FORMER SECTION II

CASE OF SEZEN v. THE NETHERLANDS

(Application no. 50252/99)

JUDGMENT

STRASBOURG

31 January 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sezen v. the Netherlands,

The European Court of Human Rights (Former Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 September 2004 and 5 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 50252/99) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Mevlut Sezen and Mrs Emine Sezen-Oğuz ("the applicants"), on 21 May 1999.

2. The applicants were represented by Mrs R. Niemer, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mrs J. Schukking, of the Ministry of Foreign Affairs.

3. The applicants alleged that the refusal to allow the first applicant to reside in the Netherlands was in breach of Article 8 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 14 September 2004, the Court declared the application admissible.

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

7. On 15 November 2004 the Government replied to a number of questions put by the Court (Rule 59 § 1). The applicants did not avail

themselves of the opportunity to submit comments on the Government's reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1966 and 1972 respectively and live in Amsterdam.

9. The first applicant entered the Netherlands in October 1989. From his relationship with the second applicant, who has been lawfully residing in the Netherlands since the age of seven and holds a permanent residence permit (*vestigingsvergunning*), a child, Adem, was born on 27 June 1990. The applicants married on 25 October 1990. One month later, the first applicant filed a request for a residence permit for the purposes of forming a family unit (*gezinsvorming*) with his wife and working in the Netherlands. This permit was granted on 12 February 1991. On 24 January 1992 the first applicant acquired the right to remain in the Netherlands indefinitely *ex jure* pursuant to Article 10 para. 2 of the Aliens Act 1965 (*Vreemdelingenwet 1965*).

10. On 31 July 1992 the first applicant was arrested and placed in detention on remand. The Regional Court of Amsterdam convicted the first applicant on 20 January 1993 of participating in an organisation aimed at committing offences and of being a co-perpetrator (*medepleger*) of intentionally being in the possession of about 52 kilos of heroin, committed on or around 31 July 1992. The first applicant was sentenced to four years' imprisonment. In respect of the determination of this sentence, the Regional Court held as follows:

> "... in the decision to impose a sentence involving a deprivation of liberty and the duration thereof, the Regional Court is in particular taking account of the fact that the accused has for a long time let his house be used as a safe house for quantities, of considerable size and suitable for further distribution, of a substance harmful to public health, so that only a prison sentence of considerable duration is appropriate."

The first applicant was released on 11 April 1995. He went back to live with his wife and child and found a job.

11. Due to marital problems, the applicants did not live together for some time in 1995/1996. On 28 November 1995 the first applicant's name was removed from the municipal register as living at the same address as his spouse. He was registered as once again living in the matrimonial home on 25 June 1996.

12. On 14 May 1996 both applicants went to the Aliens' Police Department as they were going to resume cohabitation and wanted to prolong the first applicant's residence permit. However, an official at that Department told them it would be better if the first applicant applied for an independent residence permit. For that reason, an application was made for prolongation of the first applicant's residence permit or for an amendment of the restrictions attached to that permit so that it would enable him to reside in the Netherlands for the purpose of working in salaried employment without being required to live with his spouse.

13. On 14 October 1996 a second child, Mahsun, was born to the applicants. Both children have Turkish nationality.

14. The Deputy Minister of Justice (*Staatssecretaris van Justitie*) informed the first applicant on 7 March 1997 of her intention to impose a ten-year exclusion order on him by declaring him an undesirable alien (*ongewenst vreemdeling*). The first applicant was invited to submit his views on the matter. By letter of 24 March 1997 the first applicant declared that he would never again do anything wrong and asked to be given a second chance.

15. The Deputy Minister rejected the request for prolongation of the residence permit on 5 June 1997. According to the Deputy Minister, the first applicant had lost his indefinite right to remain on 28 November 1995 when he had ceased to cohabit with his wife. The fact that the spouses had in the meantime resumed cohabitation did not have the effect of reviving this right *ex jure*. Although Netherlands policy provided that aliens, following the dissolution or breakdown of their marriage on the basis of which they had acquired an indefinite right to remain, could under certain circumstances, relating to the duration of the marriage, be eligible for an independent residence permit, the prolongation of a residence permit could also be refused on general interest grounds. In view of the first applicant's criminal conviction of 20 January 1993, the Deputy Minister considered that it was justified to deny the first applicant further residence and to impose a ten-year exclusion order. The interference with the first applicant's right to respect for his family life was held to be justified in the interests of public order and for the prevention of crime. Having regard to the seriousness of the offences committed by the first applicant and the duration of the prison sentence imposed on him, the Deputy Minister concluded that the interests of the State outweighed those of the first applicant.

16. The first applicant filed an objection (*bezwaar*) against this decision. It was rejected on 19 March 1998 by the Deputy Minister who adopted the advice issued by the Advisory Board on Matters Concerning Aliens (*Adviescommissie voor Vreemdelingenzaken*). This Board was of the opinion that the first applicant's request should be considered as a request for an independent residence permit (*onafhankelijke verblijfsvergunning*) in view of

the fact that the right to remain indefinitely, pursuant to Article 10 § 2 of the Aliens Act 1965, did not constitute a residence permit which was eligible for prolongation or for amendment of the restrictions attached to it. The Board further considered, notwithstanding the fact that the first applicant had moved back to the matrimonial home after a separation of six or seven months, that the breakdown of the applicants' marriage had been of a permanent nature given the duration of the separation and the first applicant's request for an independent residence permit which did not require him to cohabit with his wife. Therefore, the question to be examined was whether, at the time of losing the indefinite right to remain, the first applicant had been eligible for continued residence (*voortgezet verblijf*).

17. Having regard to the first applicant's criminal conviction, which implied that he had violated public order, the Board considered that the request for a residence permit should be refused and an exclusion order imposed. It saw no merit in the first applicant's expressions of regret nor in his arguments to the effect that his wife and two children resided in the Netherlands and that he had been working in the Netherlands since 21 June 1995. In this connection the Board, referring to the duration of and the reasons for the prison sentence as set out in the judgment of the Regional Court of 20 January 1993, had regard to the nature and seriousness of the offence of which the first applicant had been convicted. The Board did not consider that the period of time between the conviction and the imposition of the exclusion order was so long that for that reason alone the authorities ought to refrain from taking that measure. In this respect it was borne in mind that the first applicant had held an indefinite right to remain from 24 January 1992 until 28 November 1995 which, pursuant to the policy in force, stood in the way of an exclusion order being imposed.

Finally, as far as the first applicant's rights under Article 8 § 1 of the Convention were concerned, the Board considered that the interests of the State outweighed those of the first applicant.

18. The first applicant filed an appeal against this decision with the Regional Court (*arrondissementsrechtbank*) of The Hague, sitting in Amsterdam. He argued, *inter alia*, that there had not been any breakdown of his marriage, let alone one of a permanent nature. The spouses had merely not cohabited for a number of months because of marital problems; however, the first applicant had remained in contact with his wife. Moreover, during this time their child Mahsun had been conceived. The first applicant was gainfully employed, did not constitute a threat to public order and he had extricated himself from the criminal circles in which he had previously been involved. In the view of the first applicant, it was unreasonable to deny him continued residence and to impose an exclusion order on him more than four years after his criminal conviction.

19. In its judgment of 12 November 1998 the Regional Court agreed with the Deputy Minister that the applicants' actual close family ties (*feitelijke gezinsband*) had been severed as a result of their temporary separation and that as a result the first applicant had lost his indefinite right to remain. It upheld the Deputy Minister's decision in so far as the denial of continued residence was concerned. Having regard to the nature of the offence of which the first applicant was convicted and the length of the prison sentence imposed, the Regional Court considered that the interference with the applicants' right to respect for family life was necessary in the interests of the protection of public order. In respect of the exclusion order, which denied the first applicant the right to visit the Netherlands even for short periods, the Regional Court quashed the impugned decision. It found that insufficient weight had been accorded to the interests of the applicants and their children. Thus, no attention had been given to the consequences which the exclusion order would have for the applicants and their children, both in the case where the other family members would follow the first applicant to Turkey and in the case where they would remain in the Netherlands. In this connection the Regional Court noted that the children, who had close links with the Netherlands as they had been residing there since their birth, might at this stage of their lives have a great need for regular contacts with their father within their own surroundings (*levenssfeer*), and not exclusively abroad. The exclusion order rendered such contacts – including occasional contacts – impossible.

20. On 6 May 1999 the Deputy Minister decided anew on the first applicant's objection in so far as this concerned the exclusion order. She declared the objection well-founded and lifted the exclusion order.

21. The first applicant has not reoffended and has been in paid employment ever since his release from prison.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. At the time relevant to the present application, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1965 (*Vreemdelingenwet 1965*). On 1 April 2001 a new Aliens Act entered into force but this has no bearing on the present case.

23. Aliens married to a Netherlands national, a recognised refugee or a holder of a permanent residence permit acquired, after one year of legal residence, *ex jure* an indefinite right to remain pursuant to Article 10 § 2 of the Aliens Act 1965. This right expired *ex jure* when the alien no longer actually formed part of his or her spouse's family unit. If the married couple ceased, other than temporarily, to live together, this was indicative of a breakdown in family relations even if the marital bond was preserved. The

residence permit was not automatically reinstated if the actual close family ties were later restored. The alien could, however, apply for a new one, for the purposes of residence with his or her spouse, or for a residence permit in his or her own right.

24. Under the policy laid down in chapters A4/4.3.2 and A5/6 of the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire 1994*), an alien who has been given a custodial sentence by a Dutch or foreign court (at least part of which sentence was not suspended), by a judgment that has become final and conclusive, for intentionally committing a crime punishable by a custodial sentence of three years or more, could be refused permission for continued residence in the country. Underlying this policy is the principle that the longer an alien has lawfully resided in the Netherlands, the more serious a crime has to be before it may justify refusing continued residence; the authorities thus apply a "sliding scale" (*glijdende schaal*). The seriousness of a crime is determined on the basis of the sentence attached to it. To determine whether an alien may be refused permission for continued residence, the length of the sentence imposed is compared to the length of time that the alien had been living in the Netherlands when he or she committed the crime.

25. In accordance with this policy, an alien who, at the time of committing the offence, had been residing lawfully in the Netherlands for less than three years – like the first applicant in the present case – would be refused permission for continued residence if he or she was sentenced to an unsuspended prison sentence of more than nine months.

26. An alien who has been sentenced by a final and conclusive judgment for an offence intentionally committed, punishable by a term of imprisonment of three years or more, was also liable to an exclusion order (Article 21 of the Aliens Act 1965). A person upon whom an exclusion order has been imposed is not allowed, for as long as the order is in force, either to reside in the Netherlands or to visit it.

27. Continued residence could not be refused to, and an exclusion order not imposed on, aliens with an indefinite right to remain pursuant to Article 10 § 2 of the Aliens Act 1965.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Arguments of the parties

1. The applicants

28. The applicants complained that, as a result of the decision not to allow the first applicant to continue residing in the Netherlands, he was unable to exercise family life with the second applicant and their children in that country. They invoked Article 8 of the Convention which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ..."

29. The applicants emphasised that there had been no breakdown, let alone one of a permanent nature, of their marriage – they had merely not cohabited for a period of six to seven months. In this context they pointed to the fact that their second child had been conceived during this period. They had been harmoniously living together with their children following their reconciliation and the resumption of cohabitation. It was also not the case that the first applicant had applied for an independent residence permit because he no longer wanted to live with his wife. On the contrary, the applicants had gone to the Aliens' Police Department together, in order to apply for a residence permit allowing the first applicant to reside with his wife, and it was a police officer who had told them it would be better for the first applicant to seek a permit in his own right.

30. Whilst conceding that the first applicant had committed a serious offence in that he had given a third person the opportunity to store narcotic substances at his home, the applicants argued that that was now more than twelve years ago and, as the first applicant had not re-offended, there was thus no question of a present threat to public order. Following his conviction and after having served his sentence, the first applicant had rebuilt his life, finding a job two months after his release with a firm by whom he continued to be employed. According to the applicants, they had had no reason to suppose that the first applicant would not be in a position to continue his family life in

the Netherlands. However, more than four years later, the Netherlands authorities had decided he should leave the country.

31. The applicants further denied that the second applicant had had any knowledge of the offence committed by her husband. At the time of the offence, she had been on a two-week holiday with her son. She had never been questioned by police, either as a suspect or as a witness.

32. As to the possibility of the second applicant and the children following the first applicant and establishing family life in Turkey, the applicants pointed out that the second applicant had been living in the Netherlands since the age of seven and that she no longer had any family in Turkey. The applicants' two children had been born and were being brought up in the Netherlands. They did not speak Turkish: their parents being of Kurdish origin, they knew only Kurdish and Dutch.

33. As a final point, the applicants submitted that, although the Government had stated that the first applicant's expulsion was not permanent, no indication had been given as to how long it would last and when the first applicant might be allowed to return.

2. The Government

34. The Government submitted that the decision to deny the first applicant continued residence in the Netherlands was necessary in a democratic society and was proportionate. Referring to the guiding principles for cases of this nature as established by the Court (*Boultif v. Switzerland*, no. 54273/00, § 48, ECHR-2001), they argued that the first applicant had been convicted of an extremely serious drug offence, of the kind that creates a sense of unease and insecurity in society. The Government added that drug offences are regarded both nationally and internationally as a very serious threat, and that considerable efforts have been made, and are still being made, to counter them. The mere fact that the first applicant had not been convicted of such crimes again should not be of decisive importance when balancing the different interests involved in relation to Article 8 of the Convention.

35. It was not until it had become clear that the applicants' marriage had broken down and the first applicant had applied for continued residence in the Netherlands that this decision could be taken. This explained the fact that almost five years had elapsed between the commission of the criminal offence and the decision. If the marriage had not broken down, the first applicant would have retained the residence permit he had been granted under Article 10 § 2 of the Aliens Act 1965. In that case, it would have been impossible by law to revoke that permit.

36. Given that the sliding scale principle had been applied, which involved weighing the severity of the penalty against the length of a person's stay in the Netherlands prior to the offence, the Government affirmed that due

consideration had been given to the period of less than three years during which the first applicant had lawfully resided in the country before committing the criminal offence.

37. As regards the applicants' family circumstances, the Government noted that the couple had ceased cohabiting for some time in 1995 and 1996. Moreover, the first applicant had then applied for a residence permit in his own right, from which it could be inferred that he evidently did not want to live with his wife. In the Government's view, it therefore appeared that the effectiveness of the applicants' family life had declined after the first applicant had served his prison sentence. They further considered it implausible that the second applicant could have been unaware of her husband's criminal activities, bearing in mind that, according to the judgment of the Amsterdam Regional Court in the criminal proceedings against the first applicant, the latter had made the marital home available, for a long period of time, as a safe house for the storage of very large quantities of drugs intended for distribution.

38. The Government averred that no insurmountable or significant obstacles stood in the way of family life being exercised in Turkey. It had not been demonstrated that the first applicant, who spoke Turkish, no longer had any ties with that country. They assumed that the second applicant and the two children also possessed a sufficient command of Turkish to be able to communicate in everyday life in Turkey. Having regard, moreover, to the Turkish nationality of the second applicant and the children, as well as to the young age of the children at the time of their father being refused permission for continued residence, the Government were of the opinion that it could reasonably be expected of them to return to Turkey with the first applicant.

39. Finally, the Government submitted that, in assessing the proportionality of the impugned decision, it should be taken into account that the first applicant's expulsion from the territory of the Netherlands was not permanent. In reply to questions put by the Court, the Government explained that, the applicant having been convicted of a drug offence, his criminal record could normally be invoked against him in any new application for a residence permit he might lodge for a period of ten years. However, in the assessment of whether his criminal record could indeed still be used against him, Article 8 of the Convention would be taken into account, which would not be the case had the exclusion order initially imposed on the applicant remained in force.

B. The Court's assessment

40. The Court notes that it was common ground between the parties that the refusal to prolong the first applicant's residence permit constituted an interference with the applicants' right to respect for their family life, as guaranteed by Article 8 § 1 of the Convention. The Court finds that the interference was in accordance with Netherlands law, in particular sections 14 and 21 of the 1965 Aliens Act, and pursued legitimate aims, namely public safety and the prevention of disorder or crime, within the meaning of Article 8 § 2.

41. It remains to be determined whether the interference was "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 91, § 52; *Boultif v. Switzerland*, cited above, p. 130, § 46; *Jakupovic v. Austria*, no. 36757/97, § 25, 6 February 2003). Therefore, the Court's task consists in ascertaining whether in the circumstances of the present case the refusal struck a fair balance between the relevant interests, namely the applicants' right to respect for their family life, on the one hand, and the interests of public safety and the prevention of disorder and crime, on the other.

42. Where continued residence is refused to an alien who settled in the host country when already an adult, the Court applies the following guiding principles in its examination of the question whether that refusal was necessary in a democratic society (see *Boultif*, cited above):

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

43. The Court will first consider the nature and seriousness of the offence committed by the first applicant in the present case. It observes in this context that in 1993 he was convicted of a drug offence, namely the possession of large quantities of heroin. As the Court has held on previous occasions, it

understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see *Baghli v. France*, no. 34374/94, § 48, ECHR 1999-VIII). The fact that it concerned a first conviction does not, in the Court's view, detract from the seriousness and gravity of the crime (see *Bouchelkia v. France*, judgment of 29 January 1997, *Reports* 1997-I, p. 65, § 51, and *Amrollahi v. Denmark*, no. 56811/00, § 37, 11 July 2002).

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see *Yıldız v. Austria*, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the

domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see *Boultif*, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see *Mehemi v. France*, judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see *Yılmaz v. Germany*, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see *Mehemi v. France (no. 2)*, no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

52. The applicants did not submit any claims for just satisfaction and the Court perceives no cause to examine this issue of its own motion.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been a violation of Article 8 of the Convention.

Done in English, and notified in writing on 31 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinion of Mrs W. Thomassen joined by Mr K. Jungwiert is annexed to this judgment.

J.-P.C.*
S.D.*

DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGE JUNGWIERT

1. After much hesitation I finally voted against the finding of a violation of Article 8 of the Convention in the present case. Although I consider the way in which the majority has struck a balance between the different interests involved convincing, I also think that the reasoning of the national authorities cannot be said to have been unreasonable or arbitrary.

2. The first applicant was convicted of having participated in an organisation aimed at committing criminal offences, and of having been a co-perpetrator of the offence of intentionally being in the possession of about 52 kilos of heroin. For a long time he had allowed his house to be used for stashing considerable quantities of this drug, suitable for further distribution. This was undoubtedly a particularly serious offence, and an unconditional term of four years' imprisonment was imposed. As the Court has held on previous occasions, it understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see *Baghli v. France*, no. 34374/94, § 48, ECHR 1999-VIII).

3. The first applicant's criminal activities were discovered some three years after he had first entered the Netherlands and only one year after he had been granted a residence permit for the purposes of forming a family unit. His situation is not comparable to that of a second generation immigrant, as he arrived in the Netherlands at the age of 23. He must therefore be well acquainted with the language and culture of his native Turkey and still have strong links with that country.

4. As to the first applicant's ties with the Netherlands, these appear to be connected mainly to his marriage to the second applicant and the two children. The first applicant's residence permit which, as mentioned above, had been granted to him for the purpose of forming a family unit, had, according to the national law as established by the Regional Court (see paragraph 19 of the judgment), expired *ex iure* from the moment he no longer actually formed part of his spouse's family unit. The fact that the first applicant resumed cohabitation with his wife in 1996 led the Regional Court to withdraw the exclusion order initially imposed on the first applicant. Without the exclusion order, the first applicant is allowed to enter the Netherlands.

5. As to the question whether the second applicant and the children, who lawfully reside in the Netherlands, could be expected to follow the first applicant, even if this might entail a certain social hardship for them, no insurmountable obstacles seem to exist preventing them from settling with him in Turkey (see *İbrahim Kaya v. the Netherlands* (dec.), no. 44947/98, 6 November 2001). In this context it is further to be noted that the second applicant – even though she moved to the Netherlands at the age of 7 – is of Turkish origin and that, when the impugned decision became final, the applicants' children were still quite young – 8 and 2 years old respectively – and thus of an adaptable age. Even if the second applicant would decide not to move to Turkey with her children, it has not been established that it would be impossible for the first applicant to maintain some family life with his wife and children from that country.

6. I further find relevant the Government's explanation (summarised at paragraph 39 of the judgment) that, the first applicant having been convicted of a drug offence, his criminal record could normally be invoked against him for a period of ten years in any new application for a residence permit he might lodge (see *Radovanovic v. Austria*, no. 42703/98, § 37, 22 April 2004). However, in the assessment of whether his criminal record would indeed still be held against him, Article 8 of the Convention would be taken into account, which would not have been the case had the exclusion order initially imposed on the applicant remained in force.

7. I find it difficult to conclude that the decisions taken at the national level were arbitrary. They were the result of the application of the "sliding scale principle" (see paragraphs 22-27 of the judgment), i.e. the longer an alien has lawfully resided in the Netherlands, the more serious a crime has to be before a refusal of continued residence may be justified. In accordance with this policy, an alien who, at the time he or she commits an offence, has been residing lawfully in the Netherlands for less than three years – like the first applicant in the present case – would be refused permission for continued residence if he or she was sentenced to an unsuspended prison sentence of more than nine months.

8. To my mind, the weighing of the different interests involved does not lead to a clear and unavoidable conclusion in the present case. In other words, the conflicting arguments are more or less in balance and a decision in either direction is arguable. In these circumstances, it seems to me that it should be left to the national authorities to balance the interests involved. Since the applicants' interests have not been overlooked and reasonable and foreseeable legal principles were applied, I believe that the majority should have shown

more restraint. Their conclusion sets aside the balancing exercise carried out by the national authorities without, however, giving a clear message capable of contributing to a fair national immigration policy.