EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION (endnote 1)

CASE OF AL-NASHIF v. BULGARIA

(Application no. 50963/99)

JUDGMENT

STRASBOURG

20 June 2002

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

In the case of Al-Nashif v. Bulgaria,

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

Mr G. Ress, President,

Mr L. Caflisch,

Mr J. Makarczyk,

Mr I. Cabral Barreto,

Mr V. Butkevych,

Mr J. Hedigan,

Mrs S. Botoucharova, judges,

and Mr V. Berger, Section Registrar,

Having deliberated in private on 25 January 2001 and 30 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 50963/99) against the Republic of Bulgaria lodged with the Court on 15 September 1999 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The application was initially submitted by five applicants. Following the partial decision of 16 December 1999 rejecting the complaints of two of the applicants, the remaining applicants are Mr Daruish Al-Nashif, a stateless person born in 1967 ("the first applicant"), and Abrar and Auni Al-Nashif, the first applicant's children, who were born in 1993 and 1994 respectively and have Bulgarian nationality ("the second and the third applicants"). The second and third applicants applied to the Court through their mother, Mrs Hetam Ahmed Rashid Saleh, the wife of Mr Al-Nashif.

2. The applicants were represented by Mr Y. Grozev and Mrs K.Yaneva, lawyers practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs G. Samaras, Ministry of Justice.

3. The applicants alleged that the first applicant did not have the right to appeal to a court against his detention and that he had been detained incommunicado (Article 5 § 4), that his deportation had infringed the right of all three applicants to respect for their family life (Article 8), that they did not have an effective remedy in this respect

(Article 13), that the measures against the first applicant were in breach of his right to freedom of religion and that he had not had an effective remedy in this respect (Articles 9 and 3). In the initial application the applicants also raised complaints under Articles 5 § 1, 6 and Article 1 of Protocol No. 1 to the Convention.

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

5. A hearing on admissibility and merits (Rule 54 § 4) took place in public in the Human Rights Building, Strasbourg, on 25 January 2001.

There appeared before the Court:

(a) for the Government

Mrs G. Samaras, Ministry of Justice, Agent,

(b) for the applicants

Mr Y. Grozev, Lawyer, Counsel,

Mrs K. Yaneva, Lawyer, Counsel.

The Court heard addresses by them.

6. By a decision of 25 January 2001 the Court declared the remainder of the application partly admissible and partly inadmissible.

The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section IV.

8. Subsequently, Mr I. Cabral Barreto, substitute judge, replaced Mr A. Pastor Ridruejo who was unable to take part in the further consideration of the case.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, Mr Daruish Auni Al-Nashif, a stateless person of Palestinian origin, was born in 1967 in Kuwait. He resided in Bulgaria between September 1992 and July 1999, when he was deported. He now lives in Syria.

The second and third applicants, Abrar and Auni Al-Nashif, are the first applicant's children. They were born in Bulgaria in 1993 and 1994 respectively. They are of Bulgarian nationality and lived in the town of Smolyan, Bulgaria, with their mother, Mrs Hetam Ahmed Rashid Saleh, apparently also a stateless person, until June 2000. Thereafter, Mrs Saleh and the second and third applicants left Bulgaria and settled in Jordan.

A. The first applicant's background, family and residence status in Bulgaria

10. The first applicant describes his personal circumstances as follows. His father, who died in 1986 in Kuwait, was a stateless person of Palestinian origin. His mother is a Syrian citizen. Despite the fact that he was born in Kuwait and that his mother is a Syrian citizen, the first applicant cannot acquire Kuwaiti or Syrian nationality because in both countries only offspring of male nationals of those States may obtain citizenship.

11. The first applicant lived in Kuwait until the age of 25. He attended high school there and obtained a degree in electronics. In 1992 he married Mrs Hetam Saleh. The parties have not stated the nationality of Mrs Saleh, whose parents live in Jordan. It appears undisputed, however, that the second and third applicants, her children, became Bulgarian nationals pursuant to a provision which confers Bulgarian citizenship on children born in Bulgaria to stateless parents.

12. Mr Al-Nashif has two sisters who live in Syria. His mother also lives in Syria, in the city of Hama. He also has a brother who lived in Kuwait at least until 1994 and has resided in Bulgaria, where he married a Bulgarian national, since 1998.

13. The first applicant submits that after the Gulf War many Palestinians were expelled from Kuwait as Palestinian leaders had supported the Iraqi invasion in 1990. He left Kuwait with his wife, Mrs Saleh, on 16 August 1992 and travelled to Syria and then, on 20 September 1992, to Bulgaria. The first applicant submits that he was in search of a country in which to settle. He could not stay in Syria as he was unable to provide for his family there. The choice of Bulgaria was made because of the existing job opportunities, the relatively easy procedure for obtaining legal status, and the fact that the family had friends of Palestinian origin living there.

14. Mr Al-Nashif and Mrs Saleh arrived in Bulgaria on 20 September 1992. The first applicant was in possession of a Syrian stateless person's identity document, valid until 1993, which he later renewed at the Syrian Embassy in Sofia. In an application form for a residence permit he indicated Hama, Syria, as his place of residence.

15. On an unspecified date shortly after his arrival the first applicant obtained a temporary residence permit. Mr Al-Nashif, together with other persons, ran a beverages production business. He and his wife initially resided in Sofia, where the second and the third applicants were born in 1993 and 1994.

In February 1995 the first applicant obtained a permanent residence permit.

16. In February 1995 the first applicant contracted a Muslim religious marriage with a Ms M., a Bulgarian citizen. Under Bulgarian law that marriage has no legal effect.

Ms M. lived in Sofia with her mother. During an unspecified period of time Mr Al-Nashif supported them financially.

It is undisputed that after the religious marriage with Ms M. the first applicant continued living with Mrs Saleh and their children in Sofia.

17. At the end of 1995 he and Mrs Saleh, together with their children, moved to Smolyan, a town of about 34,000 inhabitants in Southern Bulgaria, some 300 km away from Sofia. There the first applicant ran a butcher's shop and beverages production unit until his deportation in July 1999. Between November 1998 and April 1999 he also taught Islamic classes.

18. At the beginning of 1996 Ms M. followed the first applicant to Smolyan, where she stayed several months in an apartment rented by him. She often joined Mr Al-Nashif during his business trips to towns in Bulgaria.

The first applicant stated that while in Smolyan he had continued living "on a permanent basis" with his wife Hetam Saleh and their two children, the second and the third applicants. He submitted copies of two affidavits, made in June 2000 by his wife, Mrs Saleh, and by his sister-in-law, the wife of his brother, who had resided in Bulgaria since 1998, both confirming that Mr Al-Nashif lived in Smolyan with Mrs Saleh.

In a statement made on 19 January 2001 at the request of the Government for the purposes of the hearing in the present case, Ms M. stated that the first applicant had lived with her in Smolyan.

19. Ms M. apparently suffered from a mental disturbance. In December 1996 she was hospitalised in a psychiatric clinic. Thereafter she did not return to Smolyan and stayed in Sofia.

20. Throughout 1997 the first applicant visited Ms M. in Sofia. Their relationship ended in early 1998.

B. The revocation of the first applicant's residence permit

21. On 14 January 1999 a police officer in Smolyan reported to his superiors (see paragraph 63 below) on Mr Al-Nashif's religious activities.

On an unspecified date in 1999 the Regional Prosecutor's Office (okr"zhna prokuratura) in Smolyan opened file no. 18/99 which was later transmitted to the police.

The local police in Smolyan, by a report of 18 March 1999 to the Identity Papers and Passport Regime Department (Napravlenie "Dokumenti za samolichnost i pasporten rezhim") of the National Police Directorate at the Ministry of the Interior ("the Passport Department"), proposed that the first applicant's residence permit be revoked.

22. On 19 April 1999 the Passport Department issued an order ("Order no. 63552") revoking the first applicant's permanent residence permit. The order stated that it was based on Section 40 (1)(2) and Section 10 (1)(1) of the Aliens Act (Zakon za chuzhdentsite), which provide for the revocation of the residence permit of a foreigner who poses a threat to "the security or the interests of the Bulgarian State" (see paragraph 68 below). No further details were mentioned. The order was transmitted to the Smolyan police with the instruction to inform the first applicant and to allow him 15 days to leave the country.

Order no. 63552 was served on the first applicant on 27 April 1999. He was not given any additional information.

23. On 30 April 1999 two national newspapers, Duma and Monitor, published articles explaining that the first applicant did not have permission to teach the Muslim religion, that he had taken part in an unauthorised religious seminar in 1997 and that he was linked to "Muslim Brothers", a fundamentalist organisation.

24. In May and June 1999 the local Muslim religious leader in Smolyan and the Chief Mufti of the Bulgarian Muslims filed with the Ministry of the Interior and with other institutions letters supporting the first applicant. They confirmed that Mr Al-Nashif had been teaching with their authorisation, and in full conformity with Article 21 § 5 of the Statute of the Muslim religious denomination, which in turn had been approved by the Council of Ministers. The Chief Mufti also stated that the police in Smolyan had made defamatory statements to the press, falsely portraying Mr Al-Nashif as a dangerous terrorist connected with a fundamentalist organisation. The local Muslim religious leader in Smolyan stated, inter alia, that the measures against Mr Al-Nashif constituted "a demonstration of, and incitement to, anti-Islamic and xenophobic tendencies".

25. In May 1999 the first applicant requested and obtained a certificate that he had never been convicted of a criminal offence. He needed the certificate in order to apply for Bulgarian citizenship.

C. The first applicant's detention and deportation; subsequent developments

26. On 9 June 1999 the National Police Directorate issued Orders nos. 503 and 504 for the first applicant's deportation, his detention and his exclusion from Bulgarian territory.

27. Order no. 504 provided that the first applicant was to be deported based on Section 42 of the Aliens Act. It was further ordered that, in accordance with Section 44 (4) of the Aliens Act, the first applicant was to be placed at the Adults' Temporary

Placement Centre (Dom za vremenno nastaniavane na p"lnoletni litsa) in Sofia. Order no. 504 finally stated that pursuant to Section 47 (1) of the Aliens Act the decision was not subject to appeal. Order no. 503 prohibited the first applicant's re-entry on Bulgarian territory.

The two orders did not state any reasons.

28. They were served on the first applicant on 10 June 1999 in Smolyan, at the local police station, in the presence of his lawyer. He was not given further details of the reasons underlying the measures against him. He was immediately arrested and transferred to the detention centre in Sofia.

29. On the same day the Ministry of the Interior issued a press release announcing the orders for the first applicant's deportation and exclusion. It stated, inter alia:

"In 1995 Mr Al-Nashif undertook steps ... with a view to opening an Islamic religious study centre. That provoked a significant negative public reaction, reflected in the media, and the interference of the ... State organs prevented the realisation of the project.

In 1997 an Islamic study seminar was held in Narechenski Bani with Mr Al-Nashif's active participation. Those activities of the organisers, including Mr Al Nahsif, were considered unlawful and were therefore terminated by the police. [The organisers and Mr Al-Nashif] were warned that they could not engage in such activities without permission and licence as required by law.

In the end of 1998 and the beginning of 1999 it became known that Mr Al-Nashif was teaching the Koran to ... minors, organised in groups of 10-15 children, with the financial assistance of the company ...[illegible]. An inquiry was undertaken, which disclosed that Mr Al-Nashif engaged in activities for which he had no permission or qualification. Therefore, and under ... the Aliens Act, his residence permit was withdrawn ... Orders for his deportation and exclusion were issued ... [and] served on 10 June 1999 ... Al-Nashif was transferred to the [detention centre] in Sofia and will be deported..."

30. The conditions at the detention centre, which is located in the proximity of the Sofia airport, were equivalent to prison conditions. Inmates were held permanently behind bars and could leave their cells for a daily one-hour walk and also for the time necessary to use the toilet, every morning and evening.

31. Mr Al-Nashif was detained there for 26 days in complete isolation. Despite numerous requests from his lawyer, human rights groups and representatives of the Muslim community, no visitor was allowed to meet him.

32. Following the first applicant's arrest on 10 June 1999 the competent authorities observed that he was not in possession of a document valid for international travel. On 14 June 1999 the Passport Department wrote to the Bulgarian Foreign Ministry requesting its assistance in obtaining of a laissez-passer from the Syrian Embassy in Sofia. The Syrian Embassy issued that document on 28 June 1999. On 1 July 1999 the Passport Department contacted Balkan Bulgarian Airlines.

On 4 July 1999 the first applicant was deported from Bulgaria. He was brought to the airport and put on the first available direct flight to Damascus.

33. His wife, Mrs Saleh, and their children initially remained in Bulgaria. In May 2000 the second applicant, who was then seven years' old, completed first grade in the elementary school in Smolyan. The third applicant, who was six years old at that time, attended preparatory school.

34. As Mrs Saleh had no income in Bulgaria and the first applicant was unable to provide financial support from Syria, on 29 June 2000 Mrs Saleh and the second and third applicants left Bulgaria. They went initially to Syria where they stayed for a month with Mr Al-Nashif. As there was allegedly no room for the family there, Mrs Saleh and the children went to Jordan, to the home of Mrs Saleh's parents. Mr Al-Nashif travelled to Jordan on a one-month visa and on 5 September 2000 returned to Syria as he had allegedly no legal right of remaining in Jordan.

D. The attempts of the first applicant to challenge the measures against him

1. Appeal against Order no. 63552

35. On 4 May 1999 counsel for Mr Al-Nashif submitted appeals against Order no. 63552 (the revocation of residence order) to the Supreme Administrative Court (V"rkhoven administrativen s"d) and to the Ministry of the Interior.

36. The latter appeal was rejected on 1 June 1999 by the National Police Directorate at the Ministry of the Interior. The decision stated that in accordance with Section 47 (1) of the Aliens Act an order concerning a matter of national security was not subject to review.

37. The appeal to the Supreme Administrative Court was transmitted by decision of the court to the Ministry of the Interior with instructions to complete the case-file. Thereafter it was transmitted to the Sofia City Court (Sofiiski gradski s"d), which was competent to deal with it.

38. On 28 June 1999 the Sofia City Court, sitting in camera, granted Mr Al-Nashif's lawyer's request for a stay of execution. The court noted that orders issued under the Aliens Act were not subject to judicial review if they directly concerned issues of national security. The court found, however, that the evidence submitted to it by the Ministry of the Interior did not support the allegation that the first applicant posed a threat to national security or to the national interests. In these circumstances the court considered that the appeal could not be declared inadmissible at that stage, the holding of a hearing being necessary. Pending such hearing it was appropriate to stay the execution of Order no. 63552 to avoid an infringement of the first applicant's rights.

39. On 30 June 1999 the Passport Department filed an objection with the Sofia City Court against its ruling of 28 June 1999 and submitted “certificate” no. 2701/30.6.99 which stated that Mr Al-Nashif

"had committed acts against the national security and the interests of the Republic of Bulgaria, consisting in unlawful religious activity on the territory of the country encroaching on the national interests and the rights of the religious, ethnic and minority groups in the conservation of the national and cultural values and traditions".

40. On 1 July 1999 the Sofia City Court, sitting in camera, reversed its ruling of 28 June 1999 and rejected the first applicant's appeal against Order no. 63552. The court noted that the Passport Department had certified that Mr Al-Nashif had committed acts against national security. The court also noted that the Passport Department had classified these acts as falling with the scope of Section 10 (1)(1) of the Aliens Act. It followed that Order no. 63552 concerned issues of national security and was not subject to judicial review.

41. Counsel for the first applicant learned about the rejection of Mr Al-Nashif's appeal on 26 July 1999. On 28 July 1999 she appealed to the Supreme Administrative Court. These proceedings ended by judgment of the Supreme Administrative Court of 4 April 2000, which found that orders issued under Section 40 (1)(2) in conjunction with Section 10 (1)(1) of the Aliens' Act were not subject to appeal and need not be reasoned. They should merely state the legal provision on which they were based.

2. Appeals against detention

42. On 17 June 1999 the first applicant's lawyer appealed to the Sofia City Court against his detention. She relied on Article 5 § 4 of the Convention. On an unspecified date the President of the Sofia City Court ruled that the appeal was inadmissible.

43. On 19 June 1999 counsel for the first applicant complained to the competent prosecution authorities against the detention of Mr Al-Nashif and stated that she had been refused access to her client. On 27 July 1999 the competent prosecution authority dismissed the appeal. It found that the police had acted within their powers.

3. Appeals against Order no. 504

44. On 18 June 1999 counsel for the first applicant appealed to the Sofia City Court against Order no. 504 (the deportation and detention order). Counsel stated, inter alia, that the first applicant's appeal against the revocation of his residence permit (against Order no. 63552) was still pending, that he had never sought to abscond and that he had reported voluntarily to the Smolyan police station when summoned. She again relied on Article 5 § 4 of the Convention and Article 13 of the International Covenant on Civil and Political Rights (ICCPR) and also requested a stay of execution.

45. These proceedings have not resulted in any decision. On 7 September 1999 the Passport Department filed an answer requesting the rejection of the appeal. There has been no hearing in the case.

4. Other appeals

46. On 11 June 1999 the first applicant's lawyer complained to the Ministry of the Interior, the Chief Public Prosecutor (Glaven prokuror) and other institutions. She

alleged violations of, inter alia, Article 8 of the Convention and Article 13 of the ICCPR.

E. Mr Al-Nashif's religious activities

1. Undisputed facts

47. In August 1997 Mr Al-Nashif took part in a religious seminar in Narechenski Bani. The seminar was attended by several Bulgarian Muslim religious leaders of national and regional level, including the person who in November 1997 was elected to the post of, and then registered by the competent Governmental agency as, Chief Mufti of the Bulgarian Muslims. At a certain point during the seminar the police arrived, and took away printed material and videotapes used at the seminar. No relevant criminal proceedings against any participant at the seminar have ever been brought.

48. In November 1998 the first applicant started teaching religious classes. They took place every Saturday and Sunday between 4 p.m. and 6 p.m. in the building of the District Muslim Organisation in Smolyan, and were attended by Muslim children and occasionally by their parents. The classes were organised together with the board of the Muslim religious community in Smolyan. On 15 September 1998 the board had invited Mr Al-Nashif to teach a course in the Islamic religion to children and their parents. Its decision stated that the first applicant was suitable for the job as he knew the Bulgarian language and had a good reputation. On 5 November 1998 the District Mufti Office (raionno miuftiistvo) issued to the first applicant a certificate stating that he was authorised to preach on the territory of the Smolyan district in accordance, inter alia, with the Statute of the Muslim religious denomination in Bulgaria and the decisions of the Supreme Muslim Council (Vissh miusiulmanski s"vet). The certificate was later confirmed by the Chief Mufti of the Bulgarian Muslims.

2. Allegations of the respondent Government

(a) Alleged project for the opening of an Islamic study centre in 1995

49. The Government asserted that shortly after his arrival in Smolyan in 1995 the first applicant, together with local Muslims, had sought to organise an Islamic study centre, that he had rented a house for that purpose, that his plans had provoked a negative public reaction and that after having established through an inquiry that the requirements of the Religious Denominations Act had not been met, the competent authorities had prevented the realisation of the project. There had been allegedly a danger that the Islamic centre would propagate extremist views. Mr Al-Nashif had been orally warned against engaging in unlawful religious activities.

50. In support of the above statement the Government submitted copies of several newspaper articles and four declarations, one of which was signed by 65 inhabitants of Smolyan protesting against the opening of an Islamic centre in town.

The Court notes that the names on the list of those who signed the protest suggest that it was supported exclusively by persons of Bulgarian ethnic origin.

51. The Government have not submitted any information pertaining to the alleged inquiry undertaken by the competent authorities or the requirements of the Religious Denominations Act that had not allegedly been met.

52. The first applicant submitted that he had intended to open a computer training centre, but had abandoned his plans after meeting a hostile reaction from people who considered that the computer centre would be a front for religious courses.

(b) Alleged aggressive fundamentalist proselytism

53. The Government alleged that the first applicant had sought to impose fundamentalist Islam on others through the use of force and threats.

54. In support of that allegation the Government submitted two statements by Ms M., the person whom the first applicant had married through a Muslim religious ceremony.

The first statement was written by her on 2 September 1996. On that day Mr Al-Nashif had locked her up in her room in a hotel where they had been staying during a trip to Pleven. Ms M. had called the police. She and the first applicant had been brought to the police station where they had submitted written statements and had been released. No charges had been brought against Mr Al-Nashif on that occasion. He submitted that he had locked the door as Ms M. had been in a depressed state and could have hurt herself.

55. In her statement to the police Ms M. wrote that the first applicant had told her that she should believe in Mohamed or burn in Hell, but she had replied that she loved Jesus Christ. The first applicant had also told her to dress as a Muslim woman. She further stated that she had read in the local press about the threat of fundamentalism in Smolyan. She knew that people with "black briefcases full of 100 dollar notes" were entering Bulgaria with the purpose of spreading Islam, brainwashing Bulgarians and waging "Jihad - death to Christians". She knew that they were using "bombs, guns, sedatives and other inadmissible means in order to smuggle into the country illegal [copies of the] Koran, drugs, and more".

56. The Government submitted a second written statement by Ms M., which was made on 19 January 2001 and addressed to the Court, for the purposes of these proceedings. That statement repeated Ms M.'s earlier allegations and added that the first applicant had operated with large amounts of cash, had given charity for the building of mosques and religious schools and had distributed food and clothes. He had allegedly made video tapes recording the results of his activities and had sent them to his benefactors "in the Islamic states".

(c) Alleged links with fundamentalist organisations

57. The Government stated (in submissions to the Court and through the "information note" described below) that Mr Al-Nashif had been a representative of

the Islamic foundation Tayba, which had allegedly continued the activities of the "banned" foundations Irshad and Al Wakf Al Islami.

Further, Mr Al-Nashif had registered several commercial firms in Bulgaria and his partners in these firms had included persons who had been co-ordinators of fundamentalist organisations such as Tayba, Irshad and El-Manar. Finally, there existed information that Mr Al-Nashif had performed management and co-ordination functions in the "illegitimate" Union of Islamic Organisations, Bulgarian branch.

The Government did not provide further details about those organisations.

58. The first applicant replied that he had never been a representative for the Tayba foundation which, in any event, as of 2001, was still functioning lawfully in Bulgaria. It had been registered in Bulgaria in 1995. By Decision no. 325 of 7 July 1998 the Council of Ministers had authorised the foundation to engage in religious activities.

The Irshad foundation was not a fundamentalist organisation either. It had been registered in Bulgaria in 1991 and as recently as 2001 the competent court had certified that its registration had not been terminated. The former Chief Mufti, whose election to that post had been registered by the Government in 1997, was a member of its managing board.

The El-Manar foundation had indeed been dissolved on 15 February 1996 on the ground that its goals were unlawful. However, its representative had not been among the persons named by the Government as Mr Al-Nashif's business partners.

The applicants submitted copies of certificates issued by the legal persons' register at the competent court.

(d) Alleged fundamentalist activities at the Narechenski Bani seminar

59. The Government stated that the seminar had been organised under the auspices of the Irshad foundation, which was allegedly known as one of the disguised creatures of the Muslim Brothers, a fundamentalist organisation. The police had considered the seminar unlawful and dangerous for national security. The printed and video material that had been confiscated had disclosed preaching of "religious and ethnic extremism". The police had put an end to the seminar. Two of the instructors who had participated had been deported from Bulgaria. Mr Al-Nashif had allegedly been one of the organisers. He and all other participants had received oral warnings.

60. In support of these allegations the Government submitted copies of newspaper articles.

61. The applicants submitted a declaration by the Chief Mufti of the Bulgarian Muslims, dated 1 August 2000, apparently prepared for the purposes of the present case, stating that the only sponsor of the 1997 seminar had been the International Youth Assembly Nedua, registered in Saudi Arabia and in many other countries, including Bulgaria. The Chief Mufti further stated that the seminar had been devoted to traditional religious teaching. The police had gone there, apparently in response to an anonymous call. They had taken away material, part of which they had then

returned. As the police had not established any wrongdoing, the seminar had continued after an interruption.

(e) Alleged danger stemming from the Islamic lessons given by the first applicant from November 1998 to April 1999

62. The Government stated that against the background of the first applicant's religious activities between 1995 and 1998 the authorities had justifiably feared that the classes given by him to children could be dangerous.

63. In support of this allegation the Government submitted copies of newspaper articles and a copy of a one-page report by a police officer in Smolyan, addressed to his superiors. The report, dated 14 January 1999, stated as follows:

"I report hereby that I received the following information through a third person:

...[A] Mr Daruish Auni, Syrian national, preaches to some of the inhabitants in [a] neighbourhood [in Smolyan].

He disseminates Arab literature and offers aid: money, as well as [sacrificial] meat, Kurban. There exist indications that audio cassettes with religious content are being distributed and that people listen to them in their homes."

64. The first applicant categorically denied the allegation that he had offered money or any other incentive to encourage attendance at his religious courses.

(f) The "information note" of the National Security Service

65. After the hearing on the admissibility and merits of the case the Government submitted an "information note" issued on 19 January 2001 by the National Security Service, apparently for the purposes of the proceedings in the present case. The note reiterated the allegations submitted by the Government as regards Mr Al-Nashif's religious activities, including Ms M.'s contention that he had been receiving money from abroad "in suitcases full of USD 100 bills".

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Constitution

66. Article 120 provides:

"(1) The courts shall review the lawfulness of the administration's acts and decisions.

(2) Physical and legal persons shall have the right to appeal against all administrative acts and decisions that affect them, save in the cases expressly specified by Act of Parliament."

B. The Administrative Procedure Act

67. This law establishes general rules concerning the delivery of, and appeals against, administrative decisions.

According to Sections 33-35 and 37, all administrative decisions are subject to judicial review except, inter alia, those "directly concerning national security and defence".

C. The Aliens Act of December 1998 and developments in its application and interpretation

1. The Aliens Act at the relevant time

68. Section 40 (1)(2) in conjunction with Section 10 (1)(1) provides that the Minister of the Interior or other officials authorised by him may revoke a foreigner's residence permit "where by his acts he has endangered the security or the interests of the Bulgarian State or where there exists information that he acts against the security of the country".

Section 42 provides that the Minister of the Interior or other officials authorised by him may order a foreigner's deportation where "his presence in the country poses a serious threat to national security or public order".

69. Section 44 (4), insofar as relevant, provides as follows:

"Until [his] ... deportation ... the foreigner may be placed in a specialised centre at the discretion of the Minister of the Interior or other officers authorised by him."

70. Section 47 provided, as in force at the relevant time:

"(1) Orders issued under Chapter V Part 1 imposing administrative measures which directly concern national security shall not be subject to appeal.

(2) These orders shall state only their legal ground."

2. Application and interpretation

71. The Bulgarian courts have differed on the question whether a mere reference to national security in the grounds of an order under the Aliens Act is sufficient to declare an appeal against such an order inadmissible or whether some proof that national security is indeed at stake should be required (see paragraphs 38-41 above and the Supreme Administrative Court's judgment of 26 July 2000 in case 5155-I-2000).

72. In December 2000 Parliament adopted a law on interpretation of Section 47 of the Aliens Act, clarifying that a court examining the admissibility of an appeal against

an administrative decision citing as a legal basis Section 10 (1)(1) of the Aliens Act ("directly related to national security") should automatically declare the appeal inadmissible without collecting evidence. A motion by 56 members of Parliament and by judges of the Supreme Administrative Court to declare that interpretative law, insofar as relevant here, unconstitutional was rejected by the Constitutional Court on 29 May 2001 on formal grounds.

3. The Constitutional Court's judgment of 23 February 2001

73. On 23 February 2001 the Constitutional Court delivered its judgment in a case brought by 55 members of Parliament who considered that Section 47 (1) of the Aliens Act should be repealed as being unconstitutional and in contravention of the Convention.

74. The Constitutional Court could not reach a majority, an equal number of judges having voted in favour of the application and against it.

According to the Constitutional Court's practice, in such a situation the request for a legal provision to be struck down is considered as dismissed by default.

75. The judges who found that Section 47 (1) was not unconstitutional and did not contravene the Convention considered that the Constitution authorised Parliament to exclude the right to seek judicial review of certain categories of administrative decision provided that a constitutionally guaranteed legitimate aim overrode the interests of the protection of fundamental rights and freedoms. National security was such a legitimate aim. Its protection had priority over the protection of individual rights and freedoms. Section 47 (1) of the Aliens Act took account of the fact that confidential information was at stake in deportation decisions based on national security. The wishes of a foreigner who had imperilled the security or the interests of the Bulgarian State could not prevail over national security considerations. Furthermore, there existed a possibility of filing an administrative appeal to the Minister of the Interior or to the Council of Ministers, which was a sufficient remedy.

As to the Convention, its provisions permitted restrictions on human rights on grounds of national security and did not enshrine a right to a judicial appeal against deportation decisions.

76. The judges who held that Section 47 (1) was unconstitutional considered that the principle of proportionality inherent in the Constitution required that limitations on constitutional rights could not go beyond what was strictly necessary for the achievement of the legitimate aim pursued and that regard should be had to the fundamental importance of the right to judicial remedies enshrined in Article 120 of the Constitution. Depriving aliens of any possibility of obtaining judicial review of a deportation decision was disproportionate. The interests of national security were sufficiently protected as the administration could order immediate execution of a deportation order notwithstanding a pending application for judicial review. Furthermore, it was not true that an administrative appeal was possible.

77. This second group of judges also considered that the impugned provision was incompatible with the Convention as interpreted in the case-law of the European Court of Human Rights.

The unavailability of judicial review could lead to violations of Article 3 of the Convention if an alien was deported to a country where he or she risked inhuman treatment.

The judges further stated, inter alia:

"The Aliens Act allows the confinement [of an alien pending deportation] at the discretion of the Ministry of the Interior, without limitation in time ... Neither that Act nor any other law provides for any possibility of review ... [However,] the Convention, in its Article 5 § 4, requires a remedy ...

Deportation ... may constitute an interference with family life [under Article 8 of the Convention]. Therefore, an assessment must be made as to whether such a measure is necessary in a democratic society in the interests of national security ...

National security is one of the values of a democratic society, as much as fundamental rights and freedoms are. A domestic legal provision would be contrary to the Convention if there were no guarantees against administrative abuse and arbitrariness. These guarantees must be provided for by law. The balance between fundamental rights and the public interest must be assessed in every case by a court or another body independent from the executive."

4. The amendments to the Aliens Act of April 2001

78. In April 2001 the Aliens Act was amended. The possibility of filing an administrative appeal to the Minister of the Interior was introduced (Section 46, as amended). A new Section 44 a stated that an alien should not be expelled to a country where his life, liberty or physical integrity were endangered.

The rule providing that decisions citing national security as grounds need not state any reasons and are not amenable to judicial review remains in force (Section 46 (2) and (3)). The law does not require any consideration of the question whether a deportation decision would interfere with the alien's right to family life and, if so, whether a fair balance has been struck between the public interest and the rights of the individual concerned.

D. The Religious Denominations Act of 1949 and the Statute of the Muslim Religious Denomination in Bulgaria

79. Sections 6 and 30 of the Religious Denominations Act provide, inter alia, that the statute and rules of a religious denomination shall be submitted for approval to the Council of Ministers or to one of the Deputy Prime Ministers. Where they contain provisions which are contrary to the law, public order, or morals, the Council of Ministers may require their amendment, or refuse to approve them.

80. Section 30 also provides that the statute and rules of the religious denomination must regulate all matters related to its finances and internal self-regulation, insofar as these matters are not regulated by the Religious Denominations Act. The Religious Denominations Act does not contain provisions regulating religious classes, except for Section 14 which concerns the opening of high schools and institutions of higher education for the training of religious ministers.

81. The Statute of the Muslim religious organisation in Bulgaria, in force at the relevant time, was adopted at a national conference of the Muslim believers held on 23 October 1997. On 28 October 1997 it was approved by a Deputy Prime Minister.

82. Sections 13 and 21 of the Statute provide for local Muslim boards (nastoiatelstva) and District Muslim Councils (raionni miusiulmanski s"veti) who are competent, inter alia, to organise classes for the study of the Koran.

E. The Framework National Security Concept

83. The Government relied in their submissions on the Framework National Security Concept, a declaration adopted by Parliament in April 1998. They referred to the passages in which national security was defined so as to include the following:

"... protection of the fundamental rights and freedoms of Bulgarian citizens, defence of the national borders, territorial integrity and independence, ... and the democratic functioning of public and private institutions so as to ensure that society and the nation shall preserve and enhance their well-being."

The Framework Concept further pointed to the possible threats to national security and stated, inter alia:

"Economic and social differences in Europe have deepened and new insecurity and risks have thus appeared. Conflicts on an ethnic, religious and social basis have emerged ... Religious and ethnic communities, some of which are in conflict, co-exist in south-eastern Europe. Since the creation of new States certain communities have displayed a tendency towards insularity. That has sharply increased the regional threats to our national security.... Religious and ethnic extremism influences local communities that lack strong democratic traditions..."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

84. The Government objected that domestic remedies had not been exhausted as no appeal had been submitted against Order no. 503, the second and third applicants had

not instituted any proceedings and the first applicant had not raised before the domestic courts the grievances concerning his family life or religious freedoms except in an appeal of 21 June 1999 which, however, had been addressed to a court that did not have jurisdiction to deal with it.

85. The applicants described as groundless the Government's objection in respect of the exhaustion of domestic remedies and referred to their complaints under Article 13 of the Convention.

86. The Court observes that the first applicant and his counsel filed numerous appeals to the courts and to other competent authorities. However, since the impugned measures invoked national security as their basis, none of the appeals was examined (see paragraphs 35-46 above). The Government have not explained why they considered that the applicants would have had a better chance of obtaining an examination of their case by filing yet another appeal on behalf of all three of them, by challenging Order no. 503 or by adding emphasis on their family life and religious rights in the text of their submissions. It follows that the objection under Article 35 § 1 of the Convention must fail.

87. Further, in their observations on the merits, the Government raised a new objection alleging that there had been abuse on the part of the applicants as they had not informed the Court promptly of the fact that Mrs Saleh and her children had left Bulgaria on 29 June 2000.

88. Mr Grozev, the applicants' lawyer, explained that although he had been made aware as early as the spring of 2000 of Mrs Saleh's financial difficulties in Smolyan and her tentative idea of leaving Bulgaria, he had not discussed the matter with the first applicant, who had been in Syria. The lawyer had hoped to do so in Strasbourg before the hearing. The French consulate in Damascus had not, however, examined Mr Al-Nashif's application for a visa. At the hearing, not being certain about the exact facts, the lawyer had preferred to clarify them and only then inform the Court. He had done so immediately after the hearing, on his own initiative.

89. The Court, while it considers that an application deliberately grounded on a description of facts omitting events of central importance may in principle constitute an abuse of the right of petition within the meaning of Article 35 § 3 of the Convention, does not find it established that such a situation obtained in the present case, regard being had to the stage of the proceedings, to the fact that the information allegedly withheld only concerned new developments after the deportation complained of and to the explanation by the applicants' lawyer.

The Government's objections are therefore dismissed.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

90. The first applicant complained under Article 5 § 4 of the Convention that Bulgarian law did not provide for judicial review against his detention and that he was detained incommunicado and could not see a lawyer.

Article 5 § 4 provides:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

91. The Government submitted that detention pending deportation was intended to be so short that no judicial review would normally be called for and that the Bulgarian authorities had not been responsible for the fact that Mr Al-Nashif could not be deported immediately after his arrest.

92. The Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security.

The person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation (see the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, §§ 73-76, the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, §§ 60 and 61, the Kurt v. Turkey judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, § 123, and Varbanov v. Bulgaria, no. 31365/96, ECHR 2000-X, § 58).

93. In the present case it is undisputed that in Bulgarian law no judicial appeal lies against detention pending deportation in cases where the deportation order is issued on grounds of national security (see paragraphs 67-70, 77 and 78 above). As a result, the first applicant's attempts to obtain judicial review of the lawfulness of his detention were to no avail (see paragraphs 42-45 above).

94. In accordance with the relevant law and practice, the decision whether a deportation and detention order should invoke national security - with the automatic consequence of excluding any judicial review of lawfulness - is fully within the discretion of the Ministry of the Interior. No court is empowered to enquire into the lawfulness of the detention. The detention order itself, as in the present case, states no reasons (see paragraphs 68-72 above). Moreover, Mr Al-Nashif was detained practically incommunicado and was not allowed to meet a lawyer to discuss any possible legal challenge to the measures against him.

That is a situation incompatible with Article 5 § 4 of the Convention and its underlying rationale, the protection of individuals against arbitrariness. National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved (see the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V).

95. In the Chahal case, the Court found that even if confidential material concerning national security was used the authorities were not free from effective judicial control of detentions. The Court attached significance to the information that in other countries there were techniques which could be employed which both accommodated legitimate security concerns about the nature and sources of intelligence information and yet accorded the individual a substantial measure of procedural justice.

96. In later cases (see for example Jasper v. the United Kingdom, no. 27052/95, unpublished) the Court noted that following the Chahal judgment and the judgment in the case of Tinnelly v. the United Kingdom (10 July 1998, Reports 1998-IV) the United Kingdom had introduced legislation making provision for the appointment of a "special counsel" in certain cases involving national security (Special Immigration Appeals Commission Act 1997, and the Northern Ireland Act 1998).

97. Without expressing in the present context an opinion on the conformity of the above system with the Convention, the Court notes that, as in the case of Chahal cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.

98. In the present case, however, Mr Al-Nashif was not provided with elementary safeguards and did not enjoy the protection required by Article 5 § 4 of the Convention in cases of deprivation of liberty.

There has therefore been a violation of Article 5 § 4 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

99. All three applicants complained that there had been an arbitrary interference with their right to respect for their family life contrary to Article 8 of the Convention which provides:

"1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society 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. Arguments of the parties

#### 1. The applicants

##### a) The disputed facts

100. The first applicant categorically denied that he had ever been involved in any unlawful activity and asserted that the allegations that he was linked to fundamentalist organisations preaching violence had been invented and were not supported by any reliable evidence (see paragraphs 49-65 above). Moreover, the Government had not claimed that other, confidential evidence, existed.

101. The applicants protested against the manner in which the Government's Agent had tried to "squeeze in" evidence by reading out at the oral hearing passages of documents she had not submitted to the Court. When those documents had later been submitted they had turned out to be declarations created for the purposes of the proceedings before the Court, full of vague generalisations and exaggerations lacking any credibility such as the statements about "hundreds of thousands of dollars..., once ... even twenty thousand" in the first applicant's home, coming in "USD 100 bills". The National Security Service's Information Note, moreover, contained incorrect claims, such as those concerning the Tayba and Irshad foundations.

The real facts demonstrated, in the applicants' view, that Mr Al-Nashif's expulsion had been intended to put an end to his lawful religious activities.

b) Legal arguments

102. The applicants, referring to the Court's case-law, submitted that they were entitled to the protection of Article 8 of the Convention as they were a family, had at all relevant times permanently lived together and had been financially dependent on one another. The existence of true family life between the applicants could not be denied on the sole ground that Mr Al-Nashif had a second religious marriage. Such a situation was not uncommon in the cultural traditions of many peoples.

103. Having been forced in 1992 to leave Kuwait, Mrs Saleh and Mr Al-Nashif, a stateless person, had not been able to develop strong links with any country except Bulgaria, where they had established a home and family life. The applicants asked the Court to accept that if the only legal residence which a couple finds is a country with which neither of them has previously had any connection, the expulsion from that country of one of them is an interference with their rights under Article 8 of the Convention. They alleged that the deportation of Mr Al-Nashif was a serious interference with their family life. The family had never lived in Syria and lacked any real connection with that country. Moreover, after Mr Al-Nashif's deportation economic and legal obstacles had prevented the establishment of a new family home in Syria or in Jordan. International organisations and governments had reported that the human rights situation in Syria was intolerable in particular for foreigners and stateless persons.

104. The applicants alleged that the interference with their family life had been based on legal provisions that lacked the clarity and foreseeability required by the concept of lawfulness as enshrined in the Convention and through arbitrary orders that had not stated any reasons.

The Aliens Act authorised the Ministry of the Interior to deport persons who had never been convicted, or at least investigated, on the basis of orders issued without examination of evidence, without possibility of adversarial proceedings, and without

giving reasons, while at the same time issuing press releases labelling the individual "a threat to national security".

105. The interference was furthermore disproportionate and unjustified. There was no need to deport the first applicant as he had never committed an offence. Mr Al-Nashif had never engaged in any unlawful or dangerous activity. His religious teaching had by no means posed a threat. Furthermore, the authorities' decisions were flawed as a matter of principle as they had never assessed the balance which needed to be drawn between the aims pursued by the deportation and the applicants' right to respect for their family life, including - as important factors - the interests of the children, the second and the third applicants, and the fact that the first applicant was a stateless person.

The applicants finally reiterated that the interference with their family life had caused them serious hardship.

2. The Government

a) The disputed facts

106. The Government made a number of allegations concerning the first applicant's religious activities and submitted as evidence statements of Ms M., an Information Note issued by the National Security Service, cuttings from newspaper articles and other documents (see paragraphs 49-65 above). They did not comment on the applicants' objections as to the reliability of that evidence.

b) Legal arguments

107. The Government considered that there was no family life within the meaning of Article 8 of the Convention between the first applicant and Mrs Saleh and their children as Mr Al-Nashif had not proven that he had been legally married to Mrs Saleh and had often been away from the family home as he had contracted a second marriage. Those facts were allegedly indicative of the lack of an emotional or family link between Mr Al-Nashif and his children.

108. In any event there had been no interference with the applicants' family life. Mr Al-Nashif and Mrs Saleh did not have strong links with Bulgaria where they had arrived as adults and had only spent seven years. Mrs Saleh had not worked in Bulgaria, her contacts had been limited exclusively to persons of Arab origin and she had not made efforts to integrate. The children, the second and the third applicants, were of a young and adaptable age. Despite their Bulgarian citizenship it was obvious that their legal status would be affected by the status of their parents as they were in their parents' custody. Furthermore, the fact that Mrs Saleh and the children had left Bulgaria in June 2000 confirmed that they did not feel attached to Bulgaria.

In the Government's submission there was no evidence of any obstacles against the family living in Syria or Jordan. The applicants' allegation that a return to Kuwait was impossible was not proved either.

109. Alternatively, the Government submitted that if the Court considered that there had been an interference any such interference had been lawful and justified.

110. The deportation order had been issued in accordance with the relevant law and had pursued the aim of protecting national security. Although the law itself did not contain a definition of that term, the Framework National Security Concept adopted by Parliament in 1998 (see paragraph 83 above) clarified it.

Moreover, Mr Al-Nashif had been warned against continuing his religious activities after his participation in the 1997 seminar and on other occasions.

On the basis of the above the Government considered that the law was sufficiently clear and that Mr Al-Nashif had been able to understand the possible consequences of his acts.

111. In the Government's submission the interference was furthermore proportionate to the legitimate aim pursued.

They stressed that an important aspect of the present case was the regional context in the Balkans where measures of active protection of religious tolerance were critical. In Bulgaria, in particular, owing to a number of factors - such as disruptions in community traditions caused by decades of totalitarianism - the religious consciousness of the population was currently unstable and unsettled. Communities in general, and the Muslim community in particular, were therefore susceptible to influences. It was necessary to protect them against Islamic fundamentalism.

Against that background the authorities had been justified in classifying Mr Al-Nashif's acts as "unlawful religious activity ... encroaching on the national interests and the rights of the religious, ethnic and minority groups in the conservation of the national and cultural values and traditions" (see paragraph 39 above).

B. The Court's assessment

1. Whether there was "family life" within the meaning of Article 8 of the Convention

112. The existence or non-existence of "family life" is essentially a question of fact depending upon the reality in practice of close personal ties (see K. and T. v. Finland [GC], no. 25702/94, ECHR 2001-VII, § 150).

Nevertheless, it follows from the concept of family on which Article 8 is based that a child born of a marital union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" which subsequent events cannot break save in exceptional circumstances (see the Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, § 21, the Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 19, § 54, the Gül v. Switzerland judgment of 19 February 1996, Reports 1996, § 32, and Ciliz v. the Netherlands, no. 29192/95, §§ 59 and 60, ECHR 2000-VIII).

Insofar as relations in a couple are concerned, “family life” encompasses families based on marriage and also de facto relationships. When deciding whether a relationship can be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, § 30, and the X, Y and Z v. the United Kingdom judgment of 22 April 1997, Reports 1997-II, § 36).

113. In the present case, in 1992 Mr Al-Nashif and Mrs Saleh came together to Bulgaria from Kuwait as a married couple and have apparently been regarded as such for all purposes. Two children were born to them in 1993 and 1994. Although Mr Al-Nashif contracted a religious marriage with another woman, Ms M., that marriage had no legal effect in Bulgaria. Further, there is no decisive evidence supporting the Government's allegation that Ms M. and the first applicant lived together in Smolyan. In any event, Ms M. stayed in that town less than a year. Mr Al-Nashif continued living in Smolyan with his wife, Mrs Saleh, and their two children until the moment of his arrest in 1999 (see paragraphs 11 and 14-20 above).

There were therefore no exceptional circumstances capable of destroying the family link between the first applicant and his children, the second and the third applicants. Further, Mr Al-Nashif and Mrs Saleh did not separate.

2. Whether there was an interference with the applicants' family life

114. The Court observes that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory (see, among other authorities, Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX, § 39). Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see the above cited Gül judgment, § 38).

However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see, the above cited Boultif judgment).

115. In the present case it is undisputed that the first applicant was a stateless person and that he and his wife, Mrs Saleh, who apparently was also a stateless person, were lawfully resident in Bulgaria on the strength of permanent residence permits. The couple had moved to Bulgaria in 1992, soon after their marriage, and had lawfully established their home there. Their children, the second and the third applicants, were born in Bulgaria, acquired Bulgarian nationality, and started school there.

Therefore, the deportation of Mr Al-Nashif in 1999 interfered with the applicants' family life.

116. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was "in accordance with the law", motivated by one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society".

3. Whether the interference was "in accordance with the law"

117. It was undisputed – and the Court accepts – that Orders nos. 503 and 504 had a basis in the relevant domestic law.

118. The applicants alleged, however, that the applicable law lacked the clarity and foreseeability required by the concept of lawfulness as enshrined in the Convention, since it authorised the Ministry of the Interior to deport persons who had never been convicted or investigated on the basis of orders issued without examination of evidence, without the possibility of adversarial proceedings, and without giving reasons.

119. The Court reiterates that the phrase "in accordance with the law" implies that the legal basis must be "accessible" and "foreseeable". A rule's effects are "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct.

In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see Amann v. Switzerland [GC], no. 27798/95, ECHR 2000-II, §§ 55 and 56, Rotaru v. Romania [GC], no. 28341/95, ECHR 2000-V, §§ 55-63, Hasan and Chaush v. Bulgaria [GC], no. 30985/96, ECHR 2000-XI, and the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28).

120. The Government's position was that although the Aliens Act did not circumscribe the cases in which a person might be considered a threat to national security so as to warrant his deportation, the term "national security" was clarified in the Framework National Security Concept (see paragraph 83 above).

121. The Court reiterates that as regards the quality of law criterion, what is required by way of safeguards will depend, to some extent at least, on the nature and extent of the interference in question (see P.G. and J.H. v. the United Kingdom, no. 44787/98, ECHR 2001-IX, § 46).

It considers that the requirement of "foreseeability" of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance.

122. There must, however, be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse.

123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see the judgments cited in paragraph 119 above).

124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.

Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

125. In the present case the initial proposal to deport Mr Al-Nashif was made by the police and a prosecutor in Smolyan (see paragraph 21 above). It is true that the prosecution authorities in Bulgaria are separate and structurally independent from the executive. However, the Government have not submitted information of any independent inquiry having been conducted. The prosecutor did not act in accordance with any established procedure and merely transmitted the file to the police. The decision-making authority was the Director of the Passport Department of the Ministry of the Interior (see paragraph 22 above).

126. Furthermore, the decision to deport Mr Al-Nashif was taken without disclosing any reasons to the applicants, to their lawyer or to any independent body competent to examine the matter.

Under Bulgarian law the Ministry of the Interior was empowered to issue deportation orders interfering with fundamental human rights without following any form of adversarial procedure, without giving any reasons and without any possibility for appeal to an independent authority.

127. It is highly significant that the above legal regime was the object of challenges in Bulgaria and that the judiciary was divided.

The Sofia City Court and the Supreme Administrative Court in some cases refused to accept blank assertions by the executive in unreasoned decisions under the Aliens Act. Some members of Parliament and judges of the Supreme Administrative Court considered that the existing legal regime was unconstitutional (see paragraphs 38, 71 and 72 above).

The Constitutional Court, when examining a challenge to the above legal regime, could not reach a majority, half of the judges holding that the unavailability in

Bulgarian law of judicial review of deportations in cases where the Ministry of the Interior relied on "national security" was contrary to the Constitution and to the Convention, as such a legal regime left unfettered discretion to the executive and opened the door to possible abuse (see paragraphs 73-77 above).

128. This Court finds that Mr Al-Nashif's deportation was ordered pursuant to a legal regime that does not provide the necessary safeguards against arbitrariness.

The interference with the applicants' family life cannot be seen, therefore, as based on legal provisions that meet the Convention requirements of lawfulness.

It follows that there has been a violation of Article 8 of the Convention.

129. That being so, the Court is not required to determine whether the interference with the applicants' family life pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued.

## IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

130. The applicants complained that they did not have an effective remedy against the interference with their right to respect for their family life. They invoked Article 13 of the Convention which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

131. The Government maintained that the complaint under Article 13 was manifestly ill-founded, the applicants not having exhausted all domestic remedies

132. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they comply with to their Convention obligations under this provision.

Giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.

The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely

satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see Conka v. Belgium, no. 51564/99, unreported, Kudla v. Poland [GC], no. 30210/96, ECHR 2000-XI, § 152, and T.P. and K.M. v. the United Kingdom [GC], no. 28945/95, ECHR 2001-V, § 107).

133. Quite apart from the general procedural guarantees which Article 1 of Protocol No. 7 to the Convention - not in force in respect of Bulgaria at the relevant time - provides in all cases of expulsion of aliens, where there is an arguable claim that such an expulsion may infringe the foreigner's right to respect for family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (no. 13718/89, Commission's decision of 15 July 1988, unreported, no. 22406/93, Commission's decision of 10 September1993, unreported, no. 27794/95, Commission's decision of 14. October1996, unreported, and Shebashov v. Latvia (dec.), 9 November 2000, no. 50065/99, unreported).

134. There is no doubt that the applicants' complaint that the deportation of Mr Al-Nashif infringed their right to respect for their family life was arguable. They were entitled, therefore, to an effective complaints procedure in Bulgarian law.

135. It is undisputed, however, that all appeals filed by the first applicant were rejected without examination on the basis of the Aliens Act, which – as construed by the Ministry of the Interior and the Bulgarian courts in the applicants' case and, later, in an interpretative Act of Parliament (see paragraphs 70, 72 and 78 above) – provides that deportation decisions citing “national security” as their ground need not state reasons and are not subject to appeal. Where an appeal against such an order is submitted to a court, it is not entitled to enquire whether genuine national security concerns are at stake and must reject it. In the applicants' case the same approach was adopted by the Ministry of the Interior, to which Mr Al-Nashif appealed (see paragraph 36 above).

136. It is true that the scope of the obligation under Article 13 varies according to the nature of the applicant's complaint under the Convention (see the above cited Kudla judgment, § 157).

Where national security considerations are involved certain limitations on the type of remedies available to the individual may be justified. As regards secret surveillance and the use of secret information for screening job candidates who would have access to sensitive information, Article 13 requires a remedy “as effective as it can be”, having regard to the fact that it is inherent in any system of secret surveillance or secret checks that there would be a restricted scope for recourse (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, § 69, and the above cited Leander judgment, § 78). Nevertheless, the remedy required by Article 13 must be effective in practice as well as in law. In particular, in the Klass and Leander cases, the applicants had possibilities of recourse with certain procedural guarantees and independent review. In the case of Amann v. Switzerland ([GC], no. 27798/95,

ECHR 2000-II) the applicant could appeal to a court. In those cases no violation of Article 13 of the Convention was found.

No appeal was available to the applicant in Rotaru v. Romania ([GC], no. 28341/95, ECHR 2000-V) – a case that also concerned the storage and use of secret information – and the Court found a violation of Article 13 of the Convention (see also Hewitt and Harman v. the United Kingdom, no. 12175/86, Commission report of 9 May1989).

137. The Court considers that in cases of the expulsion of aliens on grounds of national security – as here – reconciling the interest of preserving sensitive information with the individual's right to an effective remedy is obviously less difficult than in the above-mentioned cases where the system of secret surveillance or secret checks could only function if the individual remained unaware of the measures affecting him.

While procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security" (see the above cited Chahal judgment and paragraph 96 above on possible ways of reconciling the relevant interests involved).

Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined.

138. As no remedy affording such guarantees of effectiveness was available to the applicants, the Court finds that there has been a violation of Article 13 of the Convention.

## V. ALLEGED VIOLATIONS OF ARTICLE 9 AND OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 9 OF THE CONVENTION

139. The first applicant complained that his deportation had been a reaction to and a punishment for his lawful religious activities and had therefore constituted an unjustified interference with his rights under Article 9 of the Convention. He also complained that in violation of Article 13 in conjunction with Article 9, he had not had an effective remedy in that regard.

Article 9 provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

140. The first applicant submitted that his teaching and all his religious activity had been lawful and had never involved any endorsement of violence or extremist views. The allegation that he endangered national security had been absurd and arbitrary. In reality the authorities had sought to put an end to his religious activities. The aim of the deportation, as admitted by the Government, had been precisely to prevent the first applicant from practising his religion in Bulgaria. There had therefore been an interference with his Article 9 rights. Referring to his arguments under Article 8 of the Convention (see paragraphs 104 and 105 above), the first applicant maintained that that interference had been unlawful and not necessary in a democratic society.

141. The Government stated that there had been no interference with the first applicant's right to teach religion. His deportation had not been a reaction against his religious classes - which had been lawful - but had been based on the assessment that his religious activities had constituted a thread to national security. Furthermore, Mr Al-Nashif had voluntarily abandoned teaching after service of the deportation order and would not be able to restart as new instructions issued by the Chief Mufti Office after his deportation prohibited religious instruction by persons lacking appropriate religious education. The Government further stated that religious freedoms in Bulgaria were guaranteed and that the authorities strictly adhered to the principle of non-intervention in the internal affairs of religious communities and regularly allowed visits by foreigners coming to teach religion.

142. Having found that Mr Al-Nashif's deportation constituted a violation of the right of all the applicants to respect for their family life within the meaning of Article 8 of the Convention and that they did not have an effective remedy in that regard contrary to Article 13 of the Convention, the Court considers that it is not necessary to determine whether the same events contravened Article 9 of the Convention taken alone and in conjunction with Article 13.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. 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

144. The applicants claimed 60,000 euros ("EUR") in non-pecuniary damages for the distress they suffered as a result of the violations of their Convention rights.

The applicants stressed that their family life had been disrupted and Mr Al-Nashif's religious freedoms infringed despite the fact that he had never done anything unlawful. All three applicants had as a result been deprived of normal family life and lived in uncertainty, being unable to find a new common family home. The suffering had been aggravated by the media campaign organised by the authorities.

145. The applicants also stated that they had suffered pecuniary losses as Mr Al-Nashif had had to sell his business in Smolyan and could not find a job in Syria. While assessing the losses at EUR 22,000, the applicants did not claim pecuniary damages, acknowledging that they were unable to provide documentary proof. They asked the Court instead to take their losses into account when determining the amount of non-pecuniary damages.

146. The Government considered these amounts excessive and stated that the economic situation in Bulgaria should be taken into account.

147. The applicants replied that even if the economic situation might need to be taken into account to ensure that applicants in different countries did not receive disproportionately different real values, a reliable criterion, such as a comparative study of the prices of goods and services, and not the minimum monthly wage, should be used. Even so, while common goods were certainly cheaper in Bulgaria than in West European countries, other goods, such as electronic appliances and cars, were more expensive owing to the small size of the market. If it accepted the approach proposed by the Government, the Court might find itself in the awkward position of having to tell victims of violations what to buy with the compensation awarded. The Government's reasoning was further flawed in the particular case as the applicants were now living outside Bulgaria, although they wished to return there.

148. The Court considers that the applicants must have suffered non-pecuniary damage as a result of the violations of the first applicant's rights under Article 5 § 4 of the Convention and the violations of the rights of all three applicants under Articles 8 and 13 of the Convention. Ruling on an equitable basis, the Court awards EUR 7,000 to the first applicant and EUR 5,000 to each of the remaining two applicants (a total of EUR 17,000).

B. Costs and expenses

149. The applicants claimed 5,845 US dollars ("USD") for 118 hours of legal work on the proceedings before the Court, at the hourly rate of USD 40, and for 45 hours of work with the domestic institutions, at the hourly rate of USD 25. The applicants

submitted a time sheet and an agreement between them and their lawyers and referred to a publication which reported that the leading business law firms in Bulgaria charged between USD 80 and 190 per hour.

They also claimed USD 792 airfare for their attorneys Mr Grozev and Mrs Yaneva and 2,650 French francs for hotel bills, local travel and per diem for their appearance at the hearing before the Court.

The total amount claimed by the applicants for costs and expenses is the equivalent of approximately EUR 7,750.

150. The Government considered that contingency fee agreements were immoral and that lawyers should provide free legal aid to indigent clients. They submitted that the hourly rates claimed were exorbitant in view of the low minimum wage in Bulgaria.

The Government further contested the number of hours allegedly spent by the lawyers on the domestic and Strasbourg proceedings. In particular, Mrs Yaneva could not claim that she had spent ten hours on seven visits to the detention centre at Sofia airport as she had never met Mr Al-Nashif. Further, Mrs Yaneva had not indicated the dates of her purported five visits to the Smolyan Regional Court. Also, seven hours' work for the preparation of appeals to five different bodies had not been required as the text had been identical.

151. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, 25 March n99, § 79).

The fact that Mrs Yaneva was unable to meet Mr Al-Nashif at the detention centre – where he spent 26 days in complete isolation – was an aspect of the violation of Article 5 § 4 found in the present case. Her visits to the detention centre, apparently in an effort to obtain a meeting with her client, obviously constituted costs necessarily incurred in the defence of his Convention rights.

The Court rejects the Government's submission that the number of hours claimed exceeded the legal work which was actually done and which needed to be done for the representation of the applicants.

It also finds that the hourly rates of USD 40 and USD 25 were not excessive.

152. A certain reduction must be applied, however, in view of the fact that part of the initial application was declared inadmissible.

Converting the sum claimed into euros, and making an overall assessment, the Court awards the applicants EUR 6,500 in respect of costs and expenses.

C. Default interest

153. According to the information available to the Court, the statutory rate of interest in Bulgaria applicable to claims expressed in foreign convertible currency at the date of adoption of the present judgment is 13.65% per annum.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objections;

2. Holds unanimously that there has been a violation of Article 5 § 4 of the Convention;

3. Holds by four votes to three that there has been a violation of Article 8 of the Convention;

4. Holds by four votes to three that there has been a violation of Article 13 of the Convention;

5. Holds unanimously that it is not necessary to examine the complaints under Article 9 of the Convention taken alone and in conjunction with Article 13;

6. Holds by four votes to three

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, together with any value added tax that may be chargeable:

(i) EUR 7,000 (seven thousand euros) to the first applicant and EUR 5,000 (five thousand euros) to each of the other two applicants in respect of non-pecuniary damage;

(ii) EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses, jointly to the three applicants;

(b) that both sums are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(c) that simple interest at an annual rate of 13.65 % shall be payable from the expiry of the above-mentioned three months until settlement;

7. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Georg Ress

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Mr Makarczyk, Mr Butkevych and Mrs Botoucharova is annexed to this judgment.

G.R.

V.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES MAKARCZYK, BUTKEVYCH AND BOTOUCHAROVA

1. We voted against the finding of a violation of Article 8 in the present case.

2. The majority considered that Mr Al-Nashif's deportation was ordered pursuant to a legal regime that did not provide the necessary safeguards against arbitrariness and concluded that the interference with the applicants' family life was not, therefore, based on legal provisions that met the Convention requirement of lawfulness.

3. While the authorities must be criticised for the fact that there were insufficient procedural safeguards in the decision-making process, that was only one aspect - among others - of the question whether the interference with the applicants' family life was proportionate to the legitimate aim pursued by that interference. The Court has on many occasions held that the quality of the decision-making process is a matter going to the question of proportionality (see, mutatis mutandis, T.P. and K.M. v. the United Kingdom, [GC], no. 28945/95, ECHR 2001-V, § 72, and Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001-I, § 92).

4. If that approach was adopted, it would become obvious that in the present case despite any procedural deficiencies the principle of proportionality was not infringed.

5. As the majority rightly stated, Article 8 of the Convention cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see paragraph 114 of the judgment).

6. Mr Al-Nashif and Mrs Saleh arrived in Bulgaria as adults, after having married in their home country, and had spent less than seven years in Bulgaria at the time of the impugned deportation. The fact that their children born during that period acquired Bulgarian citizenship should not be seen as an important factor in the proportionality

analysis as they are very young, naturally must follow their parents, and apparently speak Arabic. Mrs Saleh left Bulgaria with the children in June 2000, a year after the deportation of her husband, and settled in Jordan, where she has close relatives. Mr Al-Nashif himself has close relatives in Syria, has a Syrian stateless person's identity document and, when entering Bulgaria in 1992, declared Syria as his country of residence. On the basis of the above it can hardly be considered that the family had sufficiently strong links with Bulgaria. It is obvious that the applicants can lawfully establish their family home in Syria or elsewhere.

7. We are of the opinion that, having regard to all relevant factors, the deportation of Mr Al-Nashif from Bulgaria was not disproportionate in the particular circumstances. There was no violation of Article 8 of the Convention. As the complaint under that provision was not arguable, Article 13 did not apply.

8. Consequently, as to just satisfaction, since the only violation of the Convention we found was that of the first applicant's rights under Article 5 § 4, we would award him 2,000 euros and dismiss the remainder of the claim.

Endnote 1: In its composition before 1 November 2001.