CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 60665/00
by Goi TUQUABO-TEKLE and Others
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 19 October 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged on 12 July 2000,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The application is brought by six applicants. The first applicant, Goi Tuquabo-Tekle, born in Ethiopia in 1963, is married to the second applicant, Tarreke Tuquabo, who was born in Ethiopia in 1952, and she is the mother of the other applicants: Mehret Ghedlay Subhatu, Adhanom Ghedlay Subhatu, Tmnit Tuquabo and Ablel Tuquabo, born in 1981, 1978, 1994 and 1995 respectively. The second applicant is the father of Tmnit and Ablel, and the stepfather of Mehret and Adhanom. All applicants are Netherlands nationals and are living in Amsterdam, apart from Mehret who is Eritrean and is living in Asmara, Eritrea. They are represented before the Court by Mr S.D. Lugt, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

In 1989, after the death of her husband, the first applicant fled from Eritrea (which was then still part of Ethiopia) to Norway, where she applied for asylum. Although denied asylum, she was granted a residence permit for humanitarian reasons in 1990. The first applicant's children Michael, Adhanom and Mehret stayed behind in Eritrea in the care of an uncle and their grandmother, but at some stage Adhanom went to Ethiopia. After permission was granted by the Norwegian authorities for the children to reside with the first applicant, and with the assistance of those authorities and the UNHCR, her son Adhanom entered Norway in October 1991. It did not prove possible at that time to procure the departure of the other children from Eritrea, but it was the applicant's intention to bring Michael and Mehret to Norway later.

In June 1992 the first applicant married the second applicant, who was living in the Netherlands where he had been admitted as a refugee. On 19 July 1993 the first applicant and her son Adhanom moved to the Netherlands to live with the second applicant. The first applicant was granted a residence permit in order to reside in the Netherlands with her husband on 21 July 1993. Two children, Tmnit and Ablel, were subsequently born to the couple.

On 16 September 1997, the first two applicants filed a request for a provisional residence visa (*machtiging tot voorlopig verblijf*) for Mehret, in an attempt to have their (step)daughter, who was then 16 years old, join them in the Netherlands. Such a visa is normally a prerequisite for the grant of a residence permit which confers more permanent residence rights.

On 25 March 1998 the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) rejected their request. The Minister concluded that there were no grounds to authorise family reunion in the Netherlands since the close family ties (*gezinsband*) between the first applicant and her daughter were considered to have ceased to exist and such ties had never existed between the second applicant and his stepdaughter. Ever since the first applicant had left Eritrea, Mehret had been living with an uncle and her grandmother; she was deemed to have been integrated into the latter's family and thus no longer actually belonged to the first applicant's family unit (*gezin*). There was no indication that this situation could not be maintained. Moreover, after marrying the second applicant, the first applicant had started a new family unit in the Netherlands to which her daughter had never belonged. Furthermore, the applicants had not shown that they had been sufficiently involved with the upbringing and care of their (step)daughter. According to the information available, it was the first applicant's parents who had custody of Mehret.

On 20 April 1998 the first two applicants filed an objection (*bezwaar*) through counsel with the Minister of Foreign Affairs, underlining that Mehret could no longer lead a normal existence in Eritrea now that she had reached marriageable age and her grandmother had decided that, for that reason, Mehret should stop going to school. There were, moreover, solid reasons why the first applicant had been unable to bring her daughter to Norway or the Netherlands prior to September 1997. At the time when she had been granted residence in Norway as well as permission to be joined by her children, contacts with Eritrea were impossible and it was for this reason that only Adhanom, who had been in Ethiopia at the time, had been able to go to Norway. In September 1992 the first applicant had travelled to Eritrea but it had not proved possible to obtain travel documents for Mehret, there not yet being any official bodies equipped to issue passports in Eritrea and the authorities in Ethiopia refusing to do so for Eritrean subjects. The family's housing situation in the Netherlands had posed a further problem. As soon as it had become possible to have a passport issued for Mehret and larger living accommodation had been obtained, the request for a provisional residence visa had been lodged. Moreover, the first applicant and her husband had sent money to Eritrea on a regular basis, initially through a courier as bank transactions were impossible.

On 21 January 1999 the Minister rejected the objection, confirming that the close family ties between the first applicant and her daughter had ceased to exist. The applicants had not shown that they had made a substantial parental or financial contribution to Mehret's upbringing. Furthermore, the applicants had not sufficiently shown why, in view of Mehret's age, she could not continue to be taken care of by her uncle or her grandmother, if necessary supported financially by the applicants from the Netherlands. The Minister did not find it established that serious attempts had been made to

have Mehret come to the Netherlands as soon as possible: the first applicant had been legally resident in the Netherlands since July 1993 but the request for Mehret to be allowed to join her had not been lodged until September 1997. Contrary to what the applicants appeared to contend, pursuant to the legal provisions in force a lack of adequate accommodation would not have stood in the way of a provisional residence visa being granted. It appeared that the applicants had let the inexpediency of Mehret's presence in their cramped accommodation prevail over the desire to reunite Mehret with her mother as soon as possible. In addition, if the first applicant had requested permission to be joined by Mehret timely after having been admitted as a refugee herself, her daughter could have been eligible for derived refugee status, in which case the absence of a valid national passport would not have been held against her. Thus, the Minister concluded, the child's integration into the uncle's and grandmother's family could not be considered to have been a temporary measure.

On behalf of Mehret, the applicants lodged an appeal against this decision of the Minister through counsel to the Regional Court (*arrondissementsrechtbank*) of The Hague, sitting in Amsterdam, on 16 February 1999. In these proceedings, the Minister of Foreign Affairs argued, *inter alia*, that from 1994 it had been possible to request and obtain a passport in Eritrea.

On 17 January 2000 the Regional Court rejected the appeal. It held that the first applicant had failed to show that her close family ties with her daughter had been maintained. It also found that, following her departure in 1989, the first applicant had no longer exercised parental authority over her daughter in the sense that she had been intensively involved with her daughter's upbringing and had taken decisions in this regard. The Regional Court agreed with the Minister of Foreign Affairs that the applicants' (step)daughter should be deemed to have become integrated into the family of her uncle and grandmother. The Regional Court attached importance to the fact that the applicants had only requested to have their (step)daughter join them in the Netherlands on 16 September 1997, and that they had failed to substantiate with documents their claim that, even after 1994, it had still been impossible to obtain a passport for Mehret in Eritrea.

When assessing whether the State's actions had been in compliance with the requirements of Article 8 of the Convention, the Regional Court addressed the question whether the refusal to grant the applicants' (step)daughter a provisional residence visa, as such, constituted a violation of that provision. It pointed out that its task was to strike a fair balance between the interests of the applicants and those of society as a whole (the latter interest being served by a restrictive immigration policy). It found that no obligation for the State to allow family reunion on its territory could be derived from Article 8 of the Convention. It further considered that there

were no objective reasons why the applicants could not exercise family life with their (step)daughter in Eritrea.

The Regional Court's decision was final and not subject to appeal.

B. Relevant domestic law

At the time relevant to the present application, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1994 ("the Act" - *Vreemdelingenwet 1994*). On 1 April 2001 a new Aliens Act entered into force but this has no bearing on the present case.

As a rule, anyone wishing to apply for a residence permit in the Netherlands must first apply from his or her country of origin to the Netherlands Minister of Foreign Affairs for a provisional residence visa (*machtiging tot voorlopig verblijf*). Only once such a visa has been issued abroad may a residence permit for the Netherlands be granted. An application for a provisional residence visa is assessed on the basis of the same criteria as a residence permit.

The Government pursue a restrictive immigration policy due to the population and employment situation in the Netherlands. Aliens are eligible for admission only on the basis of obligations arising from international agreements, or if their presence serves an essential national interest, or on compelling humanitarian grounds.

The admission policy for family reunion purposes was laid down in Chapter B1 of the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire 1994*). It provided that the spouse, a minor child born of the marriage and actually belonging to the family unit, and a minor child born outside the marriage but actually belonging to the family (such as a child from an earlier relationship of either spouse or a foster child) could be eligible for family reunion, if certain further conditions (relating to matters such as public policy and means of subsistence) were met. In the context of extended family reunion, other family members actually belonging to the family unit could also be eligible, in so far as they would otherwise suffer disproportionate hardship, for example, if the living conditions in the country of origin were such that they could not reasonably stay behind there alone.

The person with whom a family member was seeking to be reunified in the Netherlands must have suitable housing available to him or her on a permanent basis. This requirement was not imposed on Netherlands nationals, on refugees who have been admitted or on holders of a residence permit for the purposes of asylum.

The phrase “actually belonging to the family unit” (“*feitelijk behoren tot het gezin*”) used in Netherlands law only partly overlaps with the term “family life” in Article 8 of the Convention. The former is understood to mean, for instance, that the close family ties (*gezinsband*) between the child and its parents whom it wishes to join in the Netherlands already existed in another country and have been maintained. For the rest, the question of whether the close family ties should be deemed to have been severed is answered on the basis of the facts and circumstances of each specific case. Factors taken into consideration include the length of time during which parent and child have been separated and the reasons for the separation, the way in which the relationship between parent and child has been developed during the separation, the parent's involvement in the child's care and upbringing, custody arrangements, the amount and frequency of the parent's financial contributions to the child's care and upbringing, the parent's intention to send for the child as soon as possible and his/her efforts to do so, and the length of time that the child has lived in a family other than with the parent. The burden of proving that the close family ties between parent and child have not been severed rests with the parent residing in the Netherlands. The longer the parent and child have been separated, the heavier the burden of proof on the person in the Netherlands becomes. It is then incumbent on the parent to present sound reasons as to why he or she did not seek to bring the child to the Netherlands sooner.

If it is established that the conditions set in national policy have not been met, an independent investigation is then carried out to ascertain whether family life exists within the meaning of Article 8 of the Convention and, if so, whether this provision of international law imposes on the State an obligation, given the specific circumstances of the case, to permit residence in the Netherlands.

COMPLAINT

The applicants complained under Article 8 of the Convention that residence in the Netherlands for the purpose of family reunion was refused to their (step)daughter and (half-)sister Mehret, as a result of which they were unable to enjoy family life with her. They argued that their interests outweighed those of the State and submitted in this respect that the first two applicants both held jobs, so that they were able to look after and provide for Mehret.

THE LAW

The applicants complained of an unjustified interference with their right to respect for family life. They invoked Article 8 of the Convention, which, in so far as relevant, provides as follows:

> "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 ... the economic well-being of the country, ... or for the protection of the rights and freedoms of others."

The Government, while accepting that family life within the meaning of Article 8 § 1 existed between the first applicant and Mehret, were of the view that their authorities did not have a positive obligation to grant Mehret a provisional residence visa to enable her and the first applicant to develop family life in the Netherlands. In this context they attached relevance to the fact that the first applicant had left Mehret behind in the care of her grandmother and uncle of her own free will. Meanwhile, the first applicant had started a new family in the Netherlands with the second applicant and had had two children. Mehret had never been part of that family. It had also not been shown that the first applicant was involved in the moral sense in the upbringing of Mehret or that she exercised any authority over her, the family ties between the first applicant and Mehret consisting primarily of the provision of financial support.

The Government further argued that, although she had held a residence permit for the Netherlands since 1993, the first applicant had not taken any steps to bring Mehret to that country until 1997. The housing situation of the first and second applicants could not have stood in the way of an earlier visa application, given that the second applicant had been admitted as a refugee and subsequently obtained Netherlands nationality so that he was in any event exempted from the housing requirement. As regards the applicants' argument that for a long time it had not been possible to obtain a passport for Mehret, the Government submitted that they could have requested the Netherlands authorities to exempt her from the passport requirement and issue her with a *laissez passer*. Moreover, it had been possible to apply for and obtain a passport in Eritrea since 1994. The first applicant had thus not been able to present sound reasons as to why she had waited so long before applying to bring Mehret to the Netherlands, and she had therefore failed to demonstrate that Mehret's inclusion in the family of her grandmother was anything other than permanent.

According to the Government, the circumstances of Mehret having reached marriageable age and running the risk of being married off without being allowed to continue her schooling were not so special that the right to respect for family life gave rise to a positive obligation to allow her to reside

in the Netherlands. This decision did not in any way prevent the first applicant from continuing family life in the same way and at the same level as in the seven years between her departure from Eritrea and the time of the visa application.

The applicants insisted that insurmountable obstacles stood in the way of the family living together in the country of origin. The second applicant had been admitted to the Netherlands as a refugee and it was thus clear that he could not be expected to return. The fact that the first applicant had been granted a residence permit for humanitarian reasons in Norway, showed that also in her respect impediments for a return existed. In addition, the family members living in the Netherlands had achieved settled status in that country, with all of them now having Netherlands nationality and two of the children having been born there. Therefore, Mehret moving to the Netherlands was the most adequate means for the applicants to develop family life.

The applicants further argued that it was a distortion of the facts to suggest that they had let matters slide. From the copies of numerous letters to a multitude of official bodies submitted to the Court, it could be seen that they had worked incessantly in order to comply with the relevant requirements so that permission would be obtained for Mehret to join her family in the Netherlands. When the first applicant had first entered the Netherlands, she had been informed by the authorities that suitable housing constituted one of those requirements. The Government were incorrect in their submission that the applicants were exempted from this requirement: only children actually belonging to the family unit were eligible for family reunion, which meant that the individuals concerned must already have been living together in the country of origin. Mehret had never lived with her stepfather – the second applicant – in a family unit, and it was therefore not possible for her to derive an exemption from the housing requirement from the fact that he – unlike her mother – had been admitted as a refugee. Suitable housing had proved difficult to come by; in the end the first and second applicant had elected to buy a house in a less reputable area in Amsterdam just so that they might comply with the requirement.

According to the applicants, the Government were also wrong in their suggestion that Mehret might have obtained an exemption from the passport requirement. The policy applied at the relevant time by the Netherlands authorities made it practically impossible that such an exemption would have been granted to the child of a person who had not been admitted as a refugee. Although, formally speaking, it may have been true that the Eritrean authorities had started issuing passports in 1994, in practice it had been far from easy to obtain one. Those authorities had demanded, for example, that the applicants retroactively pay a percentage of their income towards the reconstruction of the country.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court by a majority

Declares the application admissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President