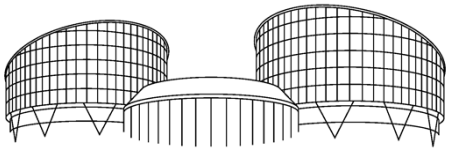

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PORMES v. THE NETHERLANDS

(Application no. 25402/14)

JUDGMENT

Art 8 • Respect for private life • Denial of residence permit to alien unlawfully staying in host State from an early age, who became recidivist once adult and aware of precarious immigration status • Applicable principles similar to those formulated in cases concerning family life • Applicant neither a "settled migrant", nor an "alien" aware of his precarious immigration status from the outset • Applicant able to manage by himself in Indonesia despite lack of strong ties there • Adequate balancing exercise by domestic authorities

STRASBOURG

28 July 2020

FINAL

14/12/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Pormes v. the Netherlands,

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

Jon Fridrik Kjølbro, *President,*
Iulia Antoanella Motoc,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 25402/14) 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 an Indonesian national, Mr Hein Pormes ("the applicant"), on 27 March 2014;

the decision to give notice of the application to the Dutch Government ("the Government");

the parties' observations;

Having deliberated in private on 21 April and 23 June 2020,

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

INTRODUCTION

1. In his application, the applicant alleged that the refusal by the national authorities to grant him a residence permit in the Netherlands, where he had been living from a very young age, amounted to a violation of his right to respect for his private and family life as guaranteed by Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1987 and lives in Assen. The applicant was represented by Mr B. van Dijk, a lawyer practising in Groningen.

3. The Government were represented by their former Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

I. THE CIRCUMSTANCES OF THE CASE

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant was born in Indonesia. His mother was Indonesian; she died in January 1991. On 13 April 1991 the applicant, at the age of almost

four, travelled to the Netherlands on an Indonesian passport containing a tourist visa for the Netherlands, together with his presumed father, who was a Dutch national. The local police were notified of his presence in the Netherlands on 13 May 1991. On 18 July 1991 the validity of the tourist visa was extended until 1 August 1991, but the applicant stayed in the Netherlands after that date. His presumed father subsequently returned to Indonesia at frequent intervals, leaving the applicant in the care of a paternal uncle and aunt who were both Dutch nationals. His presumed father died in April 1999. The applicant continued living with the aforementioned aunt and uncle, to whom he refers as foster parents, and he grew up together with their four children.

6. The applicant attended primary and secondary school and completed pre-vocational secondary education (*voorbereidend middelbaar beroepsonderwijs*) in metal works in 2002/03. At some subsequent point in time he enrolled in culinary school (*koksopleiding*).

7. On 13 August 2004 the applicant, suspected of having committed an assault on 5 February 2004, agreed to an out-of-court settlement (*transactie*) involving ten hours of community service.

8. Also in 2004, the applicant's foster father was informed by a local truant officer that the applicant was required to submit an extract from his registration in the Municipal Personal Records Database (*Gemeentelijke Basisadministratie*) to his school. It then transpired that the applicant was not registered in that database. The applicant's presumed half-sister (a daughter from a previous marriage of his presumed father) subsequently found amongst her father's possessions the applicant's Indonesian passport that had been issued in 1991. Having thus become aware that he was staying in the Netherlands without a legal status, the applicant, who felt he was a victim of circumstance, started experiencing problems and stress and he took to using drugs for a while. He was unable to concentrate and discontinued the training course in which he was enrolled.

9. On 1 August 2006 the applicant was convicted of indecent assault, defined as a criminal offence in Article 246 of the Criminal Code (*Wetboek van Strafrecht*; see paragraph 29 below) and four counts of attempted indecent assault, committed in September and October 2005, and he was sentenced to 240 hours' community service, a twenty-two hour training order and a six-month prison sentence suspended for a probationary period of two years. Four of these offences involved the applicant having followed young women whilst they were cycling, with the aim of making them stop or fall and tolerate him perpetrating lewd acts on them.

10. On 28 September 2006 the applicant applied for a temporary residence permit for the purpose of extended family reunion (*verruimde gezinshereniging*) with his foster father. He submitted, *inter alia*, that he had always assumed that he had Dutch nationality.

11. His application was rejected by a decision of the Deputy Minister of Justice (*Staatssecretaris van Justitie*; "the Deputy Minister") of 18 December 2007, which was sent to the applicant's lawyer on 28 December 2007. In response to the applicant's statement that he had assumed he was a Dutch national, the Deputy Minister noted that the applicant had not submitted any documents to substantiate this alleged Dutch nationality despite having been given the opportunity to do so, and he was therefore to be considered as an alien. The Deputy Minister held, *inter alia*, that because of the nature and seriousness of the offences he had committed, the applicant constituted a danger to public order, which was a ground for rejecting an application for a residence permit under domestic law (see paragraph 26 below). Next, the Deputy Minister examined whether obligations arising from international agreements nevertheless required that the application for a residence permit be granted (see paragraph 27 below). To the extent that it had to be assumed that family life within the meaning of Article 8 of the Convention existed between the applicant and his uncle, the Deputy Minister considered that the refusal to allow the applicant to reside in the Netherlands did not entail divesting him of any residence permit that had enabled him to enjoy family life in the Netherlands. It had, moreover, not appeared that there were any facts or circumstances of such seriousness that the right to respect for family life entailed a positive obligation on the part of the State to admit the applicant. The Deputy Minister noted that the applicant had been living in the Netherlands since he was four years old and that it had been argued that he was completely integrated into Dutch society; however, no rights could be derived from a period of residence without a residence permit.

12. The applicant lodged an objection (*bezwaar*).

13. On 27 June 2008 the applicant was convicted of two counts of indecent assault and three counts of attempted indecent assault, committed in May, November and December 2007, and was sentenced to fifteen months' imprisonment, of which five months were suspended for a probationary period of two years. Four of these offences involved the applicant having followed young women whilst they were cycling and making them stop or fall, or attempting to do so, in order to perpetrate lewd acts on them. In addition, the execution of the six-month suspended prison sentence imposed on 1 August 2006 (see paragraph 9 above) was ordered.

14. After a hearing before an official board of inquiry (*ambtelijke hoorcommissie*) on 22 May 2008, the applicant's objection against the refusal of his application for a residence permit was rejected by the Deputy Minister on 17 July 2008.

15. The Deputy Minister firstly observed that the applicant had once again been convicted (see paragraph 13 above); the grounds for rejecting the application for a residence permit thus pertained. As for the applicant's claims under Article 8 of the Convention, the Deputy Minister maintained

her previous position. In that context she considered it decisive that the applicant had never been lawfully resident in the Netherlands. His presumed biological father or his foster parents ought to have ensured that the applicant obtained lawful residence after his arrival in the Netherlands; this responsibility could not be passed on to the national authorities. Given that an application for a tourist visa had been made prior to the applicant's arrival, the Deputy Minister failed to see how the presumed biological father or the foster parents could not have realised that the applicant was not a Dutch national.

16. When it came to balancing the interests at stake, the Deputy Minister attached decisive importance to the nature and seriousness of the offences which the applicant had repeatedly committed; the interest in the protection of public order therefore outweighed the applicant's interest in being able to enjoy family and private life in the Netherlands. According to the Deputy Minister, there was no objective impediment to family life being continued in Indonesia. Holding, moreover, that the applicant was an adult who should be considered capable of managing by himself in his country of origin, the Deputy Minister found no indications that he had more than the usual dependence on, and emotional ties with, his foster parents. The fact that the applicant might experience certain problems in adapting to life in Indonesia, where he had no family and did not speak the language, was not considered an unacceptable consequence of the decision. In any event, contact between the applicant and his foster parents need not be ruptured as the latter could visit him in Indonesia.

17. On 21 July 2008 the applicant lodged an appeal with the Regional Court of The Hague, sitting in Zwolle. In support of his appeal he submitted, *inter alia*, school reports and certificates to the effect that he had successfully participated in various sporting activities, a traffic examination and a first-aid course.

18. On 5 February 2009 the applicant submitted an application under the Kingdom Act on Netherlands Nationality (*Rijkswet op het Nederlanderschap*) to the Regional Court of The Hague for an order confirming that, as from his birth, he had been in possession of Dutch nationality.

19. The Regional Court of The Hague, sitting in Zwolle, decided on 10 February 2009 to adjourn the proceedings on the appeal against the refusal to grant the applicant a residence permit until his request for confirmation of Dutch nationality had been decided.

20. On 14 February 2011 the Regional Court of The Hague rejected the application for an order confirming that the applicant had acquired Dutch nationality at birth. Having established that the applicant's mother and his presumed biological father had not been married to each other at the time of the applicant's birth, and noting further that they had not married subsequently either but that the applicant's presumed father had married

another woman on 4 March 1988 and that the applicant had not been registered as a child of the presumed father on the latter's personal record card (*persoonskaart*), the Regional Court found that it had not been satisfactorily demonstrated that he had obtained Dutch nationality at birth through descent from a Dutch father.

21. While the applicant's main address was still with his foster parents, he also started living with another uncle in a different part of the country, where it was possible for him to carry out unpaid, non-commercial activities in order to establish some structure to his days. The case file does not disclose when he moved there, but according to an email from his foster father to his lawyer dated 7 June 2011, the applicant had done so "recently".

22. The applicant's appeal against the decision to refuse him a residence permit was upheld by the Regional Court of The Hague, sitting in Zwolle, on 30 January 2012. It found, firstly, that it was not in dispute that there was family life within the meaning of Article 8 of the Convention between the applicant and his foster parents. Next, it noted that the case did not concern an interference within the meaning of Article 8 § 2 of the Convention since the applicant had not been divested of a residence permit which had enabled him to enjoy private or family life in the Netherlands. That being the case, it followed from the established case-law of the European Court of Human Rights that a balancing of interests was to be conducted in order to assess whether, in the concrete circumstances of the case, the right to respect for family life within the meaning of Article 8 nevertheless entailed a positive obligation on the part of the State to allow the applicant to remain in the country. The Regional Court considered that the Deputy Minister's decision did not demonstrate that an express and transparent balancing exercise between all the interests at stake had been conducted. It noted that the Deputy Minister had summarily reasoned that what was decisive was that the applicant constituted a danger to public order and that he had never held a residence permit enabling him to enjoy family life in the Netherlands, without indicating in a careful and sufficiently transparent manner what weight was to be attached to the circumstances that the applicant had grown up in the Netherlands, had received his schooling in that country and had built up his social, cultural and family ties there.

23. The Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*; the successor to the Deputy Minister of Justice) lodged a further appeal against the ruling of the Regional Court. This further appeal was upheld by the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), which, in a ruling of 13 November 2013, held as follows, in so far as relevant:

> "2.3 From the case-law of the [European Court of Human Rights] – *inter alia*, the judgments in *Rodrigues da Silva and Hoogkamer v. the Netherlands* [no. 50435/99, ECHR 2006-I], *Osman v. Denmark* [no. 38058/09, 14 June 2011], *Nunez v. Norway*

[no. 55597/09, 28 June 2011], and *Butt v. Norway* [no. 47017/09, 4 December 2012] – and the case-law of the Administrative Jurisdiction Division ... it follows that in the balancing exercise within the framework of the right to respect for private and family life as protected by Article 8 of the European Convention on Human Rights a fair balance must be found between the interest of the alien concerned and his or her family on the one hand and the Dutch general interest served by the pursuance of a restrictive immigration policy on the other hand. To that end, it must be shown that all facts and circumstances that are of relevance to that balancing exercise have been taken into account.

As can be deduced from the *Butt* judgment, strong immigration policy considerations in principle militate in favour of identifying children with the conduct of their parents, given the risk that parents exploit the situation of their children in order to secure a residence permit for themselves. If either the alien concerned or his or her parents could – or should – have been aware that the alien's immigration status was precarious, it is only in exceptional circumstances that there will be cause to conclude that Article 8 of the Convention imposes an obligation to allow the continuation of private and/or family life.

2.4 In accordance with paragraph B2/10.2.3.1. of the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*), as in force at the relevant time and in so far as relevant, the principles set out in the Court's judgments in *Boultif v. Switzerland* [no. 54273/00, ECHR 2001-IX] and *Üner v. the Netherlands* [[GC], no. 46410/99, ECHR 2006-XII] must be included in the balancing exercise when public order aspects are involved in the refusal to grant – continued – residence. ...

2.5 Even though, having regard to the age at which he came to the Netherlands and the duration of his stay in the country, the alien must be considered to have very strong ties with the Netherlands, the Deputy Minister has – not incorrectly and with adequate reasoning – taken the view that Article 8 of the Convention does not entail a positive obligation on the State of the Netherlands to allow the alien to reside in the country. The following is relevant in this context.

The private life and the family life, respectively, of the alien were created at a time when his foster parents – whose actions or omissions may in principle be held against the alien, having regard to paragraph 2.3 above – were aware, or ought to have been aware, that his immigration status was precarious. Nevertheless, since, as is not in dispute, the immigration status of the foster parents does not depend on the right of residence of the alien, this does not constitute a decisive element in the balancing exercise that is to be conducted.

In the balancing exercise carried out in the context of Article 8 of the Convention, the Deputy Minister has not made an error of assessment in attaching great weight to the offences committed by the alien. By a judgment of a criminal court of 1 August 2006 the alien was convicted of having committed on multiple occasions the offence set out in Article 246 of the Criminal Code or of attempting to commit that offence, and he was sentenced to a six-month suspended prison sentence. By a judgment of 27 June 2008 the execution of that prison sentence was ordered, and the alien was convicted and sentenced to fifteen months' imprisonment, of which five months were suspended. The Deputy Minister was not wrong to take account of both the seriousness and the nature of these offences, as well as of the fact that the alien is a recidivist and that, when he committed the offences, the alien was aware that he did not have a residence permit. Having regard to the case-law of the Court (*inter alia*, *Balogun v. the United Kingdom* [no. 60286/09, 10 April 2012]), it is moreover relevant that the alien was an adult when he committed the aforementioned offences.

> The Deputy Minister was furthermore entitled to attach relevance to the fact that the alien is an adult and that he has not substantiated that there are more than the normal emotional ties between his foster parents and himself.
>
> In addition, in her assessment the Deputy Minister was entitled to take into account the fact that there is no objective impediment for the alien to enjoy family life with his foster parents in Indonesia and that – even though the circumstances that he does not have any family in Indonesia at the present time and does not know the language spoken there may lead to problems of adjustment – he should be considered, given that he is of adult age, capable of managing by himself in that country."

24. The Administrative Jurisdiction Division therefore quashed the decision of the Regional Court and itself dismissed the appeal which the applicant had lodged with the Regional Court.

II. DEVELOPMENTS AFTER THE INTRODUCTION OF THE APPLICATION

25. On 1 August 2016 the applicant left the Netherlands for Indonesia with assistance from the International Organization for Migration (IOM). Just prior to his departure, at Amsterdam Schiphol Airport, he signed an IOM departure declaration, by which he agreed to the discontinuation of any pending proceedings aimed at obtaining a residence permit (*beëindiging van nog openstaande verblijfsrechtelijke procedures*).

RELEVANT LEGAL FRAMEWORK

I. IMMIGRATION LAW

26. Pursuant to section 16(1)(d) of the Aliens Act 2000 (*Vreemdelingenwet 2000*), an application for a temporary residence permit may be rejected if the alien poses a threat to public order or national security. An alien is considered to constitute a threat to public order if, *inter alia*, he or she has been convicted of a crime (*misdrijf*) and has been sentenced to an unsuspended term of imprisonment or if he or she has agreed to an out-of-court settlement in relation to a crime (section 3.77(1)(c) of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*)).

27. Section 13 of the Aliens Act 2000 states that aliens may qualify for admission to the Netherlands on the basis of obligations arising from international agreements. Respect for private and/or family life, as enshrined in Article 8 of the Convention, constitutes such an obligation.

28. Section B2/10.1. of the Aliens Act 2000 Implementation Guidelines as in force at the relevant time provided that, before the refusal of an application for a residence permit for the purpose of family reunion or family formation, an assessment was to be carried out as to whether such a refusal would be compatible with the right to respect for private and family life as guaranteed by Article 8 of the Convention. Section B2/10.2.2.

specified that, in general, the decision to refuse a residence permit to an alien who had not previously held one was not considered to amount to interference with his or her right to respect for family or private life, even if the alien had in fact already been staying in the Netherlands for some time and had been enjoying family and/or private life there. If an alien had started enjoying family life during a time when no residence permit had been required or pending a decision on an application for a residence permit, he or she had done so at his or her own risk and in the knowledge that he or she might subsequently have to leave the Netherlands. In such cases the national authorities had not expressly consented – by means of the granting of a residence permit – to that alien's continuous stay in the Netherlands, such as to enable him or her to enjoy family life there. Whilst in such a situation a balancing exercise between the interests of the State and those of the alien should nevertheless be carried out, the fact that an alien had never previously been lawfully resident would be a factor counting against him or her.

II. CRIMINAL LAW

29. Article 246 of the Criminal Code reads as follows:

> "Any person who, by an act of violence or any other act or by threat of violence or threat of any other act, compels another person to engage in or to tolerate lewd acts, shall be guilty of indecent assault and shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category."

THE LAW

I. THE GOVERNMENT'S REQUEST TO STRIKE OUT THE APPLICATION UNDER ARTICLE 37 OF THE CONVENTION

30. The Government requested the Court to strike the application out of its list of cases given that the applicant had left the Netherlands of his own volition and had agreed to end all pending proceedings aimed at obtaining a residence permit in the Netherlands.

31. The applicant submitted that he had not genuinely wanted to leave the Netherlands but had felt in despair at not being able to participate in society. He had been presented with the IOM departure declaration just prior to his departure to Indonesia and had signed it in order to qualify for that organisation's financial assistance; he had had no intention, however, of discontinuing the present proceedings.

32. The Court considers that this issue falls to be examined in the light of Article 37 § 1 of the Convention, which reads as follows in so far as relevant:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

33. Article 37 § 1 (a) of the Convention covers the situation where the applicant wishes to withdraw his or her application. While it is true that an applicant's undertaking to withdraw from proceedings which he or she has initiated before the Court is capable of justifying the striking out of that application, in accordance with Article 37 § 1 of the Convention, such a waiver, in order to be valid, must be unequivocal (see *Association SOS Attentats and de Boery v. France* (dec.) [GC], no. 76642/01, § 30, ECHR 2006-XIV).

34. The Court observes that in the IOM departure declaration signed by the applicant he agreed to the discontinuation of "any pending proceedings aimed at obtaining a residence permit" (see paragraph 25 above). It is not immediately apparent to the Court that the terms of this agreement cover the present proceedings. The Court accepts that the applicant's ultimate aim in lodging an application under Article 34 of the Convention will have been for the Dutch authorities to allow him to reside in the Netherlands by granting him a residence permit. However, his application to the Court, in which he complained of a violation of his right to respect for his private and family life as guaranteed by Article 8 of the Convention, cannot be equated with an application for a residence permit. Firstly, neither Article 8 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit (see *Bonger v. the Netherlands* (dec.), no. 10154/04, 15 September 2005). Moreover, in accordance with Article 19 of the Convention, the only task of the Court is to ensure the observance of the obligations undertaken by the Parties in the Convention. When the Court concludes that a State has breached the Convention, that State is in principle free to choose the means whereby it will comply with the Court's judgment (see, amongst other authorities, *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 80, ECHR 2014). Accordingly, the Court does not have the power to direct that a residence permit be issued to an applicant.

35. For these reasons the Court is not persuaded that it can be said with certainty that the applicant bound himself in the departure declaration to

withdraw from the present proceedings. As the applicant has subsequently expressly stipulated that he had no intention of doing so (see paragraph 31 above), there can be no question of the Court striking the application out of its list of cases in application of Article 37 § 1 (a) (see *Association SOS Attentats and de Boery*, cited above, § 31).

36. Although the finding above does not preclude the possibility of applying sub-paragraphs (b) and (c) of the first paragraph of Article 37, which does not require the applicant's consent (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 41, 24 October 2002), the Court perceives of no good reason to do so. The matter has clearly not been resolved, and neither has any redress been provided for the effects of a possible violation of the Convention (ibid., § 42). Finally, the Court sees no circumstances that would lead it to conclude that "for any other reason ... it is no longer justified to continue the examination of [it]".

37. On the above basis, the Court concludes that the Government's request to strike the application out of its list of cases must be rejected.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

38. The applicant complained that the refusal to allow him to reside in the Netherlands constituted a violation of his right to respect for his private and family life as guaranteed by Article 8 of the Convention, which reads as follows:

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

A. Admissibility

39. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

40. The applicant submitted that he had spent his childhood in the Netherlands just as any other Dutch child, and that there could therefore be no doubt that he had social and cultural ties with that country, whereas he had no ties whatsoever with Indonesia. As to the Government's argument

that he did not have family life within the meaning of Article 8 of the Convention with his foster parents, he argued that he had lived with them from when he was four years old and throughout the time he had spent in the Netherlands; those ties could not be considered to have been broken just because he had come of age. Moreover, in the proceedings at the national level it had not been disputed by the State that there was family life.

41. In the opinion of the applicant, the Government had attached too much weight to his criminal record and had omitted to include other relevant elements in the balance. Moreover, he had not reoffended since 2007 and had worked as a volunteer prior to his departure from the Netherlands.

(b) The Government

42. The Government firstly noted that although the applicant had effectively been living in the Netherlands since 1991, he had never been issued a residence permit. They held that since the contested decision did not entail the revocation of a residence permit, the present case did not involve any interference with the applicant's right to respect for private and family life. The main issue to be determined was whether the authorities were under a positive obligation to permit the applicant to reside in the Netherlands so that he could enjoy private and family life there. The Government observed that the scope of the obligations on the Contracting States to allow residence on the basis of Article 8 of the Convention was not predetermined and depended on all relevant facts and circumstances of the case. They further noted that the factual and legal situation of a settled migrant whose residence permit was revoked and that of an alien seeking admission to a host country, were not the same.

43. Secondly, the Government submitted that the applicant did not have family life within the meaning of Article 8 with his foster parents, since no additional elements of dependency between these adult family members had been demonstrated. Whilst the Government accepted that the applicant had had a private life in the Netherlands, this had been built up during his unlawful residence in the Netherlands; his removal would therefore – in accordance with the Court's case-law (*Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, ECHR 2006-I; *Nunez v. Norway*, no. 55597/09, 28 June 2011; and *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014) – only be contrary to Article 8 in exceptional circumstances, and no such circumstances pertained.

44. Taking into account that the applicant had committed a considerable number of offences at the more serious end of the spectrum of criminal activity, being not only sexual but also violent in nature, the Government concluded that the interest in protecting public order carried more weight than that of the protection of the applicant's private life in the Netherlands.

2. *The Court's assessment*

(a) Whether there was private and/or family life

45. The Court notes at the outset that it is not in dispute between the parties that the applicant had a private life in the Netherlands. The Court sees no reason to disagree with the parties on this point, given that the applicant lived in the Netherlands from when he was almost four years old until he was 29, that he spoke Dutch fluently, and that he received all his schooling and spent most of his formative years there. It further appears that he took part in everyday life in the same way as his Dutch-national contemporaries (see paragraph 17 above). However the parties' opinion differed as to whether the applicant had a family life to be protected under Article 8 (see paragraphs 40 and 43 above).

46. In accordance with its established case-law, the Court determines the question whether an applicant had "family life" within the meaning of Article 8 in the light of the position when the impugned decision became final (see *Maslov v. Austria* [GC], no. 1638/03, § 61, ECHR 2008, with further references). In the present case the Court observes that the applicant was 26 years of age when the domestic proceedings came to an end in November 2013 (see paragraph 23 above).

47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, *Konstatinov v. the Netherlands*, no. 16351/03, § 52, 26 April 2007, and *Z. and T. v. the United Kingdom* (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see *Bouchelkia v. France*, 29 January 1997, § 41, *Reports of Judgments and Decisions* 1997-I; *Ezzouhdi v. France*, no. 47160/99, § 26, 13 February 2001; *Maslov*, cited above, §§ 62 and 64; *Osman v. Denmark*, no. 38058/09, §§ 55-56, 14 June 2011; and *Yesthla v. the Netherlands* (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as

those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, *mutatis mutandis*, *A.A. v. the United Kingdom*, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see *Maslov*, cited above, § 63).

(b) General principles

51. The Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences (see, for instance, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII).

52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, *inter alia*, *Maslov*, cited above, § 75, and *Osman*, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, *Boultif v. Switzerland*, no. 54273/00, § 40, ECHR 2001-IX, and *Mokrani v. France*, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, *Üner*, cited above, §§ 57-60, and *Maslov*, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see *Jeunesse*, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing

interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation.

55. As regards aliens seeking admission to a host country the Court has held that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. It has held that in cases which concern family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see, *inter alia*, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, §§ 67 and 68; *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, § 38; and *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports* 1996-VI, § 63).

56. The Court has, moreover, identified a number of factors in its case-law that are to be taken into account when assessing whether a State may be under a positive obligation to admit to its territory an alien whose stay in the country was unlawful, such as the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000, and *Jeunesse*, cited above, § 107).

57. Another important consideration has also been found to be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has held that where this is the case it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer*, cited above, § 39, ECHR 2006-I; *Nunez*, cited above, § 36; and *Jeunesse*, cited above, § 108). Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (see *Priya v. Denmark* (dec.), no. 13594/03, 6 July 2006). In addition, the Court has accepted that weighty immigration policy considerations militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence

permit for themselves and for the children (see *Butt v. Norway*, no. 47017/09, § 79, 4 December 2012).

58. As can be seen from the preceding paragraphs, the relevant principles as well as the factors and considerations to be taken into account when examining whether Article 8 of the Convention imposes a positive obligation on a State to admit an alien unlawfully residing in its territory have so far mainly been formulated in cases which concerned family life or in which the Court considered it appropriate to focus on that aspect. The Court finds that similar considerations apply in respect of an alien who has established social ties amounting to private life in the territory of a State during a period of unlawful stay. The extent of the State's positive obligations to admit such an alien will depend on the particular circumstances of the person concerned and the general interest. Moreover, the factors set out in paragraph 56 above also apply – to the extent possible – to cases where it is more appropriate to focus on the aspect of private life. Equally, if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only.

(c) Application of the above principles in the instant case

59. The Court notes that the applicant arrived in the Netherlands in April 1991 when he was not yet four years old and that he thus spent most of his childhood and youth in that country (see paragraphs 5-6 above). However, after his short-term tourist visa had expired in August 1991, his residence in the Netherlands was at no time lawful. He was thus not a "settled migrant" as this notion has been used in the Court's case-law (see paragraph 52 above). Therefore, the domestic authorities' refusal to grant him a residence permit did not require the "very serious reasons" that would be needed to justify the expulsion of a settled migrant who had arrived in the Netherlands at around the same age (see paragraph 52 above).

60. At the same time, the Court cannot accept the Government's submission that, as the applicant had established his private life in the Netherlands whilst he was residing in the country unlawfully, the refusal to admit him would be contrary to Article 8 of the Convention in exceptional circumstances only (see paragraph 43 above). As set out above (see paragraph 58 *in fine*), that principle applies if it is known to the person concerned from the moment he or she starts a private life in the host country that his or her immigration status may well stand in the way of the continuation of that private life. In the present case, the Court observes that when the applicant started to build up his ties with the Netherlands he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay in the country. Having regard to his

young age when he came to the Netherlands and the other circumstances of the case, the Court considers that this cannot be held against the applicant. In that latter context, and with reference to paragraph 57 *in fine* above, the Court finds, moreover, that the applicant cannot be identified with any omission on the part of his foster parents to ensure that his stay in the Netherlands had a lawful basis since, as Dutch nationals (see paragraph 5 above), their right of residence in the Netherlands was not dependent on whether or not the applicant would be granted a residence permit – as was also recognised by the Administrative Jurisdiction Division of the Council of State (see point 2.5 in paragraph 23 above).

61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case.

62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above).

64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered

into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State.

65. However, it cannot be overlooked that the applicant repeatedly committed criminal offences. In 2004, whilst still a juvenile, he committed an assault in respect of which he accepted an out-of-court settlement (see paragraph 7 above). It cannot be ascertained from the case file whether he was already aware of his precarious residence status at that time. He was aware of it when, in September and October 2005 – by which time he had reached the age of majority –, he committed the offences of indecent assault and attempted indecent assault, which resulted in his conviction of 1 August 2006 (see paragraph 9 above). Furthermore, and although he knew that a further conviction within the next two years would lead to the execution of the suspended prison sentence imposed on him and whilst he was awaiting a decision on the application for a residence permit which he had lodged in September 2006 (see paragraph 10 above), the applicant once again committed the offences of indecent assault and attempted indecent assault in May, November and December 2007, of which he was convicted on 27 July 2008 (see paragraph 13 above). The Court notes as regards the applicant's conduct between the commission of the last offence in December 2007 and his departure from the Netherlands in August 2016 (see, *mutatis mutandis*, *Maslov*, cited above, § 95) that it would appear that he did not re-offend during this time.

66. The Court agrees with the Government that the offences of which the applicant was convicted in 2006 and 2008 were undoubtedly serious, entailing as they did a violation of the physical integrity of unsuspecting young women. The applicant had, moreover, no longer been a minor when he committed these offences. In addition, the Court also takes into account that the convictions of August 2006 and July 2008 each concerned no less than five offences (see paragraphs 9 and 13 above) and that the applicant was thus a multiple recidivist.

67. The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the

possibility that he may apply for a visa in order to make visits to the Netherlands.

68. In addition, the Court recognises that in the case at hand every domestic decision-making body had specific regard to the State's obligations under Article 8 of the Convention. The Deputy Minister of Justice, while emphasising that the applicant's stay in the Netherlands had never been lawful, balanced his ties to the Netherlands and the difficulties he would face adjusting to life in Indonesia against the seriousness of his criminal offending (see paragraphs 11 and 15-16 above). Whereas the Regional Court considered that the Deputy Minister had not sufficiently indicated what weight she attached to certain circumstances (see paragraph 22 above), the Administrative Jurisdiction Division of the Council of State held that the Deputy Minister had rightly attached great weight to the offences committed by the applicant in view of their nature and seriousness and the fact that the applicant was a recidivist. In its ruling it noted also that when the applicant had committed the offences at issue he was an adult and was aware that he did not have a residence permit (see paragraph 23 above). Having found that all relevant elements had been addressed in the balancing exercise carried out by the Deputy Minister, it reached the same conclusion, namely that the interests served by denying the applicant a residence permit were not outweighed by the latter's Article 8 rights.

69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Rejects*, unanimously, the Government's request to strike the application out of the Court's list of cases;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 28 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Jon Fridrik Kjølbro
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Ranzoni, joined by Judge Ravarani is annexed to this judgment.

J.F.K.
I.F.

DISSENTING OPINION OF JUDGE RANZONI, JOINED BY JUDGE RAVARANI

I. Introduction

1. In the present case, I was not able to agree with the majority and thus voted for finding a violation of Article 8 of the Convention, for the reasons set out below.

2. The case may be summarised as follows. The applicant was born in 1987 in Indonesia. His mother was Indonesian, but died in 1991. The same year his presumed father, a Dutch national, brought him to the Netherlands, where the applicant lived in the care of a paternal uncle and aunt, both Dutch nationals. His presumed father returned to Indonesia and died in 1999. In 2004 the applicant became aware that he had never acquired Dutch citizenship, although he and his foster parents had always assumed him to be a Dutch national. This explains why the applicant started experiencing problems and taking drugs. He was convicted several times of assault, indecent assault and attempted indecent assault, his last offence dating back to December 2007. In 2006 he had applied for a residence permit. While his application in 2008 was rejected by the Deputy Minister of Justice, the Regional Court in 2012 upheld the applicant's appeal. However, in 2013 the Council of State quashed that decision and confirmed the Deputy Minister's decision.

II. General principles

3. I am in full agreement with the presentation in the judgment of the Court's general principles under Article 8 of the Convention relating to immigration (see paragraphs 51-58). The Court in its case-law has in particular dealt with two different situations. On the one hand, cases involving the expulsion of settled migrants – that is, where persons have already been formally granted a right of residence in a host country and this right has subsequently been withdrawn (see, for example, *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII; *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008; *A.A. v. the United Kingdom*, no. 8000/08, 20 September 2011; *Levakovic v. Denmark*, no. 7841/14, 23 October 2018; and *I.M. v. Switzerland*, no. 23887/16, 9 April 2019). This situation gives rise to negative obligations for States, and in that respect the Court has set out relevant criteria for assessing compatibility with Article 8 of the Convention, the so-called *Üner* criteria (see *Üner*, cited above, §§ 54-60, and *Boultif v. Switzerland*, no. 54273/00, § 48, ECHR 2001-IX). On the other hand, positive obligations arise for States in cases concerning, *inter alia*, the denial of a residence permit to individuals already present in the territory of the respondent State (see, for example, *Jeunesse v. the*

Netherlands [GC], no. 12738/10, 3 October 2014; *B.A.C. v. Greece*, no. 11981/15, 13 October 2016; *Abuhmaid v. Ukraine*, no. 31183/13, 12 January 2017; *T.C.E. v. Germany*, no. 58681/12, 1 March 2018; and *Hoti v. Croatia*, no. 63311/14, 26 April 2018).

4. In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and the community as a whole, and it enjoys a certain margin of appreciation in this respect (see paragraph 54 of the judgment). The Court has therefore also acknowledged in admission cases, where the foreign national is already in the host country, that the positive and negative obligations do not lend themselves to precise definition and that the applicable principles are similar (see *Osman v. Denmark*, no. 38058/09, § 53, 14 June 2011; *Nunez v. Norway*, no. 55597/09, § 68, 28 June 2011; and *Jeunesse*, cited above, § 106). Accordingly, in *Nunez* (cited above, § 69) the Court did not find it necessary to determine whether in that case the impugned decision constituted an interference with the applicant's rights under Article 8 or was to be seen as involving an allegation of failure on the part of the respondent State to comply with a positive obligation. Where the case concerns (factual) residence in the host country without a valid residence permit, it can be considered neither a case of purely positive obligations nor one of purely negative obligations; it is rather a kind of "hybrid obligation case" (see Mark Klaassen, "Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases", *NQHR* 37(2), p. 164 (2019)). Against this background, it seems quite artificial in such admission cases to formally distinguish between positive and negative obligations. Consequently, although the Court has established the *Üner* criteria in the context of expulsion cases, as a matter of fact it has also applied most of these criteria – albeit without explicitly acknowledging it – in cases concerning residence permits, when in the balancing exercise it has taken into account the interests of the individual, most of which are reflected in the *Üner* criteria.

5. When applying the *Üner* criteria, the Court has held that the weight to be attached to each criterion will vary according to the specific circumstances of the case (see *Maslov*, cited above, § 70), and it has thus refrained from qualifying the relative weight to be accorded to each criterion in the individual assessment.

6. The nature of the crimes committed by the person concerned is of course of particular relevance, especially when the offences were serious in nature, meaning that they had or could have had serious consequences for the lives of others. In this respect, violent crimes, drug-related crimes and other similar serious crimes weigh heavily to an alien's detriment. However, this aspect needs to be balanced against other aspects of his or her behaviour in the specific case which may mitigate to some extent the weight of previous criminal convictions, such as the fact that the offences were to be

regarded as mere acts of juvenile delinquency, as well as the period of time which has passed since the offences were committed and the person's conduct since. As a result of this balancing exercise, there will, of course, be cases where the nature and seriousness of the offence committed or the person's offending history outweighed all other criteria to be taken into account (see, for example, *Üner*, cited above, §§ 62-64, and *Salem v. Denmark*, no. 77036/11, § 76, 1 December 2016).

7. Another important principle established in the Court's case-law is referred to in paragraph 54 of the majority's judgment, but is not further elaborated on, namely the State's margin of appreciation, which goes hand in hand with European supervision. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, for example, *Boultif*, cited above, § 47, and *Levakovic*, cited above, § 38). The margin of appreciation has generally been understood to mean that, where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for the Strasbourg Court to substitute its own assessment of the merits for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017). In line with the principle of subsidiarity, it is therefore not the Court's task to take the place of the competent authorities in assessing the circumstances of a specific case, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8, and whether that was sufficiently reflected in their reasoning in order to enable the Court to carry out the European supervision entrusted to it (see *El Ghatet v. Switzerland*, no. 56971/10, § 47, 8 November 2016).

III. Shortcomings in the national assessment

8. I would start with the Regional Court's assessment in January 2012 of the Deputy Minister's decision to reject the applicant's application for a residence permit (see paragraph 22 of the majority's judgment). The court first referred to the Strasbourg Court's case-law under Article 8 of the Convention and noted that the case concerned the State's positive obligation. It then considered "that the Deputy Minister's decision did not demonstrate that an express and transparent balancing exercise between all the interests at stake had been conducted". It also observed that she "had summarily reasoned that what was decisive was that the applicant constituted a danger to public order and that he had never held a residence permit enabling him to enjoy family life in the Netherlands, without

indicating in a careful and sufficiently transparent manner what weight was to be attached to the circumstances that the applicant had grown up in the Netherlands, had received his schooling in that country and had built up his social, cultural and family ties there" (ibid.).

9. The Council of State in November 2013 disagreed with the Regional Court and upheld the Deputy Minister's decision (see paragraph 23 of the majority's judgment). After mentioning the Court's case-law concerning the balancing exercise, it referred to the judgment in *Butt v. Norway* (no. 47017/09, 4 December 2012), according to which "strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children". That entailed the conclusion in *Butt* that the aliens' removal would be incompatible with Article 8 only in "exceptional circumstances" (ibid., § 79). Although the Council of State recognised that in the present case the situation was different because the foster parents' status as Dutch nationals did not depend on the applicant's residence permit, it only characterised that factor as not constituting a "decisive" element. That was not sufficient, however. In the present case, this element was of no relevance at all, not simply "not decisive", and should therefore have been completely discarded. On the contrary, with the reference to the *Butt* jurisprudence the national assessment seems to have been put on the wrong track from the outset.

10. Subsequently, the Council of State had regard to the age at which the applicant came to the host country – he was 4 years old – and the duration of his stay there – seventeen years when the Deputy Minister took his decision and twenty-two years at the time of the Council of State's decision – which led it to hold that he had "very strong ties" with the host country. I would agree with that. However, these weighty aspects in favour of the applicant were immediately wiped away by the formal argument that there was no positive obligation on the State to allow the alien to reside in the country. In other words, instead of genuinely balancing all the relevant criteria and reaching a conclusion only at the very end of the assessment, the court had already made its finding at that early stage. Unsurprisingly, these criteria did not reappear at any later stage in the domestic assessment.

11. The judgment continued in a similar manner, first by referring to the offences committed by the applicant. Here, of course, I concede that the offences were of a serious nature, that the applicant was a recidivist, that he committed the offences at a time when he was aware that he did not have a residence permit, and that he was already a (young) adult when he committed the most serious offences. No doubt these elements were of great importance in the balancing exercise and needed to be taken into account to the applicant's detriment. However, in the face of these criteria, all other elements, to the extent that they had been considered by the domestic

authorities at all, were again put aside. For example, while the Council of State mentioned the fact that the applicant did not have any family in Indonesia and did not know the language spoken there, it did not attach any relevant weight to these aspects, but instead observed in a rather laconic manner that given his adult age, he should be capable by himself of managing these problems of adjustment.

12. After having wiped away all criteria speaking in favour of the applicant's application for a residence permit, only the criterion of the offences committed remained on the one side of the balance, whereas the court had already got rid of the elements that should have been placed on the other side of the balance. As a result, the balance clearly fell on one side, entailing the rejection of the application.

13. What is more, both the Deputy Minister and the Council of State, to my mind, not only attached insufficient weight – if any weight at all – to the above-mentioned criteria in the applicant's favour, but omitted to consider some other aspects which are relevant in the weighing up of the individual's interests against the community's interests.

14. Firstly, the applicant, apparently without any particular irregularities, attended primary and secondary school and completed pre-vocational secondary education, before enrolling in culinary school. It was only after having become aware of his precarious residence status that he started experiencing problems and stress and taking drugs (see paragraph 8 of the majority's judgment). While that, of course, is no justification for committing crimes, it nevertheless explains partly why he suddenly started to go down the criminal path for a certain period.

15. Secondly, the Council of State did not take into account some important criteria according to the Court's case-law, namely the time that had elapsed between the last offence committed (December 2007) and the final domestic decision (November 2013) and the applicant's irreproachable conduct since the end of 2007.

16. Thirdly, in the domestic balancing exercise another element should have been assessed as relevant. The present case can be considered neither a case of purely positive obligations nor one of purely negative obligations (see paragraph 4 above). The majority accepted, at least, that the applicant qualified neither as a settled migrant, within the meaning of the Court's case-law, nor as an alien who had to have been aware of the precariousness of his immigration status from the outset, and therefore the assessment had to be carried out from a neutral starting-point, taking into account the specific circumstances of the applicant's case (see paragraph 61 of the judgment). Apart from the fact that the starting-point of the Deputy Minister and the Council of State could not be considered "neutral", it seems to me that the applicant's situation, from a factual point of view, was very close to that of a "settled migrant", since he had spent his life from the age of four in the host country. Although, legally speaking, he was not a "settled migrant",

because his stay in the host country was apparently never "lawful", this legal aspect should not be overstated in the specific circumstances of the present case. In this connection, it needs to be emphasised that the host country had tolerated the applicant's residence since 1991, including the period in which he had undergone primary and secondary education. The authorities must have known of his legal status, but it was only in 2004, when the applicant was 17 years old, that the authorities started to formally enquire about his nationality, and it was only in 2008, when he was 21 years old, that the decision not to grant him a residence permit was taken.

17. The fourth, and to some extent related, aspect should, to my mind, also have had a bearing in the assessment of all the relevant circumstances. As already mentioned, when the applicant started to build up his ties with the host country, he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay there. Had they taken those steps, the applicant would easily have become a Dutch national and could under no circumstances, irrespective of how badly he had behaved, have been refused residence in or been expelled from the Netherlands. The same would have been the case if, for example, not his presumed father but his mother had had Dutch nationality or if the presumed father had been married to the applicant's mother at the time of his birth. He would automatically have been a Dutch national with legal residence status in the Netherlands. My argument in this respect is that the applicant was liable to be denied a residence permit, whereas he would not have been if any of the above eventualities had occurred. How can the fact that the applicant was liable to be denied residence in the country in which he had been living since the age of four be justified when he would not have been liable had any one of these eventualities occurred? This distinction is based solely on accident and on a situation for which the applicant is not responsible at all (see, in a comparable context, the judgment of 19 October 2016 of the Supreme Court of the United Kingdom in *R v Secretary of State for the Home Department*; see also the judgment of 20 May 2020 of the German Constitutional Court, 2 BvR 2628/18). The domestic assessment in the present case is lacking any considerations on such justification.

18. Fifthly, and finally, let me reiterate an argument which has been made, *inter alia*, in several separate opinions. I concede that it is more moral than legal in nature, but nevertheless it may have a place in the overall assessment of the case. In that regard, I refer to the concurring opinion of H.G. Schermers, joined by G.H. Thune, in *Beldjoudi v. France* (6 September 1990, opinion of the Commission, Series A no. 234-A), the dissenting opinion of Judge Morenilla in *Boujlifa v. France* (21 October 1997, *Reports of Judgments and Decisions* 1997-VI) and the joint concurring opinion of Judges Bianku and Lemmens in *Levakovic* (cited above). If the applicant is denied residence in the Netherlands, consequently at a given time he must leave the country and move to another country, most

probably his country of origin, the only State in which he can settle down without having to fulfil further conditions. However, why should that State, or any other State with which the applicant has no ties at all, bear more responsibility than the Netherlands, where he has lived nearly his whole life? To borrow the words of H.G. Schermers, if there is one country responsible for the upbringing and the criminal behaviour of the applicant, that country must be considered to be the Netherlands. It would be more just for the Netherlands "to keep both the good and the bad immigrants", at least in a case such as the present one in which it is only by accident that the applicant has not become a Dutch national, whereas if he had had such a legal status, he could have stayed in the country that corresponded to his real home.

19. For all these reasons, and going back to the Regional Court's decision, I would agree with that court that the Deputy Minister's decision "did not demonstrate that an express and transparent balancing exercise between all the interests at stake had been conducted", and that it did not indicate "in a careful and sufficiently transparent manner what weight was to be attached to the circumstances that the applicant had grown up in the Netherlands, had received his schooling in that country and had built up his social, cultural and family ties there" (see paragraph 8 above). Unfortunately, the Council of State did not carry out a genuine overall assessment and balancing exercise of all relevant aspects of the applicant's case either. Through their approach, both bodies showed instead that their decision on the application for a residence permit had been predetermined from the outset. In such a situation, no fair balance was struck at national level.

IV. Consequences – further approach

20. As set out in paragraph 7 above, the Court's task, in principle, is to ascertain whether the national authorities secured the guarantees set forth in Article 8 of the Convention and to carry out the European supervision entrusted to it. If the reasoning of domestic decisions were found to be insufficient, without a real balancing exercise between the interests at stake, this would be contrary to the requirements of that Article. The Court confirmed this, for example, in *I.M. v. Switzerland* (no. 23887/16, §§ 77-78, 9 April 2019), where it held, *inter alia*:

> "77. ... If the domestic authorities had carried out a thorough balancing exercise between the competing interests, taking into account the various criteria established in the Court's case-law, and if they had set out relevant and sufficient grounds to justify their decision, the Court might, in line with the subsidiarity principle, have come to the conclusion that the domestic authorities had neither failed to strike a fair balance between the interests of the applicant and those of the respondent State, nor overstepped their margin of appreciation in matters of immigration (see *El Ghatet*, cited above, § 52).

> 78. However, the Court considers that the [national court] conducted a superficial examination of the proportionality of the expulsion order. In view of the lack of any genuine balancing exercise between the competing interests, the Court finds that the domestic authorities failed to demonstrate convincingly that the expulsion order was proportionate to the legitimate aims pursued."

21. In this situation the Court found a kind of "procedural" violation of Article 8 owing to the insufficient balancing exercise and reasoning by the domestic authorities and courts, thus preventing the Court from carrying out its European supervision (ibid.; see also *Makdoudi v. Belgium*, no. 12848/15, § 97, 18 February 2020; for a case of family reunification, and therefore positive obligations, see *El Ghatet*, cited above, § 52). To my mind, in the present case the Court could and should have taken the same approach. That would also have been in accordance with the principle of the margin of appreciation, which is accorded only if the national courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the competing interests (see paragraph 7 above). That was not the case here, and therefore the margin of appreciation could not be relied on.

22. However, there does in fact exist a different line of case-law which does not follow this "procedural" approach. Instead, in the cases concerned the Court, after having found that the assessment carried out at national level was insufficient, has substituted its own assessment of the merits for that of the competent national authorities, provided that there were shown to be strong reasons for doing so (see paragraph 7 above, with reference to *Ndidi*, § 76), thereby departing from the principle of subsidiarity.

23. Even following this line of case-law, I could not support the majority's finding of no violation in the present case. Firstly, I would observe that their reasoning is somewhat contradictory. If the majority actually were of the opinion that the national authorities had conducted an examination of the applicant's case in a reasonable manner in compliance with the Court's criteria, they could and should have limited themselves to a proper supervision of the balancing exercise performed at domestic level. However, that is not what the majority did. Instead, from the outset they engaged in their own balancing exercise, without having established that there existed strong reasons for doing so, while only at the very end of their own assessment referring to the domestic decision-making. Secondly, the majority's assessment, to my mind, suffers from the same shortcomings as the examination of the applicant's case by the Deputy Minister and the Council of State (see paragraphs 9-19 above). In that regard, I am not convinced that the nature and seriousness of the offences committed outweighed the other criteria to be taken into account in the applicant's favour. In my opinion, neither at national level nor at the Strasbourg Court has a fair balance been struck.

V. Conclusion

24. For the above reasons, I have come to the conclusion that in the present case there has been a violation of Article 8 of the Convention. This would be, first and foremost, a "procedural" violation, because the domestic authorities failed to carry out a thorough and fair balancing exercise between the competing interests and to set out convincing reasons to justify their decision. Alternatively, the violation would be a substantive one, because the majority likewise omitted to conduct a genuine and convincing balancing exercise between the competing interests and to take into account not only the seriousness of the offences committed, but also the applicant's specific situation and all the elements speaking in his favour.