CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF BAHADDAR v. THE NETHERLANDS

(145/1996/764/965)

JUDGMENT

STRASBOURG

19 February 1998

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

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SUMMARY[1]

Judgment delivered by a Chamber

The Netherlands – expulsion to a country where there is an alleged risk of ill-treatment

GOVERNMENT'S PRELIMINARY OBJECTION (failure to exhaust domestic remedies)

Reiteration of Court's case-law on requirements of Article 26 of Convention regarding exhaustion of domestic remedies.

Although prohibition of ill-treatment contained in Article 3 of Convention is also absolute in expulsion cases, applicants invoking this Article are not dispensed as a matter of course from exhausting available and effective domestic remedies and normally complying with formal requirements and time-limits laid down by domestic law.

In the instant case applicant failed to comply with time-limit for submitting grounds of appeal – failed to request extension of time-limit even though possibility open to him – no special circumstances absolving applicant from compliance – even after time-limit had expired applicant had possibility to lodge fresh applications to domestic authorities either for refugee status or for residence permit on humanitarian grounds – Court notes at no stage during domestic proceedings was applicant refused interim injunction against expulsion – thus no imminent danger of ill-treatment.

Conclusion: objection upheld (seven votes to two).

COURT'S CASE-LAW REFERRED TO

16.9.1996, Akdivar and Others v. Turkey; 15.11.1996, Chahal v. the United Kingdom; 17.12.1996, Ahmed v. Austria

1. This summary by the registry does not bind the Court.

In the case of Bahaddar v. the Netherlands[1],

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

Mr R. BERNHARDT, *President,*
Mr THÓR VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Mr D. GOTCHEV,
Mr P. KŪRIS,
Mr P. VAN DIJK,
Mr T. PANTIRU,

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

Having deliberated in private on 27 October 1997 and 30 January 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Netherlands Government ("the Government") on 28 October and 22 November 1996 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25894/94) against the Kingdom of the Netherlands lodged with the Commission under Article 25 by a Bangladeshi national, Mr Shammsuddin Bahaddar, on 2 December 1994.

Notes by the Registrar

1. The case is numbered 145/1996/764/965. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to the same Articles. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2 and 3 of the Convention.

2. The Chamber to be constituted included *ex officio* Mr P. van Dijk, the elected judge of Netherlands nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b) of Rules of Court B). On 29 October 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr I. Foighel, Mr J.M. Morenilla, Mr D. Gotchev, Mr P. Kūris and Mr T. Pantiru (Article 43 *in fine* of the Convention and Rule 21 § 5).

3. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 2 May 1997 and the applicant's memorial on 19 June. The Delegate did not express himself in writing.

4. On 2 September 1997 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the instructions of the President of the Chamber.

On 16 October 1997 the Government submitted a document which the Registrar had sought on the instructions of the President of the Chamber.

5. In accordance with the decision of the President of the Chamber, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr H.A.M. von HEBEL, Assistant Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr H.A. GROEN, Deputy *Landsadvocaat*, *Counsel*;

(b) *for the Commission*
Mr B. MARXER, *Delegate*;

(c) *for the applicant*
Mrs J. NIEMER, *advocaat en procureur*, *Counsel*.

The Court heard addresses by Mr Marxer, Mrs Niemer and Mr Groen, and also replies to questions put by the Court and by several of its members individually.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Shammsuddin Bahaddar is a Bangladeshi national born in 1966. He is currently resident in the Netherlands.

A. The applications for refugee status or, in the alternative, a residence permit on humanitarian grounds, and ensuing proceedings

7. Mr Bahaddar arrived in the Netherlands on 7 July 1990. On 13 July 1990 he lodged applications for refugee status or, in the alternative, a residence permit on humanitarian grounds.

8. With the assistance of a Bengali interpreter, Mr Bahaddar was interviewed by an official of the Ministry of Justice (*Ministerie van Justitie*) on 22 May 1991. He claimed to have been a member of the illegal organisation *Shanti Bahini* (Peace Troops), the military wing of the *Jana Samhati Samiti* (People's Solidarity Association, an organisation seeking autonomy for the inhabitants of the Chittagong Hill Tracts), and to be in danger of persecution on that ground.

Mr Bahaddar's applications for refugee status or, in the alternative, a residence permit on humanitarian grounds were refused on 16 July 1991 by the Deputy Minister of Justice (*Staatssecretaris van Justitie*). The applicant then applied to the Deputy Minister for revision (*herziening*) of this decision.

9. The Deputy Minister refused to grant suspensive effect to Mr Bahaddar's application for revision of his decision. In order to obtain an injunction against his expulsion pending the revision proceedings, the applicant instigated summary injunction proceedings (*kort geding*) before the President of the Regional Court (*Arrondissementsrechtbank*) of The Hague sitting at 's-Hertogenbosch (*nevenzittingsplaats 's-Hertogenbosch*).

10. On 14 November 1991 the President granted the injunction requested. The President found the applicant's story consistent and credible.

11. The applicant was heard by the Advisory Board on Matters concerning Aliens (*Adviescommissie voor Vreemdelingenzaken*) on 21 December 1992.

12. On the same day the Advisory Board expressed the opinion that the applicant was not a refugee within the meaning of the 1951 Geneva Convention relating to the Status of Refugees (see paragraph 24 below) and that he was not eligible for a residence permit on humanitarian grounds either. The Advisory Board considered that on essential points the applicant's account was vague and contradictory.

13. Adopting the Advisory Board's proposal and reasoning, the Deputy Minister of Justice rejected the application for revision on 26 March 1993.

14. On 31 March 1993 the applicant lodged an appeal against the Deputy Minister's decision with the Judicial Division (*Afdeling Rechtspraak*) of the *Raad van State*, adding that the grounds for the appeal would be submitted as soon as possible. As this appeal was denied suspensive effect, the applicant instigated summary injunction proceedings before the President of the Regional Court of The Hague sitting at Amsterdam.

15. Following a hearing on 22 October 1993 the President of the Regional Court, on 11 November 1993, granted the applicant an injunction against his expulsion pending the proceedings before the Judicial Division.

16. In the meantime, the applicant's lawyer was informed by the Judicial Division on 28 June 1993 that she had not so far submitted the grounds for the appeal with the Judicial Division and she was given the opportunity to comply with this requirement before 29 July 1993. The applicant's lawyer submitted grounds for the appeal on 20 October 1993, without providing an explanation for the delay.

17. On 7 March 1994 the President of the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*, the successor of the Judicial Division – see paragraph 34 below) in simplified proceedings (*vereenvoudigde procedure*) declared the applicant's appeal inadmissible for failure to comply with a formal requirement. The applicant lodged an objection (*verzet*) against this decision with the Administrative Jurisdiction Division on 11 March 1994.

18. At the hearing of the applicant's objection, which took place on 22 September 1994, the applicant argued that it had not been possible to submit his grounds of appeal before 20 October 1993 since it had been necessary, given that the Deputy Minister of Justice had disputed the authenticity of documents submitted by him, to try and obtain further proof of his allegations from Bangladesh and that this had taken a long time.

19. The Administrative Jurisdiction Division rejected the applicant's objection on 29 September 1994, on the grounds that he had been given ample opportunity to submit his grounds of appeal, that he had been informed of the possible consequences of failure to do so and that, even if he considered it impossible to cure that failing in time, he ought to have submitted a request for an extension of the time-limit before it lapsed.

20. Neither the Administrative Jurisdiction Division nor its President in his decision of 7 March 1994 examined the merits of the applicant's appeal.

B. The applicant's renewed applications for refugee status or, in the alternative, a residence permit on humanitarian grounds

21. Mr Bahaddar applied to the Commission on 2 December 1994 (see paragraph 35 below).

22. In the meantime, on 21 July 1994, Mr Bahaddar had lodged a second application for a residence permit, arguing that he had been legally resident in the Netherlands for four years already. On being given notice that he would be expelled from the Netherlands on 1 August, he brought summary injunction proceedings before the President of the Hague Regional Court for a suspension of the expulsion order. A hearing took place on 7 December.

23. At that hearing it transpired that Mr Bahaddar had lodged new applications for refugee status or, in the alternative, a residence permit on humanitarian grounds on 5 December 1994, arguing that the second declaration issued by the *Shanti Bahini* and the certified copy of the complaint filed against him, as well as information provided by his lawyer in Bangladesh, constituted new facts which the Deputy Minister of Justice had not been able to take into account when deciding on the applicant's initial applications. In view of this information the representative of the Deputy Minister of Justice promised that the applications of 21 July and 5 December 1994 would be considered together and that the applicant would not be expelled in the meantime.

In a single decision of 12 January 1995, the Deputy Minister of Justice rejected both applications.

According to the Government, Mr Bahaddar, through his lawyer, appealed against this decision to the Hague Regional Court, but failed to submit any grounds therefor within the time-limits set for that purpose. His appeal was declared inadmissible for that reason on 21 June 1995. The applicant did not lodge any objection against that decision.

II. RELEVANT LAW AND PRACTICE

A. The Geneva Convention relating to the Status of Refugees of 28 July 1951 and the 1967 Protocol

24. In so far as it is relevant to the present case, Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 (the 1951 Geneva Convention), as amended by the Protocol relating to the Status of Refugees of 31 January 1967, defines the term "refugee" as follows:

> "… any person who … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

25. Article 33 § 1 of the 1951 Geneva Convention prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Netherlands are party to both the convention and the protocol.

B. The Aliens Act

1. Entitlement to refugee status or residence permits on humanitarian grounds

26. Under section 15(1) of the Aliens Act (*vreemdelingenwet*), aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political conviction, or of belonging to a particular race or a particular social group, may be admitted by the Minister of Justice as refugees.

The expression "refugee" in this provision is construed to have the same meaning as in the 1951 Geneva Convention, as amended (see paragraph 24 above; decision of the Judicial Division of the *Raad van State* of 16 October 1980, *Rechtspraak Vreemdelingenrecht* – Immigration Law Reports – 1981, no. 1).

27. Aliens, other than refugees, wishing to reside in the Netherlands for any length of time have to hold a residence permit (section 9 of the Aliens Act). Such a permit is applied for to, and granted by, the Minister of Justice (section 11(1) of the Aliens Act).

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

(a) the Netherlands are obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the above-mentioned Geneva Convention; or

(b) this serves "essential interests of the Netherlands", e.g. economic or cultural interests; or

(c) there are "cogent reasons of a humanitarian nature" (*klemmende redenen van humanitaire aard*).

29. An alien who does not, or does no longer, qualify for admission to the Netherlands can be expelled (section 22(1) of the Aliens Act). However, aliens who claim that their removal from the Netherlands will compel them to travel to a country where they have reason to fear persecution on one of the grounds set out in section 15(1) (see paragraph 26 above) cannot be expelled except by a specific order of the Minister of Justice (section 22(2)).

2. Legal remedies

30. Prior to the entry into force of the General Administrative Law Act on 1 January 1994, an alien could, in the event of a refusal to grant refugee status or a residence permit, apply in writing to the Minister of Justice for administrative revision of his decision (section 29(1) of the Aliens Act). If such an application was not decided on within six months, it was deemed to have been refused (section 29(2)).

Such a request for revision did not suspend the alien's expulsion unless it was made more than one month before the expiry of the period during which the alien was allowed to remain in the Netherlands (section 32(2)). It was, however, open to the Minister to decide that the request would have "suspensive effect".

If suspensive effect was withheld, the alien could bring summary civil proceedings before the President of the Hague Regional Court for an injunction preventing his or her expulsion pending the Minister's decision. The latter decision, however, was not prejudged by such an injunction.

31. The advice of the Advisory Board on Matters concerning Aliens had to be obtained if a request was made for revision of a decision to refuse refugee status to an alien who would be compelled as a result of such refusal to return to a country where he or she had reason to fear persecution (section 31(1)(b) of the Aliens Act), or to expel an alien whose main place of residence for three months or more had been in the Netherlands and who had complied with the formalities required by the Aliens Act (section 31(1)(c) taken together with section 29(1)(g)).

32. In the event of a negative decision, or of failure to decide within due time, an appeal lay to the Judicial Division of the *Raad van State* (section 34(1) of the Aliens Act).

However, such an appeal had no suspensive effect if the Minister's decision was in accordance with the advice of the Advisory Board on Matters concerning Aliens (section 34(2)(a)); in such a case, the alien could seek an injunction preventing his expulsion pending the decision of the Judicial Division in summary civil proceedings before the President of the Hague Regional Court. Like the Minister's decision (see paragraph 30 above), the decision of the Judicial Division was not prejudged by such an injunction.

33. An alien appealing to the Judicial Division of the *Raad van State* had to submit grounds of appeal and, if possible, all documents pertaining to the dispute (section 72(1) of the *Raad van State* Act (*Wet op de Raad van State*). If this was not done at the time the appeal was lodged, the opportunity would be offered to do so at a later date, within a time-limit to be set by the President of the Judicial Division; failure to comply with that time-limit could lead to a decision declaring the appeal inadmissible (section 74). Such a decision could be given by the President of the Judicial Division in simplified proceedings (section 105(1)).

An objection lay, within fourteen days, to a Chamber of the Judicial Division (section 106(1)).

C. Legal developments following the entry into force of the General Administrative Law Act

34. The entry into force of the General Administrative Law Act on 1 January 1994 brought extensive changes to the procedural provisions of the Aliens Act.

An appeal against the refusal to grant refugee status or a residence permit lies to the Administrative Law Section of the Hague Regional Court (section 8:1 of the General Administrative Law Act; section 33a of the Aliens Act). No further appeal is allowed (section 33e of the Aliens Act).

Pending such an appeal the alien will not be expelled if refugee status has been claimed and the claim is not manifestly ill-founded, or if another application for admission has been lodged which is the subject of an objection or appeal that has a prima facie chance of success.

It is possible to apply to the Administrative Law Section for an order for interim measures (section 8:81 of the General Administrative Law Act).

A transitional provision (section I(3) of the Act of 16 December 1993, *Staatsblad* (Official Gazette) 1993, no. 250), provides that cases pending before the Judicial Division of the *Raad van State* prior to the entry into force of the General Administrative Law Act shall be determined according to the former law, but by the successor to the Judicial Division, the Administrative Jurisdiction Division.

PROCEEDINGS BEFORE THE COMMISSION

35. In his application to the Commission of 2 December 1994 Mr Bahaddar alleged that the decision of the Netherlands authorities to expel him to Bangladesh would, if put into effect, expose him to a serious risk of being killed or ill-treated. He relied on Articles 2 and 3 of the Convention.

36. The Commission declared the application (no. 25894/94) admissible on 22 May 1995. In its report of 13 September 1996 (Article 31), it expressed the opinion that the applicant's expulsion to Bangladesh would not be in violation of Article 2 (unanimously) but that it would constitute a violation of Article 3 (twenty-six votes to five). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

37. The Government concluded their memorial by expressing the view that the application should be declared inadmissible, and in the alternative, that the expulsion of the applicant to Bangladesh would not be in violation of Article 3 of the Convention.

The applicant's representative, speaking at the hearing, asked the Court to hold that the application was admissible and that the applicant's expulsion would constitute a violation of the Convention.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

A. Arguments before the Court

1. The Government

38. As they had done before the Commission, the Government maintained that the applicant had not exhausted the domestic remedies available to him.

On 26 March 1993 the Deputy Minister of Justice had rejected the application for revision of his refusal to recognise the applicant's refugee status or, in the alternative, to grant him a residence permit on humanitarian grounds (see paragraph 13 above). The applicant's lawyer had appealed against this decision to the Judicial Division of the *Raad van State* on 31 March 1993, stating that the grounds for the appeal would be submitted as soon as possible (see paragraph 14 above). The lawyer had been reminded by the Judicial Division on 28 June 1993 that no such grounds had yet been received, and was invited to submit them by 29 July 1993 (see paragraph 16 above). This she had failed to do, submitting her grounds of appeal only on 20 October 1993; she had not asked for an extension of the time-limit, as she might have done.

The President of the Administrative Jurisdiction Division of the *Raad van State* had eventually declared the applicant's appeal inadmissible in simplified proceedings on 7 March 1994 because the formal requirement of submitting grounds of appeal had not been complied with (see paragraph 17 above). After the applicant's lawyer had lodged an objection against this decision, the Administrative Jurisdiction Division of the *Raad van State* had upheld this decision on 29 September 1994 (see paragraphs 18 and 19 above).

39. The Government did not dispute that the applicant's lawyer had received the information on which she wished to base the applicant's appeal only on 20 October 1993. If it was assumed that this information had not been available at an earlier date, the applicant could have been expected to lodge a new application for recognition of his refugee status at that point. This, however, had not been done until 5 December 1994, three days after he applied to the Commission (see paragraph 22 above). Moreover, his appeal against the decision on that application was also declared inadmissible as he had failed to submit any grounds within the time-limit set for that purpose (see paragraph 23 above).

Neither before nor after the applicant applied to the Commission had an interim measure sought by him against his expulsion been refused.

2. The applicant

40. The applicant admitted that his lawyer had in fact not submitted any grounds when lodging his appeal, but stated that this was due to the difficulty in obtaining relevant information from Bangladesh. It had not been possible to let the Judicial Division of the *Raad van State* know in advance how long it would take for such information to arrive, and accordingly it had been pointless to make a reasoned request for an extension of the time-limit.

The information in question was eventually received on 20 October 1993 and submitted to the Judicial Division of the *Raad van State* the same day. In addition, a new application for recognition of refugee status had been lodged, based on this new information.

3. The Commission

41. The Commission referred to its normal practice of declaring applications inadmissible if the reason for the refusal of a domestic remedy was the failure on the applicant's part to comply with procedural rules unless circumstances existed which absolved the applicant from exhausting the remedies at his disposal according to the correct procedures (see the following admissibility decisions: 12 July 1984, I. and C. v. Switzerland, application no. 10107/82, Decisions and Reports (DR) 38, pp. 90 et seq.; 1 July 1985, G.P. Cunningham v. the United Kingdom, application no. 10636/83, DR 43, pp. 171 et seq.).

In the present case, however, the merits of the applicant's case had not been considered by any Netherlands authority in the light of the new documentary evidence which had been submitted in his name. Even though the documents concerned had been submitted out of time, it did not appear that the authorities had been prevented by law from taking cognisance of them. Their potential relevance had actually been recognised by the President of the Hague Regional Court in his injunction of 11 November 1993 restraining the Netherlands State from expelling the applicant pending the outcome of the proceedings on the merits.

There were accordingly, in the Commission's view, special circumstances absolving the applicant from exhausting the domestic remedies according to the correct procedures.

42. The Delegate of the Commission, speaking at the Court's hearing, recalled in addition that the Court had noted that the prohibition against ill-treatment contrary to Article 3 was absolute, in expulsion cases as in all

other cases (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1855, §§ 79–80; and the Ahmed v. Austria judgment of 17 December 1996, *Reports* 1996-VI, pp. 2206–07, §§ 40–41). In his view, it would undermine the absolute character of that Article if a person claiming refugee status could be expelled to a country where there might be a real risk that he or she would be exposed to such treatment for the sole reason that the person concerned (or his or her lawyer) had failed to comply with the formal requirement to submit the grounds for an appeal in time, even though these grounds were submitted before the national authorities took their decision.

B. The Court's assessment

43. The Court must decide whether the applicant has exhausted domestic remedies, as required by Article 26 of the Convention, which provides:

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

1. Applicable principles

44. The applicable principles have been stated by the Court as follows (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, pp. 1210–11):

> "66. Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (…).
>
> Article 26 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (…).
>
> 67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the 'generally recognised rules of international law' there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (…).
>
> …
>
> 69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism (…). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (…). This means amongst other things that it

must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

2. Application of the above principles

45. The Court notes at the outset that, although it has – as mentioned by the Delegate of the Commission – held the prohibition of torture or inhuman or degrading treatment contained in Article 3 of the Convention to be absolute in expulsion cases as in other cases (see, *inter alia*, the above-mentioned Chahal judgment, p. 1855, § 80), applicants invoking that Article are not for that reason dispensed as a matter of course from exhausting domestic remedies that are available and effective. It would not only run counter to the subsidiary character of the Convention but also undermine the very purpose of the rule set out in Article 26 of the Convention if the Contracting States were to be denied the opportunity to put matters right through their own legal system. It follows that, even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner.

Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

46. However, on the Court's analysis of the facts, such considerations do not apply in the present case. When the applicant's lawyer lodged her client's appeal against the decision of the Deputy Minister of Justice to the Judicial Division of the *Raad van State*, on 31 March 1993 (see paragraph 14 above), she did not state any grounds. In accordance with the applicable procedure, she was offered the opportunity to cure this failing (see paragraphs 16 and 33 above). On 28 June 1993 she was given a time-limit

for that purpose, which was set to expire on 29 July 1993, nearly four months after the appeal was introduced (see paragraph 16 above).

As stated by the Government and not contested by the applicant, it would have been possible for the applicant's lawyer to request an extension of this time-limit. The applicant's lawyer made no such request. She submitted grounds of appeal only on 20 October 1993, nearly three months after the time-limit had expired, and without explaining the delay (see paragraph 16 above).

The applicant has stated before the Court that it had not been possible to make a reasoned request for an extension of the time-limit because it was not clear how long it would take to obtain the documentary evidence on which it was intended to ground the applicant's appeal. The Court does not find this convincing. Leaving aside the question whether it would not have been open to the applicant to submit grounds of appeal within the time-limit, in anticipation of the evidence, there is nothing to suggest that the Judicial Division of the *Raad van State* was bound to refuse a request for an extension of the time-limit based on the fact that supporting documents were not yet available.

47. It is further significant that the applicant was able to lodge fresh applications to the Netherlands authorities, either for refugee status or for a residence permit on humanitarian grounds, even after the expiry of the time-limit. He in fact availed himself of this possibility twice, on 21 July and 5 December 1994. Both these applications were considered jointly, and the applicant's appeal against the decision given on them was declared inadmissible for failure to submit grounds within the time-limit (see paragraphs 22 and 23 above).

Moreover, at no stage of the domestic proceedings was the applicant refused an interim injunction against his expulsion (see paragraphs 10, 15 and 23 above). Consequently he was in no imminent danger of treatment contrary to Article 3.

48. Finally, it would be open to the applicant even now to lodge a further such application, and if necessary to apply for an interim measure restraining the respondent Government from expelling him pending the outcome of the ensuing proceedings (see paragraph 34 above). It has not been argued that such a remedy would necessarily be ineffective.

49. In these circumstances the Court must conclude that, in relation to the complaint before it, the applicant failed to exhaust the available domestic remedies before applying to the Commission and that it is accordingly precluded from considering the merits of the case.

FOR THESE REASONS, THE COURT

Holds by seven votes to two that as domestic remedies have not been exhausted it cannot consider the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr van Dijk;
(b) dissenting opinion of Mr Foighel;
(c) dissenting opinion of Mr Morenilla.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE VAN DIJK

I voted in favour of accepting the Government's preliminary objection. That requires some explanation since I have always agreed with those members of the Court who were of the opinion that, in the supervisory system established under the Convention and according to its "procedural economy", the Court has no jurisdiction to examine preliminary objections as to admissibility which have been raised before the Commission and rejected by it (see, in particular, Judge Martens in his separate opinion in the case of Brozicek v. Italy, judgment of 19 December 1989, Series A no. 167, pp. 23–28).

However, the position which the Court adopted on the issue in its judgment of 18 June 1971 in the case of De Wilde, Ooms and Versyp v. Belgium (Series A no. 12) has been well established and consistently maintained in the Court's case-law, albeit with substantial dissent on one ground or another (see, for example, the concurring opinion of Judge Russo, the joint dissenting opinion of Judges Bernhardt, Pekkanen, Morenilla and Baka, and the separate opinion of Judge Martens in the case of B. v. France, judgment of 25 March 1992, Series A no. 232-C). As the issue will not arise in respect of the new Court which will begin to function in November of this year, I do not consider it productive to dissent, merely as a matter of principle, from the majority in a case where the Commission was, in my opinion, plainly wrong to declare the application admissible.

The Commission, in its decision on admissibility, has created far too broad and too generally formulated an exception to the exhaustion rule, one which does not seem to sit well with the settled case-law on "special circumstances" and which, moreover, seems to ignore the fact (highly relevant to the exhaustion rule) that the applicable law enabled the applicant – without putting himself in imminent danger of expulsion – to file a new application for refugee status or a residence permit on the basis of the new, ostensibly authentic document concerning his alleged membership of the *Shanti Bahini*. This decision of the Commission, and the reasons given for it, should not, in my opinion, guide the Commission or, for that matter, the new Court in future decisions on admissibility. I therefore consider it of great importance that it should be reversed by the present Court.

DISSENTING OPINION OF JUDGE FOIGHEL

In paragraph 45 of the judgment the majority stated, rightly, that the very purpose of the rule set out in Article 26 (the rule that domestic remedies should be exhausted before an application is brought in Strasbourg) is to ensure that the Contracting States are not denied the opportunity to put matters right through their own legal system.

In the case of Akdivar and Others v. Turkey it was stated in paragraph 69 (quoted in paragraph 44 of the present judgment):

> "69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism (see the above-mentioned Cardot judgment, p. 18, § 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see the above-mentioned Van Oosterwijck judgment, p.18, § 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

In the instant case, it is necessary to have regard to the factual context.

The applicant lived in the Netherlands from 1990 onwards. In the period between 1990 and 1995, his case was heard, investigated and decided at several levels, and by several administrative and judicial authorities, all of which would have had ample opportunity to rectify his situation if they had accepted that he had suffered any wrong.

Furthermore, nothing in his behaviour indicated that he wanted to deny the authorities the opportunity to put matters right through the Netherlands system. As stated in paragraph 23, his final appeal was declared inadmissible for the sole reason that he had not submitted his grounds for appeal within the time-limit set for that purpose – although he did so afterwards, and there is nothing to indicate that the competent authority was precluded (by pressure of time or some other reason) from taking cognisance of them.

That being so – and taking into account the applicant's personal circumstances – I cannot accept the Government's preliminary objection that the applicant had not complied with Article 26.

DISSENTING OPINION OF JUDGE MORENILLA

To my regret, I do not agree with the majority's conclusion that, since the applicant failed to exhaust domestic remedies before applying to the Commission, the Court cannot consider the merits of the case.

In its decision on the admissibility of the instant case the Commission expressed the view that "the application should not be declared inadmissible for non-exhaustion of domestic remedies taking into account the special circumstances which absolve the applicant from exhausting these remedies according to the correct procedures". Moreover, in its report the Commission concluded that the applicant's expulsion to Bangladesh would be in breach of Article 3 of the Convention, having regard to the risk of ill-treatment alleged by Mr Bahaddar.

The reasons that I have been stating in my dissenting opinions ever since the cases of Cardot v. France (judgment of 19 March 1991, Series A no. 200, p. 23) and Oberschlick v. Austria (judgment of 23 May 1991, Series A no. 204, p. 36) concerning the Commission's role in the admissibility issue, apply even more in the present case, because Mr Bahaddar, relying on Articles 2 and 3 of the Convention (see paragraph 35 of the judgment), bases his application on the ground that "the decision of the Netherlands authorities to expel him to Bangladesh would, if put into effect, expose him to a serious risk of being killed or ill-treated".

Furthermore, I consider that even on a strict interpretation of Article 26 of the Convention, the gravity of these circumstances and the procedural steps taken by the applicant before the Netherlands administrative and judicial authorities (see paragraphs 7–19 of the judgment) should have outweighed the technical procedural formalities that were taken into account by the majority when re-examining the Commission's decision, and that the Court should have taken cognisance of the merits.