and also obtained a retailer's certificate (*middenstandsdiploma*). He took further courses in order to qualify as a sports instructor. His partner and son visited him in prison at least once a week and regularly more often. A second son was born to the applicant and his partner on 26 June 1996, whom he also saw every week. Both his children have Netherlands nationality and have been recognised (*erkend*) by the applicant. Neither his partner nor his children speak Turkish.

20. By a decision of 30 January 1997, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) withdrew the applicant's permanent residence permit and imposed a ten-year exclusion order (*ongewenstverklaring*) on him in view of his conviction of 21 January 1994 and seven-year prison sentence. The Deputy Minister considered that the general interest in ensuring public safety and the prevention of disorder and crime outweighed the applicant's interest in being able to continue his family life with his partner, children, parents and brothers in the Netherlands.

21. The applicant lodged an objection (*bezwaarschrift*) against this decision, arguing that the offence in question had been committed long before, in May 1993, that he had not reoffended, that there was no indication that he would reoffend, and that his partner and children could not be expected to follow him to Turkey. Following a hearing before the Advisory Board on Matters Concerning Aliens (*Adviescommissie voor vreemdelingenzaken*) on 1 July 1997, at which the applicant was assisted by an interpreter, the Deputy Minister rejected the objection on 4 September 1997 and ordered the applicant to leave the Netherlands as soon as he was released from prison.

22. The applicant appealed to the Regional Court of The Hague, sitting in Zwolle, submitting that, as there was no risk of his reoffending, there was no necessity to impose an exclusion order on him and that to do so amounted to the imposition of a second penalty.

23. The applicant was released from prison on 14 January 1998 and subsequently placed in aliens' detention (*vreemdelingenbewaring*) pending his deportation.

24. Following a hearing on 28 January 1998, the Regional Court rejected the applicant's appeal on 4 February 1998. The Regional Court did not accept the applicant's argument that the period of time that had elapsed between the date on which his criminal conviction had become irrevocable and the date on which the exclusion order had been imposed was so long that the Deputy Minister should be deemed to have acquiesced in the applicant's continued residence in the Netherlands. Furthermore, it did not discern any facts or circumstances capable of justifying a reduction of the period during which the applicant would be excluded from Netherlands territory. The applicant's claim that there was no risk of his reoffending was based solely on his own statements and was not supported by the facts, given that he had also been convicted of violent offences in 1990 and 1992. In addition, it did not appear that the applicant had put down roots in the Netherlands or become dissociated from Turkish society to such a degree that he would be unable to return to his country of origin. Finally, the Regional Court considered that the interference with the applicant's family life was justified for the purposes of preventing disorder and crime.

25. The applicant was deported to Turkey on 11 February 1998. However, it appears that he returned to the Netherlands soon afterwards, as he was apprehended there on 29 May 1998. He was again deported to Turkey on 4 June 1998, and a request for a provisional stay of execution of the deportation order, which he had lodged with the Regional Court of The Hague, was declared inadmissible on 24 August 1998. He was also convicted of the offence of residing illegally in the Netherlands while subject to an exclusion order (section 197 of the Criminal Code (*Wetboek van Strafrecht*)) and sentenced to three months' imprisonment.

26. On 17 September 1998 the applicant requested that the exclusion order be revoked. The Deputy Minister of Justice refused the request on 26 October 1998 and on 13 April 2000 dismissed an objection which the applicant had filed against that refusal. The applicant subsequently lodged an appeal, which was declared inadmissible by the Regional Court of The Hague, sitting in Zwolle, on 2 August 2000. No appeal lay against that decision.

27. The applicant submitted that, prior to his deportation in 1998, he had only been back to Turkey once in order to attend the funeral of his grandmother, and that he did not speak the Turkish language apart from

understanding certain expressions. His only relative in Turkey was an uncle with whom he had no contact.

28. According to a report drawn up by a psychiatrist in Turkey on 9 June 1998, the applicant was suffering from psychological problems as a result of being separated from his family. In particular, not being able to see his children was making him depressed. Treatment had begun in March 1998 and was continuing, though some improvement had been noted.

29. On 29 March 2006 the applicant was discovered working at an illegal cannabis plantation in the Netherlands. He was arrested and subsequently placed in aliens' detention. This detention was discontinued on 1 May 2006 in order to execute the judgment whereby the applicant had been sentenced to three months' imprisonment (see paragraph 25 above). On 16 May 2006 the applicant was deported to Turkey.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Netherlands law with regard to aliens

30. At the relevant time the decision to withdraw the applicant's residence permit and to impose an exclusion order on him was taken under sections 14 and 21 of the Aliens Act 1965 (*Vreemdelingenwet 1965*) and in accordance with the policy laid down in Chapters A4 and A5 of the "Aliens Act Implementation Guidelines 1994" (*Vreemdelingencirculaire* – a body of directives drawn up and published by the Ministry of Justice). Underlying this policy is the principle that the longer an alien has lawfully resided in the Netherlands – and the stronger, therefore, his or her ties with the Netherlands are assumed to be – the more serious an offence must be before it can justify withdrawing a residence permit and excluding the alien from Netherlands territory; the authorities thus apply a sliding scale (*glijdende schaal*).

31. In accordance with this policy, a residence permit may be withdrawn and an exclusion order imposed on an alien who, at the time of committing the offence, has been lawfully residing in the Netherlands for more than ten but less than fifteen years – like the applicant in the present case – if he or she is sentenced to an unsuspended prison sentence of more than sixty months following a conviction for a serious, violent crime or for drug-trafficking.

32. If an exclusion order is imposed on the basis of a conviction for a serious, violent crime or drug-trafficking, this order will in any event be revoked, upon request, if the alien has been residing outside the Netherlands for a period of ten years and if he has not been convicted of further criminal offences (Chapter A5/6.4 of the "Aliens Act Implementation Guidelines 1994").

33. A person upon whom an exclusion order has been imposed is not allowed either to reside in or to visit the Netherlands.

B. Netherlands criminal law

34. Section 15 paragraph 2 of the Criminal Code reads:

> "A convicted person sentenced to a custodial sentence for a determinate period of which more than one year is to be executed shall be granted early release when two thirds of that sentence have been served."

Section 15a of the Criminal Code, in so far as relevant, provides:

> "1. Early release may be postponed or withheld where:
>
> a. the convicted person, on grounds of the inadequate development or pathological disturbance of his mental faculties, has been placed in an institution for the treatment of persons subject to an order for confinement in a custodial clinic and where continuation of treatment is required;
>
> b. the convicted person has been convicted in a final judgment of a serious offence for which, pursuant to section 67 paragraph 1 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), detention on remand (*voorlopige hechtenis*) is allowed and where the offence was committed after the execution of his sentence commenced;
>
> c. there is evidence that the convicted person has otherwise grossly misbehaved after the execution of his sentence commenced;
>
> d. the convicted person evades, or attempts to evade, his sentence after its execution has commenced.
>
> 2. If the prosecuting authorities (*Openbaar Ministerie*) charged with the execution of the sentence consider that, on one of the grounds mentioned in the first paragraph, there is cause for postponing or withholding early release, it shall lodge a written request to that effect with the Arnhem Court of Appeal without delay. ..."

III. OTHER RELEVANT MATERIALS

A. Relevant instruments of the Council of Europe

35. With regard to the various texts adopted by the Council of Europe in the field of immigration, mention should be made of the Committee of Ministers Recommendations Rec(2000)15 concerning the security of residence of long-term migrants and Rec(2002)4 on the legal status of persons admitted for family reunification, and of Parliamentary Assembly Recommendation 1504 (2001) on the non-expulsion of long-term immigrants.

36. Recommendation Rec(2000)15 states, *inter alia*:

"4. As regards the protection against expulsion

a. Any decision on expulsion of a long-term immigrant should take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights' constant case-law, of the following criteria:

- the personal behaviour of the immigrant;

- the duration of residence;

- the consequences for both the immigrant and his or her family;

- existing links of the immigrant and his or her family to his or her country of origin.

b. In application of the principle of proportionality as stated in Paragraph 4.a, member states should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. More particularly, member states may provide that a long-term immigrant should not be expelled:

- after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years' imprisonment without suspension;

- after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years of imprisonment without suspension.

After twenty years of residence, a long-term immigrant should no longer be expellable.

c. Long-term immigrants born on the territory of the member state or admitted to the member state before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of eighteen.

Long-term immigrants who are minors may in principle not be expelled.

d. In any case, each member state should have the option to provide in its internal law that a long-term immigrant may be expelled if he or she constitutes a serious threat to national security or public safety."

37. In Recommendation 1504 (2001) the Parliamentary Assembly recommended that the Committee of Ministers invite the Governments of Member States, *inter alia*:

"11. ii.

...

c. to undertake to ensure that the ordinary-law procedures and penalties applied to nationals are also applicable to long-term immigrants who have committed the same offence;

...

g. to take the necessary steps to ensure that in the case of long-term migrants the sanction of expulsion is applied only to particularly serious offences affecting state security of which they have been found guilty;

h. to guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances;

..."

The Committee of Ministers replied to the Assembly on the matter of non-expulsion of certain migrants on 6 December 2002. It considered that Recommendation (2000)15 addressed many of the concerns of the Assembly and it was thus not minded to devise any new standards.

38. Under the heading "Effective protection against expulsion of family members", the Committee of Ministers recommended to Governments in Recommendation Rec(2002)4 that, where the withdrawal of or refusal to renew a residence permit, or the expulsion of a family member, is being considered:

"...member States should have proper regard to criteria such as the person's place of birth, his age of entry on the territory, the length of residence, his family relationships, the existence of family ties in the country of origin and the solidity of social and cultural ties with the country of origin. Special consideration should be paid to the best interest and wellbeing of children."

B. Comparative law

39. In the majority of the member States of the Council of Europe, second-generation immigrants may be deported by the authorities on the ground that they have been convicted of a criminal offence. Eight member States have provided in their laws that second-generation immigrants cannot be deported on the basis of their criminal record or activities: Austria, Belgium, France, Hungary, Iceland, Norway, Portugal and Sweden. Apart from Iceland and Norway, this protection is not confined to those who were actually born in the host country but also applies to foreigners who arrived during childhood (varying from before the age of three in Austria to before the age of fifteen in Sweden).

THE LAW

I. PRELIMINARY ISSUE: SCOPE OF THE GRAND CHAMBER'S JURISDICTION

40. In his request for referral of the case to the Grand Chamber, the applicant argued that the present case disclosed a violation not only of Article 8 of the Convention but also of Article 6, in that the Dutch authorities had waited an unduly long period of time following his conviction before deciding that his residence permit should be withdrawn and that an exclusion order was to be imposed on him. He had perceived those measures as a second punishment. He further submitted that it would not have been possible to expel him had he been a Dutch national.

41. The Court observes that under its case-law, the "case" referred to the Grand Chamber is the application as it has been declared admissible (see *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 128, ECHR 2005-XI). It notes that in its partial decision of 26 November 2002, the Chamber declared inadmissible those of the applicant's complaints which did not relate to Article 8 of the Convention (see paragraph 5 above), including complaints under Article 6 of the Convention and Article 4 of Protocol No. 7, taken both on its own and in conjunction with Article 14 of the Convention. As a result of that decision, therefore, the complaint under Article 6 of the Convention and those under Article 4 of Protocol No. 7 and Article 14 of the Convention – if it is to be assumed that the applicant indeed intended once more to rely on the latter provisions in the present proceedings – are not within the scope of the case before the Grand Chamber.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. Article 8 of the Convention, in so far as relevant, provides:

> "1. Everyone has the right to respect for his private and family life ....
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The Chamber judgment

43. Applying the guiding principles set out in the Court's judgment in the case of *Boultif v. Switzerland* (no. 54273/00, § 48, ECHR 2001-IX), the

Chamber, in its judgment of 5 July 2005, concluded that in the circumstances of the present case the respondent State could not be said to have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in preventing disorder or crime on the other. It accordingly found that there had been no violation of Article 8 of the Convention.

B. The parties' submissions before the Grand Chamber

1. The applicant

44. As he had done before the Chamber, the applicant argued that the respondent Government had failed to strike a fair balance in the present case. When he had committed the offence which ultimately led to the impugned measures, he had still been very young; being confronted with violent people he had acted in self-defence. He had subsequently turned over a new leaf, leading, *inter alia*, to his being granted early release from prison, which indicated that he was no longer regarded as posing a danger to society. The applicant would in any event have preferred to serve a longer sentence if it had meant avoiding deportation and being able to resume his family life in the Netherlands. While the applicant was in detention, his children had been able to visit him regularly and to develop a normal family relationship with him. According to the applicant, following his expulsion his partner and children had visited him on a number of occasions during the summer holidays. Each time they had returned to the Netherlands he had sunk deeper into depression.

45. By focusing solely on the applicant's responsibility for the consequences of his actions, the State had disregarded the interests of his Dutch partner and his Dutch children. The strength of the relationship with his partner was illustrated by the fact that they had decided to try for a second child while the applicant was still in detention. He would not have taken that decision had he known that he would be refused continued residence in the Netherlands. But the Dutch authorities had waited more than three years after the criminal conviction before deciding to impose an additional penalty on him by withdrawing his residence permit and making him the subject of an exclusion order.

46. It was only because he did not have Dutch nationality that the authorities had been able to impose the impugned measures on him. However, having left Turkey at the age of twelve, he had spent more of his life in the Netherlands, where he had a very strong entitlement to residence and into whose society he had integrated to such an extent that he did not think of himself as a foreigner. By contrast, in Turkey he felt like a stranger. Even though the exclusion order was nominally limited in time, it was unlikely that he would ever be able to return to live in the Netherlands,

given that new legislation had in the meantime been adopted under the terms of which his criminal conviction could be held against him in an application for a residence permit.

47. Having been informed that he could attend the hearing before the Grand Chamber, the applicant had been unable to resist the temptation to travel to the Netherlands first in order to see his children. He had accepted the offer of a friend to work in the latter's cannabis plantation in order to finance his travels and stay in the Netherlands. No criminal proceedings had been instituted against him but he nevertheless realised that he had committed a mistake capable of prejudicing his chances of living with his family in the Netherlands.

2. The Government

48. The Government submitted that no support could be found, either in the Convention or in the Court's case-law, for the idea that the expulsion of aliens belonging to the category of second-generation or long-term immigrants was always disproportionate and discriminatory. Such a premise would entirely eliminate the margin of appreciation enjoyed by the State when assessing individual immigration cases. The principle of non-discrimination did not, in any event, come into play, as the situation of nationals and non-nationals was not equal.

49. They further maintained that the imposition of an exclusion order in the present case had been necessary in a democratic society as well as proportionate. As the decision to impose an exclusion order was a discretionary power, it was not subject to a time-limit, and it was customary for this procedure not to begin until the person concerned had already been subjected, at least in part, to the measures imposed in connection with the criminal conviction. Given that the applicant must be deemed to have been aware that he risked having an exclusion order imposed on him under the applicable legislation, his family-planning choices were entirely his own responsibility.

50. The Netherlands authorities had decided to withdraw the applicant's residence permit and to impose an exclusion order on him after applying the "sliding scale principle", which took into account the length of his stay in the Netherlands. Even though this may not have been stated explicitly in the text of the decisions at issue, the authorities, as they always did in cases of this nature, had subsequently applied a "full" Article 8 test, involving an assessment of the guiding principles set out by the Court in its judgment in the case of *Boultif v. Switzerland* (cited above). Account had thus been taken of the very serious nature of the crime committed by the applicant – in respect of which the trial courts had dismissed his claim of self-defence – and also of the fact that it was not his first offence. The fact that the applicant had obtained early release was not of relevance in this context. Early release was virtually automatic and unconditional in the Netherlands,

whereas an exclusion order could be imposed on the basis of the person's previous conduct – the serious criminal offence – even if he or she did not pose an actual and immediate threat.

The Government did not deny that the applicant had strong ties with the Netherlands, but noted that he had chosen not to opt for Dutch nationality even though he had been eligible to do so since 1987. They took the view that, having come to the Netherlands at the age of twelve, he must still have some ties with his native Turkey. There were, in addition, no insurmountable obstacles to the applicant's partner and children following him to Turkey, in particular as the children were still very young – much younger in fact than the applicant had been when he first moved to the Netherlands.

51. Finally, the exclusion order was not of a permanent nature and would be lifted after ten years at the applicant's request, provided he had not been convicted of further criminal offences and had resided outside the Netherlands for ten years. The applicant would then be able to gain re-admission to the Netherlands if he complied with the relevant requirements, namely having sufficient means of existence (120% of the monthly minimum wage) and being able to prove the effectiveness of his family life in the Netherlands.

3. Third party

52. In their comments submitted under Article 36 § 2 of the Convention and Rule 44 § 2 (a) of the Rules of Court the intervening party, the Government of Germany (see paragraph 10 above), pointed out in the first place that the possibility for a State to expel individual aliens – on whom the Convention did not confer a right not to be expelled – was a necessary means by which a State could effectively fulfil its core tasks, namely maintaining and guaranteeing public safety and the protection of its nationals and other aliens residing on its territory. The fact that an alien had been living on the State's territory for a long time, had perhaps even been born there, and had started a family there did not put him or her on a par with the State's nationals in terms of rights of residence.

53. The German Government were further of the view that Article 8 of the Convention did not contain a general requirement that exclusion orders be limited in time. It was for the State to decide when and whether to exclude a foreign national from its territory for ever or for a specific period, so long as it abided by the principles of the rule of law and human rights. Moreover, an expulsion ordered in administrative proceedings following a criminal conviction did not constitute a double punishment, either for the purposes of Article 4 of Protocol No. 7 or “in the humane sense of the term”. Whereas the primary aim of a criminal penalty was to punish a previous criminal wrong, an expulsion order was aimed at guaranteeing public safety in the future without the intention of inflicting a punishment.

C. The Court's assessment

1. General principles

54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2264, § 42). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien 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, be in accordance with the law and 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 *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Mehemi v. France,* judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; *Boultif v. Switzerland*, cited above, § 46; and *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, § 113).

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, *inter alia*, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

56. The aforementioned Parliamentary Assembly Recommendation also advocates that long-term immigrants, with the exception of the category referred to in paragraph 55 above, who have committed a criminal offence should be subjected to the same ordinary-law procedures and penalties as are applied to nationals and that the "sanction" of expulsion should be applied only to particularly serious offences affecting state security of which

they have been found guilty (see paragraph 37 above). The Court considers nevertheless that, even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the above-mentioned power of the Contracting States to expel aliens (see *Moustaquim v. Belgium*, judgment of 18 May 1991, Series A no. 193, p. 20, § 49) for one or more of the reasons set out in paragraph 2 of Article 8 of the Convention. It is, moreover, of the view that a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment, either for the purposes of Article 4 of Protocol No. 7 or more generally. Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided, of course that, to the extent that those measures interfere with the rights guaranteed by Article 8 paragraph 1 of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as preventive rather than punitive in nature (see *Maaouia v. France*, cited above, § 39).

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland,* cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

- the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the "*Boultif* criteria" to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there.

59. The Court considered itself called upon to establish "guiding principles" in the *Boultif* case because it had "only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin" (op. cit., § 48). It is to be noted, however, that the first three guiding principles do not, as such, relate to family life. This leads the Court to consider whether the "*Boultif* criteria" are sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction. It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61,

ECHR 2002-III) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect.

60. In the light of the foregoing, the Court concludes that all the above factors (see paragraphs 57-59) should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction.

2. Application of the above principles in the instant case

61. The Court has no difficulty in accepting that the impugned measures constituted interference with the applicant's right to respect for his family life, that that interference was in accordance with the law and that it pursued the legitimate aims of the interest of public safety and the prevention of disorder or crime. It follows from paragraph 59 above that these measures also amounted to interference with the applicant's right to respect for his private life. Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay specific attention to the applicant's right to respect for his family life.

62. The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of twelve together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant lived with his partner and first-born son for a relatively short period only, that he saw fit to put an end to the co-habitation, and that he never lived together with his second son. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would have had if they had been living together as a family for a much longer time." Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

63. As to the criminal conviction which led to the impugned measures, the Court is of the view that the offences of manslaughter and assault

committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence – a claim that was in any event rejected by the trial courts – (see paragraphs 44 and 50 above), the fact remained that he had two loaded guns on his person. Taking his previous convictions into account (see paragraphs 14 and 16 above), the Court finds that the applicant may be said to have displayed criminal propensities. Having regard to Dutch law and practice relating to early release (see paragraph 34 above), the Court is, furthermore, not inclined to attach particular weight to the fact that the applicant was released after having served two-thirds of his sentence.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Dutch nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there.

Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case, the family's interests were outweighed by the other considerations set out above (see paragraphs 62 and 63).

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court notes that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted (see paragraphs 32 and 51 above).

66. Finally, the Court notes that the applicant also complained of the fact that after his conviction a period of three years elapsed before the authorities decided to withdraw his residence permit and impose an exclusion order. The Government have explained this delay with reference to domestic law and practice in this area. The Court considers that it does not have to take a stance on this issue, but notes that the applicant was still serving his sentence when the impugned measures were taken (cf. *Sezen v. the Netherlands*, no. 50252/99, §§ 44 and 48, 31 January 2006). Moreover, in adopting the latter measures, the authorities addressed all relevant considerations militating for or against the denial of residence and use of an exclusion order.

67. In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

Holds by fourteen votes to three that there has been no violation of Article 8 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 October 2006.

Luzius WILDHABER
President

T.L. EARLY
Section Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Mr Maruste;

(b) Joint dissenting opinion of Mr Costa, Mr Zupančič and Mr Türmen.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGE MARUSTE

While being in agreement with the majority in finding no violation in this case, I would like to highlight the point that an ability to determine what constitutes a crime and what should be the consequences (penalty) is part and parcel of the very sovereignty of the State.

It is widely recognised in the theory and practice of criminal law in European States that the penalty (sanction) for a crime may incorporate several (linked) elements. For example, in addition to deprivation of liberty or a fine (as the main penalty), the sanction may also encompass a ban on exercising certain activities or professions, withdrawal of a licence or licences, confiscation of property, withdrawal of a permanent residence permit, and so on. It is up to the national authorities to determine, in the particular circumstances of their country and the case, what measures are best designed to prevent disorder or crime and protect health, morals, national security or public safety.

The same applies in respect of expulsion as part of a criminal sanction. This practice has also been recognised as permissible by the Court, provided that the measure is prescribed by law, determined by a court and is necessary in a democratic society and proportionate to the aim pursued.

JOINT DISSENTING OPINION OF JUDGES COSTA, ZUPANČIČ AND TÜRMEN

(*Translation*)

1. The question whether the expulsion of a foreign national from the territory of a State is in breach of Article 8 of the Convention has been the subject of numerous judgments by the European Court of Human Rights since the *Berrehab* judgment nearly twenty years ago[1].

2. All those judgments, both before and after the entry into force of Protocol No. 11, were delivered by the Chambers of the Court. The latter, moreover, were often divided, with dissenting opinions on both sides of the argument, quite impassioned in some cases. The Grand Chamber, however, has not had an opportunity since *Berrehab* to consider the issue. In *Maaouia*[2], for instance, it was called upon to rule not on Article 8, but on Article 6 § 1 alone, which, incidentally, it held by fifteen votes to two to be inapplicable[3].

3. In the present case the Grand Chamber, breaking new ground, had to determine whether the order excluding a Turkish national from Netherlands territory following a criminal conviction was in breach of Article 8. We might note in passing that this application was perhaps not the most typical candidate for referral following the Chamber judgment. However, in its wisdom, the panel of five judges provided for by Article 43 of the Convention accepted the applicant's request for referral. This implies that the question was a serious one within the meaning of Article 43 and that the present judgment will, or should, establish a precedent.

4. We respectfully disagree with the findings of the majority of our colleagues, who held that there had been no violation of Article 8.

5. First of all, in general terms, we believe that foreign nationals – in any case those who, like Mr Üner, have been residing legally in a country – should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals. This objective has been set forth and reiterated in numerous instruments at European level within both the European Union and the Council of Europe, and to some extent at global level.

6. Hence, the conclusions of the Presidency of the Tampere European Council on 15 and 16 October 1999 stressed the need for approximation of national legislation on the conditions for admission and residence of third-country nationals; the Presidency added that a third-country national who had resided legally in a European Union Member State for a period of

1. *Berrehab v. the Netherlands*, judgment of 21 June 1988, Series A no. 138.
2. *Maaouia v. France* [GC], no. 39652/98, ECHR 2000-X.
3. Five judges expressed concurring opinions and two expressed dissenting opinions.

time to be determined, and who held a long-term residence permit, should be granted in that Member State a set of uniform rights which were as near as possible to those enjoyed by EU citizens. This was reaffirmed by the Seville European Council of 21 and 22 June 2002, when the Heads of State and Government of the Union expressed their willingness to develop a common policy on the separate but closely related issues of asylum and immigration. They added that the integration of immigrants entailed on their part both rights and obligations in relation to the fundamental rights recognised within the Union.

7. The Council of Europe has also had its say. What is more, paragraphs 36 to 38 of the judgment cite Committee of Ministers Recommendation Rec(2000)15, Parliamentary Assembly Recommendation 1504 (2001) and Committee of Ministers Recommendation Rec(2002)4. One has only to read the judgment to realise that these instruments – which admittedly are not binding – emphasise, among other things, the need to protect long-term immigrants against expulsion, to restrict the *penalty* of expulsion to particularly serious offences affecting State security and to give particular consideration to the interests and well-being of children.

8. At the global level, need we recall the 1989 United Nations Convention on the Rights of the Child (to which the Netherlands is a party), which articulates the principle of the "best interests of the child" (a principle which can, as in the present case, have a bearing on family life)?

9. Of course, we are not arguing that all these international instruments – which, moreover, do not all have the same legal force – mean that foreign nationals can never be expelled, as is the case with nationals under Article 3 of Protocol No. 4. That would be ridiculous. But we do believe that Article 8 of the Convention must be construed in the light of these texts. In our view, the judgment does not quite do that, as it does not, we believe, draw the correct inferences from the international instruments which it cites.

10. Let us now turn from the general to the specific facts of this case. The applicant is not a second-generation immigrant; however, he was only twelve years old when he arrived in the Netherlands in 1981 to join his father, who had already been living there for ten years. The applicant arrived with his mother and his two brothers; it was therefore a case of family reunion. After being issued with a series of one-year renewable residence permits he obtained a permanent residence permit at the age of 19. Finally, as far back as 1991 – when he was 22 – he started a family in the host country, with a Netherlands national with whom he has had two children, born in 1992 and 1996. His partner and their children all have Netherlands nationality; they have never lived in Turkey, have no links to that country and do not speak the language. Moreover, although their family ties have been strained at times, they have never been severed, not even while the applicant was in prison.

11. From a criminal-law viewpoint, there is no doubt that the applicant committed serious offences, most notably when, at the age of 24, he committed manslaughter and assault during a fight in a cafe, and was sentenced to seven years' imprisonment as a result (see paragraph 18 of the judgment). He was released in early 1998, having served four and a half years in prison.

12. It was following this criminal conviction that the authorities imposed further penalties on Mr Üner. In 1997 – four years after the crime had been committed (it is not clear why the interval was so long) – his permanent residence permit was withdrawn and an order was issued prohibiting him from re-entering the Netherlands for ten years. On that basis, he was deported to Turkey shortly after his release from prison; he was deported a second time a few months later, having returned illegally to the Netherlands.

13. In order to assess whether the applicant's right to respect for his private and family life had been violated, the Court applied the "Boultif criteria"[1] and, in fact, extended them (see paragraph 58 of the judgment). Our own interpretation of the case in the light of these criteria (or "guiding principles"), however, leads us to the opposite conclusion to that reached by the majority.

14. The nature and seriousness of the offence committed by the applicant were, as we have said, factors contributing to his expulsion (despite the fact that the offence was committed during a fight and did not affect State security, to use the language of the Parliamentary Assembly recommendation cited in paragraph 37 of the judgment). On the other hand, the length of the applicant's residence in the Netherlands (seventeen years prior to his expulsion) militated in his favour. Furthermore, almost five years had passed since the applicant had committed the offence, and his conduct in prison does not appear to have caused any problems. His partner and children, as mentioned, are Netherlands nationals. The couple's relationship had begun seven years before he was expelled and the ties were strong (a stable relationship and two children). It seems clear, too, that the applicant's partner would have faced considerable difficulties had she been forced to move with him to a country which was completely alien to her.

15. In short, apart from the seriousness of the offence, all the "Boultif criteria" seem to us to point to a violation of Article 8. Paradoxically, even those added by the judgment in this case (see paragraph 58) tend in the same direction, whether the criterion is the "interests and well-being of the children" (whose paternal grandparents, even, had lived in the Netherlands for a long time), or the "solidity of social, cultural and family ties". The latter were clearly stronger with the host country (the Netherlands) than with the country of destination (Turkey), which the applicant had left almost twenty years before and with which his partner and children had no links.

1. See *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, and in particular § 48.

(In this respect, paragraph 64 of the judgment seems to us to be more than a little contrived, and in any case unconvincing.)

16. Hence, the only way in which the finding of a non-violation can possibly be justified, when the "Boultif criteria" – especially in their extended form – are applied, is by lending added weight to the nature and seriousness of the crime. Quite apart from a problem of method (how do we assign relative weight to the various factors on the basis of some *ten* guiding principles – are we not seeing here the implicit emergence of a method which gives priority to one criterion, relating to the offence, and treats the others as secondary or marginal?), we believe a question of principle to be at stake, on which we should like to conclude.

17. The principle is that of "double punishment", or rather the discriminatory punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence. We do not agree with the assertion in paragraph 56 that the applicant's expulsion was to be seen as preventive rather than punitive in nature. Whether the decision is taken by means of an administrative measure, as in this case, or by a criminal court[1], it is our view that a measure of this kind, which can shatter a life or lives – even where, as in this case, it is valid, at least in theory, for only ten years (quite a long time, incidentally) – constitutes as severe a penalty as a term of imprisonment, if not more severe. This is true even where the prison sentence is longer but is not accompanied by an exclusion order or expulsion. That is why some States do not have penalties of this kind specific to foreign nationals, while others have largely abolished them in recent times (the case of France springs to mind: see the Laws of 26 November 2003 and 24 July 2006).

18. For these reasons relating to the Court's reasoning (the application of the "Boultif criteria" to this case) and on a point of principle (our mistrust of any more severe penalty imposed on a foreign national because he or she has the misfortune to be such), we have been unable to vote with the majority of our colleagues. We truly regret this. True, the Convention is a living instrument which must be interpreted in the light of present-day conditions[2]. But we would have liked to see this dynamic approach to case-law tending towards increased protection for foreign nationals (even criminals) rather than towards increased penalties which target them specifically.

1. As in the case of *Maaouia v. France*, cited above, and referred to in paragraph 56 of the judgment.
2. See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 15, § 31, and subsequent settled case-law.