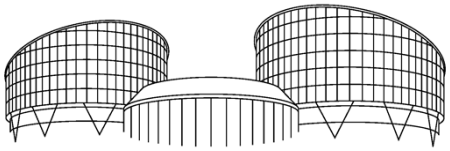

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF AZZAQUI v. THE NETHERLANDS

(Application no. 8757/20)

JUDGMENT

Art 8 • Expulsion • Private life • Revocation of residence permit of long-term settled migrant with mental illness and imposition of ten-year entry ban on account of violent offences, despite progress after years of confinement in custodial clinic • No consideration given to applicant's reduced criminal culpability due to mental illness • Failure to take into account properly and balance interests at stake and all relevant factors

STRASBOURG

30 May 2023

FINAL

30/08/2023

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

In the case of Azzaqui v. the Netherlands,

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Yonko Grozev,
Georgios A. Serghides,
Peeter Roosma,
Andreas Zünd,
Oddný Mjöll Arnardóttir*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 8757/20) 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 a Moroccan national, Mr Karim Azzaqui ("the applicant"), on 10 February 2020;

the decision to give notice to the Government of the Kingdom of the Netherlands ("the Government") of the complaint concerning Article 8 of the Convention and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 9 May 2023,

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

INTRODUCTION

1. The case concerns the revocation of a residence permit of, and imposition of an entry ban on, a person who had suffered a mental disorder which had reduced his criminal culpability at the moment when he had committed a serious offence. The applicant argues that his personal circumstances have insufficiently been taken into account when balancing the interests at stake.

THE FACTS

2. The applicant is a Moroccan national born in 1972. He was represented by Mr C.F. Wassenaar, a lawyer practising in Rotterdam.

3. The Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

I. THE CIRCUMSTANCES OF THE CASE

4. The facts of the case may be summarised as follows.

5. The applicant was born in Morocco and entered the Netherlands in 1982. In the same year the Dutch authorities granted him a residence permit to live with his father. In May 1991 he obtained a permit for permanent residence (*vergunning tot vestiging*).

6. Between 1987 and 1996, the applicant was convicted of multiple crimes, including (attempted) theft, burglary, extortion, threats and robbery, and sentenced to several terms of imprisonment.

7. On 24 September 1996 a full-bench chamber (*meervoudige kamer*) of the Arnhem Regional Court (*rechtbank*) convicted the applicant of rape, sentenced him to two years' imprisonment and imposed an order for his placement at the disposal of the Government with confinement in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*, "TBS order"). The relevant parts of the judgment read as follows:

> "A report concerning the accused was prepared on a multidisciplinary basis by [O.], a psychiatrist, and [A.], a psychologist, dated 8 August 1996, in which both authors concluded that at the time of the commission of the offence with which he was charged, the [applicant] had been able to see its impermissibility, but would have been able to freely determine his will in accordance with such awareness to a lesser extent than the average person. At the time of the commission of the offence the [applicant] was suffering from a defective development of his mental faculties to such an extent that the offence can only be attributed to him to a reduced extent.
>
> The court adopts that conclusion and makes it its own.
>
> In the light of that conclusion, it cannot be said that the accused is not criminally liable. Circumstances which would remove or exclude his criminal liability have not become apparent ...
>
> [O.], the psychiatrist, and [A.], the psychologist, advised as follows:
>
> The [applicant] has a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences, and has been exposed to long-term and severe (hard) drug use. The [applicant's] behaviour remains highly unpredictable. The nature and severity of the psychiatric problems, that is, a personality disorder and psychotic experiences focused on the offences with which he is charged – 'the fight' between the need for contact with women and the inability to initiate contact, given the (schizotypal) nature of the problems – contribute to this. Therefore, in the expert's view, there is a significant risk of reoffending, not least due to the [applicant's] impaired judgment and criticism disorder. On the basis of these findings, the recommendation is given to impose [a TBS order].
>
> The court is of the opinion that general safety of persons specifically requires the imposition of [a TBS order]."

8. The TBS order was extended in January 2000, June 2001, June 2002, June 2004, June 2006, May 2008, July 2010, July 2011, June 2012, August 2013, July 2014 and June 2015.

9. In the proceedings concerning another extension of the TBS order, the behavioural experts from the applicant's treatment facility drew up a report on 11 April 2016 in which they reported that the applicant had shown consistent good behaviour while on permitted leave, remorse for what he had

done to the victim and a willingness to be helped and to do well. He had not broken any rules or withdrawn from treatment or guidance. Although the applicant would never be able to function independently because of a permanent lack of coping and judgment skills, he had displayed no signs of sexual deviancy and it was estimated that the risk of reoffending could be kept permanently low in an assisted living facility. They described the aims of the resocialisation plan as follows:

> "The [applicant] will continue to need ongoing support, guidance and monitoring in the future to keep the risk manageable in the long term. A protective environment appropriate to his abilities and limitations, [and] the taking of medication, are important factors to prevent reoffending. The [applicant] has come to live at the De Nieuwstad facility in Zutphen. The aim is to continue his resocialisation here within a residential setting for people with a mental disability. Here, conditions can be created where the person concerned can function properly and in a permanently safe manner (living, working, spending leisure time)."

With the foregoing in mind, they advised the court to extend the TBS order with one year and to conditionally release (*voorwaardelijke beëindiging*) the applicant from confinement in the custodial clinic in order to assess whether he would also function well under the supervision of the probation services (*reclassering*).

10. On 27 May 2016 the criminal division of the Gelderland Regional Court – referring to the April 2016 report – extended the TBS order for one year and granted conditional release from confinement in a custodial clinic. The conditions included, amongst others, that the applicant would not commit a criminal offence, that he would remain in the country, that he would put himself under the supervision of the probation services and adhere to all their regulations and instructions, that he would live in an assisted living facility and that he would not use drugs or alcohol.

11. On 10 February 2017, referring to the applicant's criminal record, the Deputy Minister of Justice and Security ("the Deputy Minister") informed the applicant of his intention (*voornemen*) to revoke his residence permit and to impose an entry ban on the grounds that he posed a threat to public order (*gevaar voor de openbare orde*).

12. The applicant submitted written comments (*zienswijze*) in response to the Deputy Minister's intention. Relying, *inter alia*, on the report by the treatment facility (see paragraph 9 above) and on Article 8 of the Convention, the applicant objected to the revocation of his residence permit and the imposition of an entry ban.

13. In the proceedings concerning another extension of the TBS order, the probation services, on 23 March 2017, reported that the Deputy Minister's intention to revoke the residence permit had severely disturbed the applicant and that he had not been prepared for returning to Morocco. He had immediately violated the terms of his conditional release from confinement in the clinic by smoking marijuana and drinking alcohol. They advised

extending the TBS order for two years, during which time they would draw up a plan to prepare the applicant for returning to Morocco.

14. On 21 July 2017 the criminal division of the Gelderland Regional Court decided to extend the TBS order for one year. The court considered, *inter alia*:

> "[I]t appears from ... the probation services' report [of 23 March 2017; see paragraph 13 above] that under the current circumstances, in which the [Deputy Minister's] intention to revoke the [applicant's] residence permit plays a role in particular, there is a risk of recidivism that justifies the extension of the TBS order."

15. On 24 July 2017 the applicant's lawyer sent a copy of that judgment to the Deputy Minister to be appended to his written comments (see paragraph 12 above).

16. On 19 January 2018 the Deputy Minister revoked the applicant's residence permit and imposed a ten-year entry ban on him. On Article 8 of the Convention, he considered the following. The applicant's ties with his adult family members in the Netherlands did not fall within the scope of Article 8. As regards the right to respect for private life, the Deputy Minister balanced the interests involved, referring to the Court's case-law as set out in *Boultif v. Switzerland* (no. 54273/00, ECHR 2001-IX), and *Üner v. the Netherlands* ([GC], no. 46410/99, ECHR 2006-XII), and considered that the applicant's private life rights did not outweigh the interests of the general public. In that context the Deputy Minister noted that there was no evidence of the applicant's having any strong social ties to the Netherlands, that the applicant had not shown respect for or made any positive contributions to Dutch society, and that treatment in the context of the TBS order did not constitute private life within the meaning of Article 8 of the Convention but was rather a measure imposed in the context of criminal proceedings. The instant case was therefore not comparable to *Ciliz v. the Netherlands* (no. 29192/95, ECHR 2000-VIII). The Deputy Minister acknowledged that the applicant had been living in the Netherlands for a long time, but that was outweighed by the seriousness of the multiple crimes he had committed and the extensions of the TBS order. He further noted that the threat to public order stemming from the applicant's offences had not diminished, because up until now the TBS order had consistently been extended and the applicant had not shown any positive progress outside a clinical setting. In addition, from the psychological reports prepared in the context of the TBS order extension proceedings, it appeared that the applicant would always be in need of supervision, and his relapse into alcohol and drug use showed that he could not cope with setbacks. The applicant's contention that the TBS order had only been extended because of the intention to revoke the applicant's residence permit, was contested. That order was extended because of a risk of recidivism; the cause of that risk was irrelevant. Although a long time had elapsed before the Deputy Minister had decided to revoke the residence permit and impose an entry ban, that had given the applicant an

opportunity to obtain the treatment needed to reintegrate into society. The applicant could not have derived any expectations or rights from that lapse of time. As to his return to Morocco, the Deputy Minister considered that the applicant was an adult male who could be expected to fend for himself after assisted repatriation.

17. The applicant lodged an objection (*bezwaar*) on 13 February 2018. In the grounds of objection submitted at a later date, the applicant referred to the contents of the expert reports drawn up on 14 February 2018 and 23 March 2018 (see paragraphs 20 and 21 below).

18. On 13 April 2018 the Deputy Minister declared inadmissible the applicant's objection. According to the Deputy Minister, the applicant had not put forward any arguments that warranted reconsideration of the decision of 19 January 2018. As to repatriation to Morocco, he added that the applicant could either speak the local language or should be able to pick it up, that the applicant had family in Morocco with whom he had stayed in contact, and that he would be prepared for his return by the clinic.

19. The applicant appealed on the same day and, *inter alia*, reiterated that the decision to revoke his residence permit had not been in compliance with Article 8 of the Convention. He stated that during his stay in the Netherlands he had developed ties amounting to private life, including while he had been in detention and when subject to the TBS order. He argued that with thirty-five years of lawful residence he was a "settled migrant" for whose expulsion "very serious reasons" were needed (alluding to *Maslov v. Austria* [GC], no. 1638/03, § 75, ECHR 2008). According to the applicant, the application of the guiding principles from *Üner* and *Boultif* (both cited above) should have led to a balance being struck in his favour. In that context he put forward, amongst other things, that he had not reoffended, and that the TBS order had forced the applicant to stay in the Netherlands, during which time the Deputy Minister had failed to take any action with a view to his expulsion but had instead renewed his residence permit. In addition, he argued that the revocation of his residence permit interfered with the aims of the TBS order, which had been his resocialisation in the Netherlands.

20. On 6 July 2018 the criminal division of the Gelderland Regional Court extended the TBS order for one year. In its judgment (ECLI:NL:RBGEL:2018:2980) the court cited the following passage from a report which had been drawn up by an independent forensic psychiatrist on 14 February 2018:

> "If [the applicant] could stay in the Netherlands, the TBS order would no longer be necessary. Deportation from the Netherlands has such a destabilising effect on him that it increases the likelihood of his reoffending. The TBS order is then needed to prepare a course for deportation with him and to arrange conditions as much as possible."

21. The court also cited the following from a report which had been drawn up by the probation services on 23 March 2018:

"Since he was informed of the [Deputy Minister's intention to revoke his residence permit], the applicant has not been doing well ... The [applicant] absolutely cannot cope with this complex situation and he lacks the skills to deal with it. He needs [the assisted living facility's] guidance and support precisely to deal with this situation. If the TBS order were terminated, the [applicant] would lose his right to stay in the Netherlands; in fact, he could be deported immediately and would not be allowed to return for the next ten years. We have been in contact with the Veldzicht Centre for Transcultural Psychiatry. They indicate that Morocco is not eager to have the [applicant] either, given his criminal and psychiatric background, and that [the Moroccan authorities] will do everything possible to stop [his return]. There is a good chance that the [applicant] will fall between two stools and end up on the streets. It should be clear that it is to be expected that the [applicant] will not be able to cope and will start committing crimes to get money. His family is a supportive/protective factor. When this [factor] disappears because the [applicant] must be deported, the risks [of reoffending] will increase. The undersigned consider it necessary to extend the TBS order to support the [applicant] during this uncertain time and thus ensure that conditions remain as optimal as possible for him, with the lowest possible risk of reoffending."

22. The judgment further contained the following considerations:

"The court faces a dilemma in the present case. The reports show that, in principle, the [applicant's] risk of reoffending has been reduced to a sufficiently acceptable level so that his treatment could take place outside a clinic on a voluntary basis. This is the result, particularly, of the guidance and support he now receives from the probation services and the residential facility, and of the medication which he takes conscientiously. This means that, strictly speaking, the measure of placement is no longer necessary. He could, while continuing to benefit from this guidance on a voluntary basis, hold his own in Dutch society without relapsing into delinquent behaviour.

However, the uncertainty about his right of residence in the Netherlands as a result of the removal procedure initiated by the [Deputy Minister] changes the situation. This uncertain situation causes so much tension for the [applicant] that he balances on the edge of a psychosis every time he is triggered by – in particular – information about the deportation proceedings. In addition, the prospect of losing his right of residence entails a high risk of decompensation for the [applicant].

Two scenarios are possible if his residence permit is revoked.

1. If he were forced to return to Morocco, he would not be given any reception, treatment or medication there. He came to the Netherlands in 1982, at the age of 10, and has not returned since. His entire family lives here. In Morocco, he will have to live on the streets and, given his problems and the lack of (medicinal) treatment, shelter and supervision, will inevitably relapse into seriously dangerous behaviour.

2. If he cannot be deported, for instance because of a lack of cooperation by the Moroccan authorities, as outlined in the probation services' report, his illegal residence status means he no longer has any entitlement to continued (medicinal) treatment and counselling, no housing provision, no work or daytime activities and no financial security. Even then, the threat of psychological decompensation remains, and the risk of seriously disordered and dysregulated behaviour will rapidly increase, with all the dangers to the [general public safety] that that entails.

In this case (and previously in similar TBS order cases) the court finds itself confronted with an apparent paradox in Dutch policy when it comes to the interpretation of the notion of [general public safety], the safeguarding of which is the primary aim of

a TBS order. In that context, [general public safety] is not limited to society in the Netherlands ... At present, this understanding [of general public safety] is commonplace when considering whether to impose or extend a TBS order ...

In view of the foregoing, the court has no choice but to extend the TBS order, in accordance with the opinion expressed by the parties to these proceedings and the experts, and pending the decision of the court in the ongoing proceedings concerning [the revocation of] the [applicant's] residence permit. This is despite the fact that, according to the experts, continuation of the measure would not be necessary under normal circumstances because the risk of reoffending has diminished sufficiently."

23. The applicant sent a copy of that judgment to the Regional Court of The Hague, sitting in Arnhem, to be joined to his appeal in the proceedings concerning the revocation of his residence permit.

24. On 6 November 2018 the administrative division of the Regional Court of The Hague, sitting in Arnhem, declared inadmissible the applicant's appeal in the revocation proceedings and dismissed his appeal against the entry ban. The relevant parts of the judgment read as follows:

"8.2 The court finds that the [Deputy Minister] has properly reasoned his view that the [applicant] is currently a threat to public order.

The [applicant] has been sentenced several times to imprisonment for committing serious crimes. At the time of the contested decision, he was still under supervision as part of the conditional termination of the [TBS order]. The probation services' recommendation of 23 March [2017; see paragraph 13 above] to extend the TBS order stated that after receiving the notice of intent to revoke his residence permit, the [applicant] used drugs to regulate tension, after which it was decided to admit the [applicant] to a clinic. It appears from that advice that on [the Friday before] 13 March 2017, the [applicant] drank beer despite the terms of the [treatment] agreement because he felt bad about the possible entry ban and hoped that a few beers would make him feel better. The [Deputy Minister] did not err in inferring from this advice that there was a risk of the [applicant] relapsing into substance abuse in the event of adverse life events. Contrary to the [applicant]'s contention, the 23 March 2018 report [see paragraph 21 above] does not paint a different picture. That report states that without counselling he might easily fall back into substance use, that his transgressive behaviour is linked to his living conditions, and that the risk of repetition of property-related and sexual crimes is high if the [applicant] finds himself in unfavourable living conditions. The court finds that it does not appear from the report that a foreseeable relapse will *only* occur as a result of decisions in respect of [the applicant's] right of residence in the Netherlands, and that the risk would therefore be eliminated in the event of a waiver of the revocation of [the applicant's] right of residence. [The Deputy Minister] has further correctly argued that the fact that the [applicant] did not offend again after 1995, that he has made progress in his treatment and that the TBS order has been conditionally terminated, cannot be given the weight that the [applicant] wants it to be given. Indeed, the [Deputy Minister] has duly reasoned that there is still a risk of reoffending and that no positive change in behaviour has occurred without external help, so that this does not detract from the actuality (*actualiteit*) of the threat ...

10. The [applicant] argued that the revocation of the residence permit and the imposition of the entry ban violated the right to private life enshrined in Article 8 of the ECHR. The [applicant] pointed out that he had been living in the Netherlands since 1982, was educated and fully integrated and had immediate family members living in the Netherlands. In the view of the [applicant], he should be classified as a 'settled

migrant' whose stay can only be terminated in exceptional circumstances, given his long period of residence. Moreover, according to [the applicant], it appears from the probation services' recommendation to extend [the TBS order] that the risk of recidivism is moderate and that during his treatment and leave weekends he has shown an improvement in his behaviour. Finally, the [applicant] argues that there are subjective obstacles to returning to Morocco.

10.1. From the case-law of the European Court of Human Rights ..., for example ... *Rodrigues da Silva and Hoogkamer v. the Netherlands* [no. 50435/99, ECHR 2006-I] ..., and that of the [Administrative Jurisdiction] Division [of the Council of State] of 13 July 2009 (ECLI:NL:RVS:2009:BJ7527), it follows that the [Deputy Minister], in balancing the competing interests in the context of the right to respect for private life, must strike a 'fair balance' between the interests of the foreign national, on the one hand, and the general interest of the Netherlands, which is served by pursuing a restrictive immigration policy, on the other. In doing so, he must consider all the facts and circumstances relevant to this balancing of interests. The court must assess, if requested, whether the [Deputy Minister] included all relevant facts and circumstances in that balancing of interests and, if so, whether the [Deputy Minister] did not make an error of assessment by concluding that his balancing of interests had resulted in a fair balance being achieved between, on the one hand, the interest of an alien in the exercise of his private life in the Netherlands and, on the other, the general interest of Dutch society in pursuing a restrictive immigration policy.

10.2. In the context of the right to respect for private life, the [Deputy Minister] weighed the relevant individual interests of the [applicant] against the general interest. In that regard, the [Deputy Minister] took into account the fact that the [applicant] came to the Netherlands at the age of 10, had lived in the Netherlands for a very long time, had been educated there and had built up social ties with the Netherlands, but considered that this did not outweigh the fact that the [applicant] had been repeatedly convicted of committing (very serious) crimes. Although the [applicant] has resided in the Netherlands for a long time, the [Deputy Minister] having never taken steps to revoke the [applicant]'s residence permit on grounds of public order, and new residence cards have consistently been issued to him, the [Deputy Minister] did not make an error of assessment in giving decisive weight to the serious crimes repeatedly committed [by the applicant]. The [Deputy Minister] was not wrong to reject the [applicant]'s argument that, in view of the passage of time since his last offence, there were no longer any very serious reasons to end his residence in the Netherlands. In this context, it is important to note that the TBS order imposed on the [applicant] has been consistently extended on the basis that [the applicant] continues to pose a threat to public order. Although it can be concluded that the [applicant] has developed positively, it appears from the probation services' advice which formed the basis for the last extension of the TBS order that there is a moderate to high risk [of reoffending] and that the risk of reoffending will increase without supervision. In addition, the [Deputy Minister] was not wrong to take into account the fact that the [applicant] had used drugs and alcohol, contrary to his [treatment] agreements. It was also permissible for the [Deputy Minister] to take into account the fact that the [applicant] had spent a large part of his stay [in the Netherlands] in detention and treatment clinics. While it is true that an alien builds up a private life during such a stay, which the court understands the [Deputy Minister] does not deny, it is not incorrect for the [Deputy Minister] to attach less weight to such a private life ... than to a private life built up in freedom. The ties with society [built up during such a stay] are, after all, less intensive. The [Deputy Minister] also does not deny that the [applicant] has ties with the Netherlands and his family members residing in the Netherlands, but there is no evidence of strong social ties with the Netherlands. Furthermore, the [Deputy Minister] did not make an error of assessment by concluding

that the [applicant] should be considered able to fend for himself in Morocco. Indeed, during the hearing before the official committee, the [applicant] indicated that he had family members still living in Morocco with whom he was still in contact. In addition, the [applicant] is an adult male and can be expected to make his own way in the context of repatriation to Morocco. The [applicant] has not made a sufficiently plausible claim that he will encounter insurmountable problems when returning to Morocco. In this regard, the [Deputy Minister] rightly pointed out that as part of his inpatient treatment the [applicant] will be prepared for, and assisted in, returning to Morocco and that adequate assistance will be sought in his country of origin.

10.3. In view of the above, the [Deputy Minister] has included all the facts and circumstances put forward by the [applicant] in the balancing of interests and was not incorrect in taking the position that the balancing of interests ended up to [the applicant's] detriment. The judgments cited by the [applicant] in the context of Article 8 of the ECHR do not lead to a different outcome, as they are not comparable to the case at hand."

25. The applicant's further appeal against the Regional Court's judgment of 6 November 2018 was rejected by the Administrative Jurisdiction Division *(Afdeling bestuursrechtspraak)* of the Council of State (*Raad van State)* on 13 August 2019 with summary reasoning. No further appeal lay against that judgment.

II. SUBSEQUENT DEVELOPMENTS

26. On 1 March 2019 the Gelderland Regional Court, criminal division, ordered the applicant's resumed confinement in a custodial clinic. The TBS order was subsequently extended on 29 November 2019 and 8 October 2021.

27. On 17 June 2022 the Gelderland Regional Court again extended the applicant's TBS order for one year. In its judgment (ECLI:NL:RBGEL:2022:3438) that court considered, *inter alia*, (footnotes omitted):

"First of all, the court notes that the situation in which the person concerned finds himself as a result of the entry ban and revocation of his residence permit seems to have become quite hopeless. The legal frameworks concerning the residence permit and the TBS order do not fit well together, as a result of which a seemingly unbreakable status quo has in fact been reached. Deportation or repatriation of [the applicant] hardly seems feasible and at the same time the treatment or resocialisation of [the applicant] is stagnating because of the loss of his residence permit. The guidance and treatment that can be offered in Morocco seem, as things stand, to be a very diluted version of what [the applicant] needs. This seems to have created a situation where the TBS order is in fact protecting [the applicant] rather than protecting society from [the applicant]. Judicial review is primarily aimed at ensuring compliance with applicable regulations, but it is also the court's role to point out incompatibilities between different legal frameworks and the court does so again, as it did last year ...

The court does want to stand up for (*lans breken*) extending [the applicant's] leave to transmural leave. The considered reports show that from a treatment and resocialisation point of view, this is clearly possible. Only the [the applicant's] residence status stands in the way of this. However, this need not always be an insurmountable obstacle; it mainly comes down to the willingness of institutions to provide tailor-made solutions

in order to break the impasse that has been created primarily by the regulations and the policy of the Minister [of Justice and Security]. In the court's view, from a human perspective the factors of treatment and resocialisation, at least to a certain extent such as through transmural leave, should be decisive in the process of balancing the various interests. Owing to the revocation of [the applicant's] residence permit, the TBS order has in fact become a punishment with hardly any prospect of change, such that a violation of Article 5 of the Convention comes closer with every subsequent extension of it. Gradually increasing transmural leave may bring about the desired change, at least in part."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. REVOCATION OF A RESIDENCE PERMIT OF INDEFINITE DURATION AND IMPOSITION OF AN ENTRY BAN

28. The minister responsible may revoke a residence permit of indefinite duration on grounds of public order if the holder has been convicted by a final court judgment of a crime (*misdrijf*) that is punishable by a custodial sentence of three years' imprisonment or more or has been placed at the disposal of the Government (section 20(1)(b) read in conjunction with section 22(2)(c) of the Aliens Act 2000 – *Vreemdelingenwet 2000*), and if the revocation is in keeping with the "sliding scale" principle (section 3.98 read in conjunction with section 3.86 of the Aliens Decree 2000 – *Vreemdelingenbesluit 2000*; on this principle, see further *Azerkane v. the Netherlands*, no. 3138/16, §§ 37-38, 2 June 2020).

29. A non-asylum-based residence permit of indefinite duration cannot be revoked if removal of the alien would be contrary to Article 8 of the Convention (section 3.86(17) of the Aliens Decree 2000).

30. Where an entry ban is imposed on an alien who constitutes a serious threat to public order, public security or national security, its maximum length is ten years (section 66a(4) of the Aliens Act 2000). Evidence of such a threat includes a conviction for an offence punishable by a custodial sentence of more than six years' imprisonment or the fact that a TBS order has been imposed (section 6.5a(5) of the Aliens Decree 2000).

II. IMPOSITION AND EXTENSION OF A TBS ORDER

31. The relevant provisions of the Criminal Code (*Wetboek van Strafrecht*) concerning the imposition and the extension of a TBS order provide as follows:

Article 37a

"1. If it is necessary in the interests of the safety of others or the general safety of persons or goods, a suspect may be ordered to be placed at the disposal of the Government if the court finds that:

1º the mental faculties of the suspect were inadequately developed or pathologically disturbed at the time of the commission of the offence; and

2º the offence he has committed is one which, according to its statutory definition, renders offenders liable to a term of imprisonment of four years or more, ...

2. ...

3. The court shall give an order as referred to in the first paragraph only after it has ordered the submission of a reasoned, dated and signed advisory opinion of at least two behavioural experts of different disciplines – one of whom shall be a psychiatrist – who have examined the person concerned ...

4. ...

5. In giving an order under paragraph 1, the court shall take account of the statements contained in the other opinions and reports made concerning the suspect's personality, and shall take account of the seriousness of the offence committed and the number of previous convictions for indictable offences.

6. ..."

Article 37b

"1. The court may order that a person who is placed at the disposal of the Government shall be confined in a custodial clinic if this is necessary in the interests of the safety of others or the general safety of persons or goods.

2. ..."

Article 38e

"1. The total duration of the placement at the disposal of the Government with confinement in a custodial clinic shall not exceed a four-year period, unless the placement at the disposal of the Government with confinement in a custodial clinic is imposed in connection with an indictable offence that is directed against, or endangers, the physical integrity of one or more persons.

2. ...

3. If the total duration of the placement at the disposal of the Government is not limited in time, the duration of the placement at the disposal of the Government can be extended periodically, if the safety of others or the general safety of persons requires such extension."

Article 38j

"In case of conditional release from confinement in a custodial clinic, the placement at the disposal of the Government can be extended for one year or two years at a time."

III. RELEVANT DOMESTIC CASE-LAW

32. On 17 August 2022 the administrative division of the Regional Court of The Hague, sitting in Amsterdam, gave judgment (ECLI:NL:RBDHA:2022:11298) in a case concerning an alien whose residence permit had been revoked by the Deputy Minister following several

criminal convictions and the imposition of a TBS order. In so far as relevant for the present case, the court found as follows:

> "5.7. [T]he court finds that the [Deputy Minister] did not include all relevant facts and circumstances in the balancing of interests in a sufficiently clear manner. It does not appear that when assessing the nature and seriousness of the crimes committed by the [alien], the [Deputy Minister] took into account the fact that the [alien] has a reduced degree of responsibility for the offences charged against him due to a pathological disturbance of the mental faculties. However, the European Court of Human Rights held in *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021 that in assessing the nature and gravity of the offence, it must be considered whether the person concerned was suffering from a serious mental disorder at the time the offences were committed and that less weight can be given to this criterion if it is established that the offence cannot be attributed to the person concerned. Although this ruling refers to the situation where the offence cannot be attributed to the person concerned at all, the court considers that this is a relevant fact also in the case of reduced imputability that must be taken into account in the assessment of the nature and seriousness of the offence and in weighing this [criterion]. In this regard, the court also refers to the [Deputy Minister] Working Instruction (*werkinstructie*) no. 2020/16, which states that when assessing the nature and seriousness of the offence account is taken of the circumstances under which the offence was committed, and that the judgment generally provides insight in this regard. In brief, by considering that the personal circumstances put forward by the [alien] relate to his person and not to the nature and seriousness of the committed crime ... the [Deputy Minister] did not sufficiently address the circumstances under which the [alien] committed the crimes ..."

In view of, *inter alia*, the foregoing, the court found that the Deputy Minister had failed to consider all relevant facts and circumstances in the balancing of interests. It upheld the alien's appeal, quashed the impugned decision and ordered the Deputy Minister to make a fresh decision. It is unknown whether the Deputy Minister lodged a further appeal against this judgment.

33. On 27 March 2023 the administrative division of the Regional Court of The Hague, sitting in Groningen, gave judgment (ECLI:NL:RBDHA:2023:4036) in another revocation of residence permit case. In so far as relevant for the present case, the court found as follows:

> "The court finds that the [Deputy Minister] has given sufficient reasons that the balancing of interests was to the detriment of the [alien]. The [Deputy Minister] took into account the ... guiding principles [from *Boultif* and *Üner*, both cited above]. In the contested decision, under the criterion of the nature and seriousness of the offence, it was not explicitly stated that the [alien] was deemed to have diminished criminal responsibility, but in the contested decision the [Deputy Minister] ... weighed the [alien's] personal conduct and included [his] diminished culpability in this connection. In the statement of defence and at the hearing, the [Deputy Minister] elaborated on this, namely that the [alien's] mental disorder did not detract from the seriousness of the crimes committed by [him], because [his] criminal responsibility was not fully excluded. The starting point, according to the [Deputy Minister], is that the [alien] does have a certain degree of culpability for having committed the offences, despite his drug use and his disorder. The [Deputy Minister] rightly took into account in this context that the [alien] had been sentenced by the criminal court to a prison sentence and [a TBS order]. The court therefore follows neither the [alien's] argument that the

> balancing of interests was insufficiently evidently reasoned, nor his reliance on the judgment of the Regional Court of 17 August 2022 [see paragraph 32 above]. Nor does the court follow the [alien's] reading of the *Savran* judgment [cited above], insofar as he argued that the [Court] has held that less weight can be given to the nature and gravity of the offence if it is established that the offence cannot be imputed to the person concerned. To this end, first of all, the court considers that this judgment refers to the situation in which the offence cannot be attributed to the person concerned at all. Moreover, the [Court] considered in [paragraph 194 of the *Savran* judgment] that criminal culpability which is excluded *may have the effect of limiting the weight* of the nature and seriousness of the crime, and [in paragraph 195 of that judgment] that the Court *is not called upon to make general findings in this regard*, but only to determine whether the manner in which the national courts assessed this criterion *adequately took into account* the fact that the applicant in that case was, according to the national authorities, suffering from a serious mental illness." (emphasis in original)

The court dismissed the alien's appeal. It is unknown whether the person concerned lodged a further appeal against this judgment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained of an unjustified interference with his right to respect for his private life as provided for in Article 8 of the Convention, which, in so far as relevant, reads:

> "1. Everyone has the right to respect for his private ... 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

35. The Court notes that the application 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

36. The applicant maintained that the revocation of his residence permit and the imposition of the entry ban constituted a disproportionate interference with his right to respect for private life that served no legitimate aim. He submitted that his treatment history showed that he posed no threat to public order. In that respect he pointed to the fact that since his conviction in 1996

he had not committed or been accused of any crimes. When he had violated the terms of his conditional release from confinement in the clinic by smoking marijuana and drinking alcohol after having been informed of the Deputy Minister's intention to revoke his residence permit, he had immediately reported himself to the staff of the residential facility, which demonstrates that he had learned coping mechanisms to stop and prevent further relapse.

37. It was also argued that the measures had not been foreseeable by the applicant, who lived in the Netherlands since he was eleven years old and whose legal residence status after the conviction in 1996 had been precarious but had nonetheless been left untouched by the authorities. By waiting more than twenty years, the authorities had left a precarious right in existence for too long (the applicant relied on *Aristimuño Mendizabal v. France*, no. 51431/99, 17 January 2009) and had thereby relinquished their right to revoke it. Furthermore, the measures had been counterproductive to the aim of the TBS order, which had been for more than twenty years to reintegrate the applicant into Dutch society. The applicant, relying on *Ciliz v. the Netherlands* (no. 29192/95, ECHR 2000-VIII), argued that when it came to the protection of his private life, different authorities had made decisions that had served contradictory aims, which had caused his medical treatment to stagnate.

38. Further, referring to several expert reports submitted in the domestic proceedings concerning the extension of the TBS order, the applicant argued that due to his mental illness and the lack of prospects of the necessary external guidance in Morocco there would be insurmountable obstacles upon his return to that country, and that he cannot be deemed capable of settling there.

(b) The Government

39. The Government maintained that the domestic courts had thoroughly assessed the applicant's personal circumstances, carefully balanced the competing interests, taken into account the criteria set out in the Court's case-law, and reached findings that were neither arbitrary nor manifestly unreasonable. Although the applicant was a "settled migrant", there had been "very serious reasons" to expel him from the Netherlands, namely the repeated commission of very serious violent, sexual and other offences.

40. They further submitted that, even twenty years after his last conviction, the applicant continued to pose an undiminished threat to public order, as had been shown by the repeated extension of the TBS order. The Government pointed out that the Regional Court in its judgment of 6 November 2018 (see paragraph 24 above) agreed with the Deputy Minister's position that this outweighed the applicant's long stay in the Netherlands and the fact that no steps had previously been taken to withdraw his residence permit. It was also submitted that the circumstances in *Aristimuño Mendizabal* (cited above), relied on by the applicant, substantially

differed from the present case. They further noted that although the applicant had made progress, the most recent TBS extension and the violation of the terms of his conditional release from confinement in the clinic (that was, consuming alcohol and marijuana) had shown that there was still a risk of his reoffending. Even if a causal link between the revocation of his residence permit and his relapse into the use of drugs and alcohol could be assumed, this would only indicate that the applicant was unable to cope with difficulties or setbacks.

41. The Government were also of the opinion that the present case was not comparable with *Ciliz* (cited above), noting that the measures (the revocation of the residence permit and the TBS order), unlike in that case, were a consequence of the same cause, namely the applicant's criminal conduct, and served a similar aim, namely to ensure public safety and prevent disorder or crime. Lastly, the Government maintained that the applicant had no strong ties to either the Netherlands or Morocco. The applicant had never applied for Dutch nationality and still had Moroccan nationality. In any case, the applicant should be deemed capable of settling in Morocco, because he may be assumed to be acquainted with the local language and able to pick it up again, and he had relatives there with whom he was in contact. In sum, all the relevant aspects of the case had been duly considered by the Deputy Minister and the courts.

2. The Court's assessment

42. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. To that end, States have the power to deport aliens convicted of criminal offences (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, an interference with a person's private or family life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that provision as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "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 *Boultif v. Switzerland,* no. 54273/00, § 41, ECHR 2001-IX, and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII).

(a) Whether there was an interference with the applicant's right to respect for his private life

43. The Government did not dispute that there had been an interference with the applicant's right to respect for his private life. The Court sees no reason to find otherwise.

(b) "In accordance with the law"

44. The parties did not dispute that the measures in question were taken pursuant to section 20(1)(b) read in conjunction with section 22(2)(c) of the Aliens Act 2000, and to section 66a of the Aliens Act 2000 and section 3.86 of the Aliens Decree 2000 (see paragraphs 28 and 30 above). The interference at issue was thus in accordance with the law.

(c) "Legitimate aim"

45. The Court accepts that the impugned measures pursued the legitimate aims of ensuring public safety and preventing disorder or crime (see *Üner*, cited above, § 61, and *Azerkane v. the Netherlands*, no. 3138/16, § 68, 2 June 2020). It remains to be ascertained whether they were also "necessary in a democratic society" within the meaning of the Court's case-law.

(d) "Necessary in a democratic society"

(i) General principles

46. The relevant criteria for assessing whether the revocation of the residence permit and the imposition of an entry ban were necessary in a democratic society and proportionate to the legitimate aims pursued under Article 8 of the Convention have been laid down by the Court in its case-law (see *Üner*, cited above, §§ 57-58, and *Maslov v. Austria* [GC], no. 1638/03, §§ 68-76 and 98, ECHR 2008). These criteria are the following:

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period;

– the nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age;

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;

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

– the solidity of social, cultural and family ties with the host country and with the country of destination; and

– the duration of the exclusion order.

47. All of the relevant criteria established in the Court's case-law should be taken into account by the national authorities, including the domestic courts, from the standpoint of either "family life" or "private life" as appropriate, in all cases concerning settled migrants who are to be expelled and/or excluded from the territory following a criminal conviction (see *Savran v. Denmark* [GC], no. 57467/15, § 183, 7 December, with further references).

48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see *Savran*, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see *Akbulut v. the United Kingdom* (dec.), no. 53586/08, § 18, 10 April 2012; *Unuane v. the United Kingdom*, no. 80343/17, § 87, 24 November 2020, with further references; and *Üner*, cited above, § 63), the severity of the criminal penalty (see *Unuane*, § 86, and *Azerkane*, § 73, both cited above), the risk of reoffending (see *Ndidi v. the United Kingdom*, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; *Levakovic v. Denmark*, no. 7841/14, §§ 19 and 44, 23 October 2018; and *Azerkane*, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, *Maslov*, cited above, § 81).

50. In *Savran* (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts,

assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

51. Moreover, for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion (see *Savran*, cited above, § 186).

52. Lastly, the Court has also consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but that it goes hand in hand with European supervision. The Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8. The competent national authorities, including the domestic courts, must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, and the interests in issue have not been weighed in the balance, there will be a breach of the requirements of Article 8 of the Convention (see, for instance, *I.M. v. Switzerland*, no. 23887/16, § 72, 9 April 2019). Where the competent national authorities, including the domestic courts, have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) 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 *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021, and *Savran*, cited above, §§ 187-89, with further references).

(ii) Application of these principles to the present case

53. The Court notes that the Deputy Minister, when balancing the various interests in the context of the proceedings in which the applicant's residence permit was revoked and an entry ban was imposed on him, acknowledged that the applicant had been living and had built up social ties in the Netherlands for a very long time but held that this was outweighed by the seriousness and nature of the crimes committed by him and the still prevailing risk of reoffending. He further considered that the applicant was an adult male who could be expected to fend for himself after assisted repatriation (see paragraphs 16 and 18 above). The Deputy Minister's decision was subsequently assessed and upheld by the national courts (see paragraphs 24 and 25 above).

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant

criteria established in the Court's case-law, and adequately balanced the interests of the applicant against those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare *Savran*, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see *Savran*, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see *Savran*, cited above, § 195).

58. With respect to the criterion "the time that has elapsed since the offence was committed and the applicant's conduct during that period", the Court notes that in the present case this period is more than twenty years and thus significantly long. The Court does not follow, however, the applicant's contention that the authorities had therefore relinquished their right to revoke

his residence permit. The case of *Aristimuño Mendizabal* (cited above), relied on by the applicant, concerned a different issue.

59. The Court further notes that in the balancing exercise in the revocation proceedings, little attention was paid to the issues concerning the applicant's personal circumstances which had been regarded by the criminal courts in their rulings on the extension on the TBS order. The applicant had shown good behaviour during his TBS treatment, and otherwise made positive progress in the years after the commission of his most recent offence, which led the criminal division of the Gelderland Regional Court to follow the behavioural experts' advice to grant the applicant conditional release from confinement in the custodial clinic and continue his treatment in an assisted living facility (see paragraphs 9 and 10 above). While it is true that the applicant at one point in time, namely twenty years after his treatment had started, mentally deteriorated and relapsed into substance abuse (see paragraphs 13, 14, 20 and 21 above), this appears to have been prompted by the Deputy Minister's intention to revoke his residence permit and the subsequent decisions in the revocation proceedings (see paragraphs 11, 16 and 18 above).

60. In this respect it should also be noted that up to that moment the applicant's treatment had been aimed at reintegration into Dutch society and thus no steps had been taken to prepare him for a return to Morocco. Moreover, the Court considers that it follows from the criminal court rulings (see paragraphs 22 and 27 above) that the "status quo" situation in which the applicant ended up had an impact on his medical treatment, his reintegration and the possibility of ending the TBS order. In these particular circumstances, it fell to the authorities to coordinate the various proceedings touching on the applicant's right to respect for his private life and to timely and thoroughly assess the practical feasibility of his expulsion to Morocco, so as to afford due respect to the interests safeguarded by Article 8. That the circumstances of the present differ from those in *Ciliz v. the Netherlands*, as indicated by the Government, does not alter that finding. In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare *Savran*, cited above, § 197).

61. Finally, the Court observes that the Deputy Minister, when balancing the interests at stake, merely found that the applicant was an adult male who could be expected to fend for himself after assisted repatriation, that he was or could become familiar with the local language and that he had family in Morocco with whom he had stayed in contact (see paragraphs 16 and 18 above), which findings were upheld by the administrative courts. It does not appear from their decision-making process that the domestic authorities have contemplated on medical aspects, including the availability and accessibility

in Morocco of medication and treatment matching the applicant's needs (contrast *Savran*, cited above, §§ 191-92). In the light of this, the Court considers that in the revocation proceedings the domestic authorities insufficiently took into account the difficulties that the applicant might encounter in Morocco due to his mental vulnerability, and of which they could not have been unaware given the Gelderland Regional Court's judgment of 6 July 2018 (see paragraphs 20-23 above).

62. In view of the above, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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."

A. Damage

65. The applicant claimed 17,475 euros in respect of non-pecuniary damage, which he alleged to have suffered by being detained in a custodial clinic after the impugned decision. He also claimed that he should be allowed to return to the assisted living facility and that his residence permit be reinstated.

66. The Government argued that there was an insufficient causal link between the alleged violation and the damage claimed by the applicant, pointing out that the present case did not concern the extension of the TBS order but rather the proceedings concerning his legal residence in the Netherlands.

67. The Court considers that, having regard to the circumstances of the case, the conclusion it has reached under Article 8 of the Convention constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. It therefore makes no award under this head (see *Savran*, cited above, § 208, with further references).

B. Costs and expenses

68. The applicant has not made a claim for the costs and expenses incurred before the domestic courts or the Court.

69. The Court will, accordingly, not make any award to the applicant under this head.

FOR THESE REASONS, THE COURT

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

2. *Holds,* unanimously, that there has been a violation of Article 8 of the Convention;

3. *Holds,* by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 30 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Pere Pastor Vilanova President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

P.P.V.
M.B.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. This case concerns the revocation of the applicant's residence permit and the imposition of an entry ban on him. The applicant suffered from a mental disorder which had reduced his criminal culpability at the time when he had committed a serious offence. He argued that his personal circumstances had been insufficiently taken into account when balancing the interests at stake and he complained of an unjustified interference with his right to respect for his private life as provided by Article 8 of the Convention. The applicant also asked the Court to award him an amount in respect of non-pecuniary damage.

2. I agree with points 1 and 2 of the operative provisions of the judgment, namely that the application is admissible and that there has been a violation of Article 8 of the Convention respectively. However, I respectfully disagree with paragraph 67 of the judgment and the corresponding point 3 of its operative provisions, namely that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

3. In paragraph 67 of its judgment, the Court (citing *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021, § 208, with further references), makes no monetary award for non-pecuniary damage. The Court considers that, having regard to the circumstances of the case, the conclusion that it has reached under Article 8 of the Convention constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. Regrettably, in a number of cases the Court has used such wording in not awarding monetary just satisfaction, without providing any further explanation or argument. In a number of other cases, the Court has either awarded monetary compensation for non-pecuniary damage after explaining that the applicant has suffered distress or anguish as a result of the violation established or without giving any explanation for such a finding, its conclusion merely following the submissions of the parties. There is, in my humble view, a need in future for clarity, coherence and consistency in the Court's judgments when affording or not affording just satisfaction under Article 41 of the Convention.

4. I would submit that Article 41 of the Convention, as worded, cannot be interpreted as meaning that "[the] finding [of] a violation of a Convention provision" can in itself constitute sufficient "just satisfaction to the injured party". This is because the former is a prerequisite for the latter and one cannot take them to be the same (see, to similar effect, paragraphs 5-9 of my joint partly dissenting opinion with Judge Felici in *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022; paragraphs 14-19 of my partly concurring and partly dissenting opinion in *L.B. v. Hungary* [GC], no. 36345/16, 9 March 2023; paragraph 2 of my partly dissenting opinion in *Ghadamian v. Switzerland*, no. 21768/19, 9 May 2023; paragraph 2 of my partly

dissenting opinion in *Anderlecht Christian Assembly of Jehovah's Witnesses and Others v. Belgium*, no. 20165/20, 5 April 2022; paragraph 9 of my partly dissenting opinion in *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021; and paragraph 45 of my partly concurring and partly dissenting opinion in *Savran*, cited above).

5. In the present opinion, for the reasons I explain above (see paragraph 3), I consider it necessary to elaborate further on what I argued in my previous opinions (see paragraph 4 above). My reading of Article 41 of the Convention is that it sets out the following three requirements or criteria which must be satisfied cumulatively for the Court to award just satisfaction, including, of course, satisfaction for non-pecuniary damage (the numbering to be followed is mine): (a) the Court finds that there has been a violation of the Convention or the Protocols thereto; (b) the internal law of the High Contracting Party concerned allows only partial reparation to be made; and (c) the Court considers it necessary to afford just satisfaction. The Court in the present case confined itself to the first requirement of Article 41, and instead of also examining the other two requirements in order to decide whether or not to afford just satisfaction to the applicant, it regrettably considered, without any justification or explanation, that the fulfilment of the first requirement by itself constituted sufficient just satisfaction for non-pecuniary damage, without ultimately making any monetary award for non-pecuniary damage. In my opinion, such an interpretation and application of Article 41 has no foundation either in the wording or in the purpose of that provision. When a provision asks for three requirements to be satisfied in order to afford just satisfaction, there is a logical fallacy in deciding that the existence of one of them by itself constitutes sufficient satisfaction. Apart from this fallacy, such a conclusion entirely prevents the appropriate application of Article 41, and ultimately the full realisation of the substantive right concerned, in this instance Article 8.

6. To my regret, the judgment omits to see that the purpose of Article 41, albeit related, is not the same as the purpose of the substantive provisions of the Convention securing human rights, such as Article 8. In particular, it does not acknowledge that these Articles cannot replace one another in the sense that, as was decided in the present case, the finding of a violation of Article 8 automatically satisfies Article 41.

7. Further, even if my above reading of Article 41 were wrong, I would still have made a monetary award for non-pecuniary damage, because I consider that in the particular circumstances of the present case the applicant should have received just satisfaction in respect of such damage.

8. The failure to award the applicant a sum in respect of non-pecuniary damage for the violation of his right amounts, in my view, to rendering the protection of his right illusory and fictitious (see, to similar effect, the opinions referred to in paragraph 4 above of the present opinion). This runs counter to the Court's case-law to the effect that the protection of human

rights must be practical and effective and not theoretical and illusory, as required by the principle of effectiveness which is inherent in the Convention (see *Artico v. Italy*, 13 May 1980, §§ 33 and 47-48, Series A no. 37). For the right to respect for the applicant's private life to be practical and effective and not theoretical and illusory, both Articles 8 and 41 must be satisfied, by the Court not only finding a violation of Article 8, as it did in the present case, but also by its awarding the applicant just monetary compensation for non-pecuniary damage under Article 41, which it did not do.

9. The applicant claimed 17,475 euros in respect of non-pecuniary damage (see paragraph 65 of the judgment). For their part, the Government argued that there was an insufficient causal link between the alleged violation and the damage claimed by the applicant, pointing out that the present case did not concern the extension of the TBS order but rather the proceedings concerning his legal residence in the Netherlands (see paragraph 66 of the judgment). Regrettably, the judgment does not answer this argument by the Government, as it simply states that the finding of a violation of Article 8 constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. Nor does the judgment examine the other two requirements of Article 41 for awarding just satisfaction (see paragraph 5 above). In my understanding, by equating the violation of Article 8 with just satisfaction under Article 41, the Court assumes that the applicant has indeed suffered non-pecuniary damage, such as distress and anxiety. My disagreement, however, is as explained above and concerns the fact that no pecuniary award has been made to the applicant.

10. Regarding the Government's stance that there was an insufficient causal link between the alleged violation and the damage claimed by the applicant, I respectfully disagree, since the issue of the proceedings concerning the applicant's legal residence in the Netherlands is inextricably connected with the issue of the change of the applicant's assisted living facility, the latter being a consequence of the former, and the violation found by the Court under Article 8 was sufficiently linked to both of these issues. In any event, the applicant, besides his complaint that he was forced to change his assisted living facility, clearly requested in paragraph 23 of his observations to the Court dated 26 October 2021: "The applicant [would like] to ask for just satisfaction for non-pecuniary damage as ... compensation for suffering and distress occasioned by the violation." From this statement, it is clear that the applicant linked his claim for just satisfaction for non-pecuniary damage to the violation of Article 8, although subsequently in the same paragraph and in the next one, he also referred to his complaint regarding the change of his living facility.

11. From my point of view, all three requirements set out in Article 41 are satisfied in the present case, so I would have made an award to the applicant in respect of non-pecuniary damage, by way of just satisfaction under

Article 41 of the Convention. Since, however, I am in the minority, it is not necessary for me to determine the sum that should have been awarded.

12. For the foregoing reasons, I voted against point 3 of the operative provisions of the judgment and I disagree with my eminent colleagues.