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

CASE OF MAAOUIA v. FRANCE

(Application no. 39652/98)

JUDGMENT

STRASBOURG

5 October 2000

In the case of Maaouia v. France,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr GAUKUR JÖRUNDSSON,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr I. CABRAL BARRETO,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mrs N. VAJIC,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mr T. PANTÎRU,
Mr K. TRAJA,
Mr A. KOVLER,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 5 July and 13 September 2000,

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

PROCEDURE

1. The case originated in an application (no. 39652/98) against the French Republic 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 Tunisian national, Mr Nouri Maaouia ("the applicant"), on 30 December 1997.

2. The applicant alleged, in particular, that the length of proceedings he had brought on 12 August 1994 for the rescission of an exclusion order, which proceedings had ended with the judgment of the Aix-en-Provence Court of Appeal of 26 January 1998, had been unreasonable, contrary to Article 6 § 1 of the Convention.

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

4. The case was assigned to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 12 January 1999 the Chamber decided to adjourn the examination of the applicant's complaint concerning the length of the proceedings for rescission of the exclusion order (Article 6 § 1 of the Convention) and to declare the remainder of the application inadmissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

5. On 1 February 2000 the Chamber, composed of the following judges: Sir Nicolas Bratza, President, Mr J.-P. Costa, Mrs F. Tulkens, Mr W. Fuhrmann, Mr K. Jungwiert, Mr K. Traja and Mr M. Ugrekhelidze, and of Mrs S. Dollé, Section Registrar, decided to relinquish jurisdiction in favour of the Grand Chamber, none of the parties being opposed thereto (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. In a decision of 22 March 2000 [*Note by the Registry*. The Court's decision is obtainable from the Registry.] the Grand Chamber declared the remainder of the application admissible, while reserving the issue of the applicability of Article 6 § 1 of the Convention.

7. The applicant and the French Government ("the Government") each filed written observations on the merits of the case.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 5 July 2000.

There appeared before the Court:

(a) *for the Government*
Mr R. ABRAHAM, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs C. D'URSO, Head of the Human Rights Office,
Department of European and International
Affairs, Ministry of Justice,
Mr P. BOUSSAROQUE, administrative court judge,
on secondment to the Legal Affairs Department,
Ministry of Foreign Affairs, *Counsel*;

(b) *for the applicant*
Mr A. CHEMAMA, of the Nice Bar, *Counsel*.

The Court heard addresses by Mr Chemama and Mr Abraham.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, who was born in 1958 in Tunisia, entered France in 1980 at the age of 22. On 14 September 1992 he married a French national, an invalid whose disability had been assessed at 80%, with whom he had been living since 1983.

10. On 1 December 1988 the Alpes-Maritimes Assize Court sentenced the applicant to six years' imprisonment for armed robbery and armed assault with intent for offences committed in 1985. He was released on 14 April 1990.

11. On 8 August 1991 the Minister of the Interior made a deportation order against him. The order was served on the applicant, who had been unaware of its existence, on 6 October 1992, when he attended the Nice Centre for Administrative Formalities in order to regularise his status.

12. He refused to travel to Tunisia and was prosecuted for failing to comply with a deportation order. On 19 November 1992 the Nice Criminal Court sentenced him to one year's imprisonment and made an order excluding him from French territory for ten years. That decision was upheld on appeal by the Aix-en-Provence Court of Appeal on 7 June 1993. An appeal on points of law was dismissed by the Court of Cassation on 1 June 1994 on the ground that the applicant had failed to challenge the legality of the deportation order in the courts below.

13. On 22 July 1994 the applicant applied to the Criminal Cases Review Board of the Court of Cassation for a review of the criminal proceedings that had resulted in his being imprisoned for one year and banned from French territory for ten years. In a judgment of 28 April 1997, which was served on 22 September 1997, the Court of Cassation dismissed that application.

A. Proceedings before the administrative courts for an order quashing the deportation order made against the applicant

14. In December 1992 the applicant sought judicial review of the deportation order. In a judgment of 14 February 1994 the Nice Administrative Court quashed the deportation order of 8 August 1991, *inter alia*, on the ground that no notice had been served on the applicant requiring him to appear before the Deportation Board. That judgment became final on 14 March 1994 after being served on the Minister of the Interior.

B. Application for rescission of the exclusion order

15. On the strength of the administrative court's judgment of 14 February 1994 quashing the deportation order, the applicant applied to the Principal Public Prosecutor's Office at the Aix-en-Provence Court of Appeal on 12 August 1994 for rescission of the ten-year exclusion order made by the Nice Criminal Court on 19 November 1992. He contended that he was married to a French national and held a provisional residence permit.

16. In a letter of 6 July 1995 the applicant reminded the Principal Public Prosecutor's Office of the terms of his application for rescission. Noting that the application had been outstanding for some time, he asked the office to arrange for it to be heard and a ruling given. On 12 July 1995 the Principal Public Prosecutor's Office requested the Public Prosecutor's Office at the Nice *tribunal de grande instance* for its opinion on the merits of the application and any information that would assist the court in deciding whether the exclusion order should be rescinded. On 19 September 1995 Nice Central Police Station sent the Principal Public Prosecutor's Office the results of an inquiry concerning the applicant.

17. On 3 November 1997 the Principal Public Prosecutor's Office at the Court of Appeal informed the applicant that the case would be heard on 26 January 1998. On that date the Aix-en-Provence Court of Appeal granted the applicant's application and rescinded the exclusion order on the ground that the Nice Administrative Court had quashed the deportation order.

C. Steps taken by the applicant to regularise his immigration status

18. The applicant also sought to regularise his status with the immigration authorities. He initially obtained acknowledgment forms for applications for provisional residence permits (not work permits) for renewable three-month periods. On 4 September 1995, however, he was given a new three-month residence permit incorporating the right to seek employment.

19. On 14 September 1995 the applicant applied to the prefect for the Alpes-Maritimes *département* for a residence permit allowing him to live and work in France for a prolonged period, as he was married to a French citizen. On 9 April 1996 the applicant received notice of a decision dated 2 April 1996 refusing him a residence permit. He appealed to the Nice Administrative Court, but his appeal was dismissed on 27 September 1996.

20. The applicant appealed on 24 December 1996 to the Lyons Administrative Court of Appeal. On 29 August 1997 the President of that

court ordered the transfer of the file to the Marseilles Administrative Court of Appeal – the court with jurisdiction – where the case is currently pending.

21. On 21 July 1998 the applicant obtained a temporary residence permit valid for one year (from 13 July 1998 to 12 July 1999). Recently he obtained a ten-year residence permit with the right to seek employment.

II. RELEVANT DOMESTIC LAW

22. Article 27 of the Ordinance of 2 November 1945 as amended, concerning the conditions of entry and residence of aliens in France reads as follows:

> "Any alien who has evaded or attempted to evade the execution of an order refusing him leave to enter France, a deportation order or a removal order or who, having been deported or being subject to an exclusion order, re-enters the national territory without authorisation shall be liable to a term of imprisonment of from six months to three years.
>
> The same penalty may be imposed on any alien who fails to present to the relevant administrative authority travel documents enabling any of the measures mentioned in the first sub-paragraph to be executed or who does not have such documents and fails to supply the information necessary to allow such execution.
>
> The court may in addition issue an order banning a person so convicted from re-entering the territory for a period not exceeding ten years.
>
> A ban on re-entering the territory automatically entails the convicted person's removal from French territory, on completion of his prison sentence where appropriate."

23. Article 702-1 of the Code of Criminal Procedure reads as follows:

> "Any person subject to a ban, forfeiture or incapacity or any measure whatsoever by operation of law following a criminal conviction or imposed as an additional penalty on sentencing may request the court which convicted him, or, if more than one, the last court to convict him, to end all or part of it, including provisions relating to the length of such ban, forfeiture or incapacity. ..."

24. Article 703 of the Code of Criminal Procedure reads as follows:

> "Applications by convicted persons for the ending of a ban ... shall contain particulars of the date of conviction and the places where the applicant has been living since his conviction or release.
>
> Applications shall be sent to the Public Prosecutor's Office or, as the case may be, the Principal Public Prosecutor's Office, which shall obtain all relevant information and, if appropriate, the opinion of the judge responsible for the execution of sentences, and shall refer the application to the relevant court.

> The court shall decide applications in private after considering the submissions of the prosecution. It shall hear the applicant or his or her lawyer, but may decide the application in their absence provided due notice has been served on them to attend ...
>
> A reference to the order ending all or part of a ban, forfeiture or incapacity ... shall be entered on the judgment of the court of trial or retrial and the convicted person's criminal record."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicant complained in substance that the length of the proceedings which he had brought on 12 August 1994 for rescission of the exclusion order and which had ended with the decision of the Aix-en-Provence Court of Appeal of 26 January 1998 had been unreasonable, contrary to Article 6 § 1 of the Convention. The relevant part of that provision reads as follows :

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Applicability of Article 6 § 1

26. The Court must examine, firstly, whether Article 6 § 1 is applicable in the instant case. The Government submitted that it was not; the applicant disagreed.

1. Submissions of the parties

(a) The Government

27. The Government contended that Article 6 of the Convention was not applicable to the proceedings which the applicant had brought for rescission of the temporary exclusion order.

28. The Government argued, firstly, that the proceedings for rescission of the exclusion order did not concern a dispute (*contestation*) over civil rights and obligations. They did not deny the existence of a dispute, but maintained that no civil rights had been at stake. The exclusion order had been made against the applicant as a result of his failure to comply with an order for his deportation from France and the main issue, therefore, had been his right to stay in France. Accordingly, the measure was based on

public-order considerations that did not concern civil law. The Government pointed out that the Commission had consistently expressed the view that proceedings relating to the entry, stay and deportation of aliens were outside the scope of that Article in so far as it concerned disputes over civil rights and obligations, the reason being that the acts in issue in such proceedings were governed by public law and represented the exercise of public-authority prerogatives. The fact that deportation orders generally had pecuniary or family implications for those concerned could not suffice to bring them within the civil limb of Article 6 § 1, as that would mean that all measures concerning immigration control were caught by the scope of that provision since they produced similar consequences for those on whom they were imposed. The Government concluded that litigation relating to exclusion orders, like all litigation concerning immigration control, could not be a civil dispute for the purposes of Article 6 § 1 of the Convention.

29. The Government further pointed out that under the Commission's settled case-law, deportation and exclusion orders did not concern criminal charges or amount to punishment for the purposes of Article 6 of the Convention. The Government agreed with that analysis, which was based on the elementary observation that exclusion orders were not penalties, but administrative measures, even if, unusually, the legislature had assigned the task of making such orders to the criminal courts. Indeed, that observation was supported by the fact that under the laws of most States the administrative authorities were also competent to make such orders, the purpose being not to punish a specific act but to deter foreign nationals from further infringing the legislation on the entry and stay of aliens. The aim of exclusion orders was therefore essentially preventive. It was that special characteristic that made it possible to request the rescission of such orders, no equivalent remedy being available for criminal penalties in the strict sense. Referring to the criteria established by the Court's case-law for determining whether a particular penalty was criminal in character, the Government contended that it appeared clear that an exclusion order could not be regarded as a penalty or as criminal in character for the purposes of the Convention. It was a measure peculiar to immigration control and one far removed from the context of ordinary criminal proceedings.

30. The Government observed that in any event, however exclusion orders were classified, and even if they were classified as criminal penalties, it was common ground that proceedings for the rescission of such orders did not entail the court “determining” a criminal charge against the applicant. Such proceedings did not entail any decision by the relevant court on the

merits of the charge. The court did not decide whether the applicant was guilty of the offence forming the basis of the exclusion order. Indeed, the arguments generally relied on by applicants when seeking rescission of an exclusion order showed that the debate focused on the applicant's personal circumstances, which, by definition, did not concern the validity of the earlier conviction. The court to which the application for rescission was made merely had to decide whether or not it should remain in effect. Indeed, when applications for rescission were lodged, the applicant was no longer a "person charged" since such applications were precluded unless the conviction had become final. Therefore applications for rescission of exclusion orders did not concern the penalty itself, but its enforcement. That observation had, moreover, led the Commission to express the opinion that the criminal limb of Article 6 § 1 was not applicable to disputes concerning applications for the rescission of such orders.

31. The Government concluded by asking the Court to hold that Article 6 § 1 of the Convention was inapplicable in the instant case.

(b) The applicant

32. The applicant referred to the facts of the case and the various steps and procedures he had taken before the domestic courts in order to obtain the right to reside in France. He submitted that having regard, in particular, to the effects that the proceedings in issue had had on his family life, Article 6 § 1 of the Convention should be applicable.

2. The Court's assessment

33. The Court notes, firstly, that the Government have not denied the existence of a dispute (*contestation*) within the meaning of Article 6 § 1. However, they maintained that the dispute in question did not concern the determination of the applicant's civil rights or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.

34. The Court points out that, under its case-law, the concepts of "civil rights and obligations" and "criminal charge" cannot be interpreted solely by reference to the domestic law of the respondent State. On several occasions, the Court has affirmed the principle that these concepts are "autonomous", within the meaning of Article 6 § 1 of the Convention (see, among other authorities, the König v. Germany judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89; the Baraona v. Portugal judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42; and the Malige v. France judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2935, § 34). The Court confirms those principles in the instant case, as it considers that any other solution might lead to results that are

incompatible with the object and purpose of the Convention (see, *mutatis mutandis*, the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 34, § 81, and the König judgment cited above, pp. 29-30, § 88).

35. The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention (see, for example, Uppal and Singh v. the United Kingdom, application no. 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149; Bozano v. France, application no. 9990/82, Commission decision of 15 May 1984, DR 39, p. 119; Urrutikoetxea v. France, application no. 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151; and Kareem v. Sweden, application no. 32025/96, Commission decision of 25 October 1996, DR 87-A, p. 173).

36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...". Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

> "6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...
>
> 7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be

brought within the purview of the system of control provided for in the ... Convention ...

...

16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."

37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

38. In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a "civil right" for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (see, *mutatis mutandis*, the Neigel v. France judgment of 17 March 1997, *Reports* 1997-II, pp. 410-11, §§ 43-44, and the Maillard v. France judgment of 9 June 1998, *Reports* 1998-III, pp. 1303-04, §§ 39-41).

39. The Court further considers that orders excluding aliens from French territory do not concern the determination of a criminal charge either. In that connection, it notes that their characterisation within the domestic legal order is open to different interpretations. In any event, the domestic legal order's characterisation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account (see Tyler v. the United Kingdom, application no. 21283/93, Commission decision of 5 April 1994, DR 77, pp. 81-86). On that subject, the Court notes that, in general, exclusion orders are not classified as criminal within the member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either (see, *mutatis mutandis*, Renna v. France, application no. 32809/96, Commission's decision of 26 February 1997, unreported).

40. The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.

41. Consequently, Article 6 § 1 is not applicable in the instant case.

FOR THESE REASONS, THE COURT

Holds by fifteen votes to two that Article 6 § 1 of the Convention is not applicable.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 October 2000.

Luzius WILDHABER
President

Michele DE SALVIA
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 Rozakis;

(b) concurring opinion of Mr Costa joined by Mr Hedigan and Mr Pantîru;

(c) concurring opinion of Sir Nicolas Bratza;

(d) dissenting opinion of Mr Loucaides joined by Mr Traja.

L.W.
M. de S.

CONCURRING OPINION OF JUDGE ROZAKIS

I have voted in favour of a non-violation of Article 6 § 1 of the Convention in this case, but on the basis of a reasoning that differs from the one of the majority of the Court. My approach is very close to the one followed by Judge Costa in his concurring opinion, appended to the text of the judgment, both with regard to his interpretation of Article 1 of Protocol No. 7 and his assessment that the exclusion order constitutes, under the French legal system, an ancillary penalty to the main sanction of imprisonment imposed on a person refusing to comply with a deportation order. My conclusion that Article 6 § 1 is not applicable in the circumstances of this case, despite the fact that the impugned sanction is of a criminal nature, is founded on the consideration that the proceedings for the rescission of the deportation order are not criminal, i.e. they do not determine a criminal charge. Indeed, it seems to me, that they do not belong to the phase of the determination of a criminal charge, but to the phase of the execution of the sanction imposed; and consequently, following Strasbourg's constant case-law, are outside the ambit of protection of the Convention's guarantees.

CONCURRING OPINION OF JUDGE COSTA JOINED BY JUDGES HEDIGAN AND PANTÎRU

(Translation)

I voted in favour of the operative provision of the judgment. I wish, however, to express my disagreement with the reasoning (on two counts) and a regret of a more general nature.

1. The basis for the judgment (contained in paragraphs 36 and 37) is Article 1 of Protocol No. 7, which was adopted on 22 November 1984. Considering that provision as expressing the States' intention to exclude expulsion proceedings from the scope of Article 6 § 1 of the Convention, as borne out by the explanatory report, the Court inferred that Article 6 § 1 was not applicable in the instant case, at least not in its "civil" branch.

2. I do not find that reasoning persuasive. The provision relied on affords aliens affected by expulsion measures a substantive guarantee (expulsion orders must be made in accordance with the law), and three procedural guarantees: the right to put forward the reasons why they should not be expelled, the right to have their case examined and, lastly, the right to representation to that end before the relevant authority. However, those guarantees concern *expulsion*, and then only of aliens who are lawfully resident in the territory. Yet, here, the measure in respect of which Mr Maaouia prays in aid Article 6 § 1 is not the expulsion of a lawfully resident alien but, as indicated in paragraph 25 of the judgment, an application for the rescission of an exclusion order made against him by the criminal courts because he had failed to comply with a deportation order and was, on the contrary, unlawfully present in France. In other words, even supposing that Article 1 of Protocol No. 7 constitutes the *lex specialis* that, in principle, operates as an exception to the *lex generalis* constituted by Article 6 of the Convention, it still has to be shown that the *lex specialis* was applicable in the present case. I do not consider that it was, as the applicant did not seek to rely before the Court on the guarantees to which he should have been entitled on deportation.

3. In paragraph 39 of the judgment, the Court examines the nature of exclusion orders in law. It concludes that, since their role is essentially a preventive one, they are not penal in character such that neither they, nor applications for their rescission, may relate to the determination of a criminal charge.

4. I find that analysis surprising, too. To my mind, exclusion orders, which the criminal courts may (without obligation) add to a term of imprisonment for a criminal offence, constitute an *ancillary penalty* and thus come within the criminal law. Admittedly, they are both preventive and punitive in character, but do not criminal penalties always have that dual

purpose: to punish the offender and to deter him from reoffending? Moreover, I have some difficulty in detecting any consistency between the reasoning followed here and the main body of the Court's case-law. I fail to see how it is possible to reconcile classifying exclusion orders as administrative with the Court's decisions that the following are penal in nature: tax surcharges for bad faith (see the Bendenoun v. France judgment of 24 February 1994, Series A no. 284), a confiscation order made on imposing a term of imprisonment (see the Welch v. the United Kingdom judgment of 9 February 1995, Series A no. 307-A), an order for imprisonment in default of payment of a fine (see the Jamil v. France judgment of 8 June 1995, Series A no. 317-B), or the deduction of points from a driver's driving licence (see the Malige v. France judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII). I conclude from the above that exclusion orders should, in principle, be classified as part of the criminal law and thus come within the scope of Article 6 § 1.

5. I agree, however, that that provision was not applicable in the instant case. For what reason? The answer is that Article 6 § 1 is applicable when a court determines "any criminal charge" against a person who relies on that provision. Is it possible to maintain that a person who seeks rescission of an exclusion order is asking the Court to hold that the charge forming the basis of the order was unfounded? That seems to me to be a very wide, indeed artificial, interpretation. The aim of proceedings for the rescission of exclusion orders is not to have the penalties imposed by the criminal courts quashed. Such proceedings do not take the form of an appeal, an appeal on points of law or even an application for judicial review. Their aim is to persuade the trial court (in this case the court of appeal) to discontinue, for reasons of humanity, the effects of the exclusion order, but not to call into question either the operative provision or the reasoning contained in the judgment. This is illustrated in the instant case by the fact that Mr Maaouia had unsuccessfully challenged the exclusion order imposed by the court of appeal both on appeal to the Court of Cassation and by an application for judicial review. The exclusion order was therefore irrevocable and its validity was not called into question by the judgment of the same court which, ultimately, granted the applicant's request for rescission. It is for that reason that I was bound, not without regret, to vote in favour of the operative provision and to hold that, as Article 6 § 1 was inapplicable, it could not have been infringed.

6. I would like, in finishing, to express a regret, namely that exclusion orders exist. In my opinion, they constitute double punishment, not of course within the meaning of the *non bis in idem* rule, reflected in Article 4 of Protocol No. 7 cited above, as there is nothing in the Convention to prevent a court imposing both a substantive and an ancillary penalty for the same offence. It is nonetheless double punishment in the humane sense of

the term. Although already deprived in general of all the guarantees afforded nationals (see also paragraph 38 of the judgment), aliens who seek to avoid the consequences of deportation orders are liable by statute to a term of up to three years' imprisonment. Is it also necessary to impose statutory banishment on them? I should like to repeat what Mrs Tulkens and I said in our joint dissenting opinion in *Baghli v. France* (no. 34374/97, ECHR 1999-VIII), which concerned Article 8 of the Convention: this statutory increase in the debt which aliens owe to society does not appear necessary, to me, in a democratic society.

CONCURRING OPINION OF Sir Nicolas BRATZA

I agree that Article 6 § 1 of the Convention was not applicable in the present case but cannot fully share the reasoning in the judgment of the Court or in Judge Costa's concurring opinion.

In general, I can agree that proceedings which exclusively concern decisions of administrative authorities to refuse leave to an alien to enter, to impose conditions on an alien's leave to stay or to deport or expel an alien, do not involve the determination of the "civil rights and obligations" of the alien. In this regard, I see no reason to depart from the constant case-law of the Commission that, because of the substantial discretionary and public-order element in such decisions, proceedings relating to them are not to be seen as determining the civil rights of the person concerned, even if they inevitably but incidentally have major repercussions on his private and family life, prospects of employment, financial position and the like. Some support for this view is, as the Court points out, to be found in the Article 1 of Protocol No. 7. While I agree with Judge Costa that justification for the non-applicability of Article 6 cannot be found in the Protocol alone, I consider that the provisions of Article 1 of the Protocol at least serve to confirm the understanding of the Contracting Parties, based on the Commission's case-law, that decisions to deport a person do not in general involve a "determination of civil rights and obligations" so as to attract the procedural guarantees provided by Article 6.

It is true that, as emphasised by Judge Costa, the proceedings in question in the present case concerned not a deportation order as such but an exclusion order. It is also true that the proceedings concerned not the making of the exclusion order but an application to rescind an order which had already been made not by an administrative authority but by a court. However, neither point leads me to conclude that the Commission's constant case-law should not be applied or to find that there the proceedings involved a determination of the applicant's "civil rights and obligations". There was in my view a close relationship between the deportation order made by the Minister of the Interior and the exclusion order, the latter being dependent on the refusal of the applicant to comply with the former. Moreover, the proceedings to rescind the order and thereby regularise the applicant's immigration status in France must be seen as related to the "stay" of an alien and as falling within the established case-law, notwithstanding the fact that the decision to rescind can only be taken by a court.

I can further accept that an administrative decision to deport an alien, even if taken on the grounds that the continued presence of the alien was undesirable because of his suspected involvement in criminal activities, would not in general involve "the determination of a criminal charge" for the purposes of Article 6.

However, the situation would be different if the order for deportation were made by a court following a conviction for a criminal offence and formed an integral part of the proceedings resulting in the conviction. In such a case, the procedural guarantees of Article 6 would clearly apply to the criminal proceedings as a whole, whether or not the deportation order which resulted was to be regarded as a penalty or as having an exclusively preventative function. The same is true of the making of an exclusion order following the applicant's conviction for refusing to comply with the deportation order made against him: the proceedings leading to imposition of the order were required to comply with Article 6 of the Convention, whether the order is to be regarded as a penalty or as essentially a preventive measure.

However, as correctly pointed out by Judge Costa, in the present case the impugned proceedings were not the proceedings which resulted in the applicant's conviction and the making of the order – these concluded when the applicant's appeal was dismissed by the Court of Cassation on 22 September 1997 – but separate proceedings for the rescission of the order. Although these proceedings took place in accordance with Article 702-1 of the Code of Criminal Procedure before the court which had convicted the applicant, they did not entail a re-examination of the merits of the charge that led to the exclusion order being imposed; nor can they be seen as an appeal against the making of the exclusion order. In these circumstances, they did not in my view involve a "determination of ... any criminal charge" against the applicant.

Consequently, Article 6 of the Convention is not applicable in the present case.

DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGE TRAJA

The present case concerns a complaint that the length of the proceedings brought by the applicant for rescission of an exclusion order excluding him from French territory for ten years as a result of a criminal conviction had been unreasonable contrary to Article 6 § 1 of the Convention. The Court had to decide as a preliminary issue the question whether the proceedings under examination concerned the determination of a "civil right" for the purposes of Article 6 § 1.

It is common ground that the proceedings for rescission of the exclusion order concern a dispute (*contestation*). However, it was argued by the Government and accepted by the Court that the proceedings in question did not fall within the ambit of Article 6 § 1 of the Convention because they did not concern any "civil rights" as envisaged by that Article. I disagree with this finding.

In the past, the case-law of the Commission and the Court followed a restrictive approach regarding the concept of "civil rights and obligations". There never was any definition of these terms, with the result that the case-law led to uncertainty as to their meaning and the solutions given were not based on common and consistent criteria. This was due to the assumption that the word "civil" restricted the scope of the rights and obligations intended to be covered by the judicial guarantees of Article 6 § 1. No attempt was made to pay sufficient attention to the legal history which led to the drafting of Article 6. Moreover, although the Court has adopted an extensive and dynamic interpretation of many provisions of the Convention, even going so far as to extend by implication the scope of a right (a method applied in respect of Article 6 itself leading to the finding that the right of access to a Court is inherent in the rights stated by this Article[1]), both the Court and the Commission have shown great reluctance to interpret in a liberal way the concept of "civil rights and obligations".

According to Article 31 of the Vienna Convention on the Law of Treaties,

> "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

What gives rise to a problem of interpretation in this case is the use of the word "civil" in describing the "rights and obligations" covered by the guarantees of Article 6 § 1. It was assumed that by the use of that word the drafters of the Article intended to confine the rights and obligations in

question only to those falling within the domain of private law. I do not agree with this approach, which I believe is incompatible with the wording of Article 6 § 1 when examined in its context and in the light of the object and purpose of the Article.

I believe that the word "civil" when examined in the context in which it appears, has the meaning of "non-criminal". Once the term "criminal charge" was used – inevitably for technical reasons – another term intended to cover the rest of the adjudicative procedures distinguishing them at the same time from the criminal procedures would also have to be used. The word "civil" seems appropriate to achieve this purpose.

However, even if there are doubts about this conceptual approach, I think that it could reasonably be said that the word "civil" is at least capable of having the meaning just pointed out, in which case it should not be limited only to private-law disputes[2]. I believe that if a term allows more than one interpretation, the one which enhances individual rights is more in line with the object and purpose of the Convention and should always be preferred. Even the Court in following its restrictive approach has felt the need to extend the application of the terms "civil rights and obligations" to matters that do not ordinarily belong to the sphere of private law. For instance, the Court held that a dispute between an applicant and a public authority concerning the grant of a licence to which the applicant claimed to be entitled was a determination of a civil right in spite of the applicability of rules of public law in such cases[3]. One could add here the examples of claims for social security and social assistance[4], for a judge's pension[5], etc. Generally, the trend of the Court has been to include more and more situations within the terms "civil rights and obligations", even though such situations cannot be explained by reference to the criterion of private law. In fact, the Court's reasoning and the distinctions adopted in such cases appear artificial.

At any rate, taking into account the object and purpose of Article 6 § 1, combined with the context of the words under consideration, as dictated by the primary rule of interpretation of treaties mentioned above, it becomes quite clear that the term "civil" should be interpreted as covering all other legal rights which are not of a criminal nature. If this teleological

interpretation is not adopted, then the object and purpose of Article 6 § 1 would be frustrated[6]. It is, I believe, evident that the object and purpose of Article 6 was to ensure, through judicial guarantees, a fair administration of justice to any person in the assertion or determination of his legal rights or obligations. It would be absurd to accept that the judicial safeguards were intended only for certain rights, particularly those between individuals, and not for all legal rights and obligations, including those *vis à vis* the administration, where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State. In other words, it is inconceivable for a Convention which, according to its Preamble, was intended to safeguard "those fundamental freedoms which are the foundation of justice ... in the world" and implement the principle of "the rule of law"[7] to provide for a fair administration of justice only in respect of certain legal rights and obligations, but not in respect of rights concerning relations between the individual and the State. It is, I think, pertinent in this respect to quote the following passage from the judgment of the Court in the case of Klass and Others v. Germany (judgment of 6 September 1978, Series A no. 28, pp. 25-26, § 55).

> "The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantee of independence, impartiality and a proper procedure."

On the basis of the above, I find that the words "civil rights and obligations" should be given the broadest possible meaning which, in accordance with their context and in the light of the object and purpose of the Convention, should extend to all legal rights and obligations of the individual whether *vis à vis* other individuals or *vis à vis* the State. Good faith, another factor relevant to interpretation under the Vienna Convention on the Law of Treaties, also supports this approach, which is also consistent with European law generally.

Having reached a conclusion regarding the meaning of the words in issue on the basis of the considerations set out above, it is not necessary to resort to supplementary means of interpretation such as the *travaux préparatoires* on the Convention, etc. However, even if one had to have recourse to the

legal history of Article 6 § 1, it seems that such history points in the direction of the above interpretation[8].

The applicant in the present case sought rescission of the temporary exclusion order affecting him on the basis of the relevant provisions of French legislation and relying on the fact that he was married to a French national and that he held a provisional residence permit. Rescission of an exclusion order as claimed by the applicant is an available legal remedy in France. Therefore, the applicant's claim concerned the determination of a "civil" right.

The majority, in support of their position that the present case did not concern the determination of a "civil right" for the purposes of Article 6 § 1, referred to the fact that the European Commission of Human Rights "has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention". To my mind, the reference by the Court to the Commission's jurisprudence without any analysis of the reasoning of such jurisprudence and the grounds for its adoption by the Court itself on a question on which the Court was expected to indicate its own legal approach is not by itself convincing.

The Court however proceeded further and relied decisively on the fact that Article 1 of Protocol No. 7 contains procedural guarantees applicable to the expulsion of aliens. According to the majority, these guarantees taken together with the reference, in the preamble to this Protocol, to the decision to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ..." show "that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere". In support of that construction, the majority quoted passages from the explanatory report on Protocol No. 7 including the following:

> "16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."

The majority then concluded that "by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States *clearly intimated their intention not to include*

those procedures within the scope of Article 6 § 1 of the Convention" (emphasis added).

In response to the above position of the majority, I state the following:

(a) Special provisions in a Protocol providing certain minimum procedural rights regarding persons who become the object of expulsion cannot reasonably be interpreted as limiting or derogating from any human rights and fundamental freedoms of those persons if such rights are already safeguarded by the Convention. Protocols add to the rights of the individual. They do not restrict or abolish them. Article 53 of the Convention provides: "*Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*" In the light of that provision, it would be strange to find that later additions to the Convention in the form of Protocols, which are part and parcel of the Convention, were intended to qualify or abolish rights which, I believe (as explained above), were provided in the main body of the Convention.

(b) The special provisions under Article 1 of Protocol No. 7 furnish additional special protection for the persons liable to be expelled. The wording and purpose of these provisions clearly refer to procedural guarantees *vis à vis* the *administrative* authorities which do not in any way affect any *judicial* guarantees that such persons may already have under the Convention. The provisions in question do not refer to Article 6 and cannot limit its scope and effect as they appear from its wording and purpose as explained above.

(c) The statement in the preamble to Protocol No. 7 regarding the decision to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention" cannot possibly mean that the procedural administrative guarantees in question were provided because the persons intended to benefit from them were not entitled to judicial guarantees in the assertion or determination of their rights and obligations. Both guarantees can coexist because they serve different purposes.

(d) It is not, I think, reasonable to assume that an explanatory report on Protocol No. 7, which includes a statement to the effect that Article 1 of Protocol No. 7 "does not affect" the interpretation of Article 6 as per the decision of the Commission in application no. 7729/76, amounts to an endorsement by the drafters of the Protocol of that interpretation or an intention on their part to maintain it or prevent the development of the

jurisprudence by the Court on the same subject. Moreover, such report cannot imply (as the majority asserts) that Article 1 of Protocol No. 7 was adopted because the High Contracting Parties wished to take special measures in the sphere of expulsion of aliens, being "aware that Article 6 § 1 did not apply to procedures" in that sphere. There is nothing in the text of Article 1 of Protocol No. 7 which supports such a conclusion. Furthermore, there is nothing in the nature of the special minimum guarantees provided thereunder that may indicate that they were meant to fill a gap resulting from the lack of judicial guarantees in Article 6 in the field of the expulsion of aliens. As already pointed out above, Article 1 of Protocol No. 7 was aimed at the establishment of a protection *vis à vis* the administration which in any case could not serve as a substitute for the judicial guarantees of Article 6 or even minimise the negative effects resulting from the absence of the latter. The protection in question may very well be supplementary to the judicial guarantees of Article 6.

For all the above reasons, I find that Article 6 § 1 is applicable in the instant case.

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1. See Golder v. the United Kingdom, judgment of 21 February 1975, Series A no. 18.
2. It is interesting to recall here the statement made by the President of the Commission, Sir James Fawcett, as its representative before the Court in the König v. Germany case (Series B no. 25, p. 179): "I submit that there are choices here of judicial policy on the part of the Court in the interpretation of Article 6."
3. See Benthem v. the Netherlands, judgment of 23 October 1985, Series A no. 97.
4. See Feldbrugge v. the Netherlands, judgment of 29 May 1986, Series A no. 99.
5. See Francesco Lombardo v. Italy, judgment of 26 November 1992, Series A no. 249-B, pp. 26-27, § 17.
6. In its case-law the Court underlined on several occasions the decisive role of the object and purpose of the Convention in interpreting its provisions. See, for example, the König v. Germany judgment of 28 June 1978 (Series A no. 27), where in paragraph 88 the Court stated: "... any other solution might lead to results incompatible with the object and purpose of the Convention."
7. See the Golder judgment cited above, p. 17.
8. See, in particular, Pieter van Dijk, "The interpretation of 'civil rights and obligations' by the European Court of Human Rights – one more step to take", in *Protecting Human Rights: The European Dimension*, Studies in honour of Gerard J. Wiarda, pp. 131 et seq.