CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61292/00
by Kazim USEINOV
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 11 April 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE, *judges*,
and Mr V. BERGER, *Section Registrar,*

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

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court on 25 November 2005,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Kazim Useinov, is a national of the Former Yugoslav Republic of Macedonia ("the FYR of Macedonia"), who was born in 1965 and lives in Kudelstaart. He is represented before the Court by Mr M.F. Wijngaarden, a lawyer practising in Amsterdam. The respondent

Government are represented by their Agent Ms J. Schukking, of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

The applicant came to the Netherlands on 19 May 1992 and applied for asylum. This request was rejected on 15 June 1992. The applicant's subsequent request for revision (*herziening*) was dismissed on 13 April 1994. The final decision on the asylum application was taken by the Amsterdam Regional Court (*arrondissementsrechtbank*), which rejected the applicant's appeal on 12 April 1995. However, the applicant did not leave the country and neither was he forcibly expelled.

In 1993, while the proceedings on his request for asylum were still pending, the applicant formed a relationship with a Ms van B., a Netherlands national. Ms van B. was living next door to the applicant with her parents, but she spent so much time with the applicant that they were *de facto* living together. On 7 January 1995 a daughter, M., was born to the applicant and Ms van B. The applicant did not at that time recognise his daughter given that Ms van B.'s father was vehemently opposed to this. Being an asylum seeker, the applicant was not allowed to work in the Netherlands and he was thus unable to contribute financially to his daughter's upbringing. However, he did spend one or two afternoons per week with her.

On 26 November 1997 the applicant applied for a residence permit for compelling reasons of a humanitarian nature related to his having a Netherlands partner and daughter. On 28 November 1997 Ms van B. informed the immigration authorities that her relationship with the applicant had ended.

The applicant's request for a residence permit was rejected by the Deputy Secretary of Justice (*Staatssecretaris van Justitie*) on 7 May 1998. It was held that, even assuming that it could be established – *quod non* – that the applicant was the father of M., it had in no way been shown that he had enjoyed family life with her. Neither had it appeared that there had existed a lasting and exclusive relationship between the applicant and Ms van B.

The applicant lodged an objection (*bezwaar*) against this decision, arguing that he saw his daughter on a regular basis – at least once and sometimes twice a week – and that, as his relationship with Ms van B. had ended, it could not be expected of the latter to move to the FYR of Macedonia in order to enable him to enjoy family life with his daughter. He further submitted a letter written by Ms van B. to his lawyer, in which she confirmed that the applicant was the biological father of her daughter M.; that the applicant had insufficient means to contribute financially to M.'s

upbringing but that he did sometimes buy presents for her; that, although their relationship had ended, they were still friends; and that the three of them undertook activities together at least once a week.

By a decision of 2 February 1999, the Deputy Minister rejected the objection, considering that the refusal to grant the applicant a residence permit did not constitute an interference with the applicant's family life since that refusal was not aimed at taking from the applicant a residence permit which enabled him to enjoy family life in the Netherlands. Neither did there exist any special facts or circumstances which placed the State under a positive obligation to grant the applicant a residence permit. In this context the Deputy Minister noted that the applicant had never officially lived together with Ms van B. and that his claim that he saw his daughter once or twice a week had remained unsubstantiated. It had further not been shown that he had custody of M. or that he contributed financially to her upbringing. In addition, in view of the geographical distance between the Netherlands and the FYR of Macedonia and the cost of regular trips between those two countries, it was held that the contact which the applicant had with his daughter would not need to undergo a substantial change as a result of the refusal of a residence permit.

The applicant appealed this decision to the Amsterdam Regional Court, submitting that his return to the FYR of Macedonia would render regular contact with his daughter impossible. As the FYR of Macedonia was the poorest country in Europe, it was unlikely that he would be able to afford regular trips to the Netherlands. If he had a job in the FYR of Macedonia, he would not have enough holidays to make regular longer trips to the Netherlands. In addition, there was no guarantee whatsoever that the applicant would be granted a visa. It was further not to be expected that Ms van B. would travel to the FYR of Macedonia to enable the applicant to see his daughter in view of the difficulties between the applicant and Ms van B.'s father and the latter's influence over his daughter. The applicant also argued that not all relevant circumstances had been taken into account by the Deputy Minister when the interests of the community as a whole were balanced against those of the applicant's. The circumstances which, in his view, merited to be taken into account were the fact that he had been living in the Netherlands since 1992, that his daughter was four years old, that he had regular contact with her, that due to an insufficiency of means it was impossible for him to contribute financially to his daughter's upbringing, and that he did not dare take legal proceedings in order to recognise his daughter out of fear that Ms van B.'s father would stop him from seeing his daughter. In the proceedings before the Regional Court the applicant submitted a letter from the owner of a company saying he should like to employ the applicant and requesting that the applicant be granted a residence permit.

On 21 February 2000 the Regional Court rejected the appeal. It found that the Deputy Minister had been justified in attaching greater weight to the economic well-being of the country than to the applicant's interest in exercising family life with his daughter in the Netherlands. In this context the Regional Court had regard to the fact that the applicant and his daughter had never lived together as a family unit (*gezin*), that there was no arrangement concerning access and that the applicant did not contribute financially to his daughter's upbringing. Finally, the Regional Court considered that the applicant should be deemed capable of maintaining some kind of contact with his daughter from the FYR of Macedonia. No further appeal lay against this decision, which was notified to the applicant on 14 March 2000.

On 24 May 2000 the applicant requested the juvenile court judge of the Amsterdam Regional Court to establish an access arrangement between him and his daughter. In her decision of 14 November 2000, the juvenile court judge noted that M. was born out of the relationship between the applicant and Ms van B., and that the parents had themselves agreed on an access arrangement which had latterly, however, not been working out. Given that, pending the proceedings, it had appeared that the parents had reached agreement, the juvenile court judge established the access arrangement as agreed by the parents, to the effect that the applicant would see M. every Saturday from midday to 7 p.m. and that further contacts would take place by mutual agreement.

On 3 January 2001 the applicant recognised his daughter with the permission of Ms van B., as a result of which legally recognised family ties (*familierechtelijke betrekkingen*) were created between them. Moreover, on 11 December 2001 a son, J., was born to the applicant and Ms van B., who was recognised by the applicant on 31 January 2002. In a letter to the Court of 24 February 2004 the applicant described his family situation as "living apart together". Ms van B. worked four days a week, during which the applicant, who lived just two-hundred metres away, looked after the children. The family spent the remaining three days of the week mainly together.

As of 9 August 2005 the local authorities of the town where the applicant was residing stopped providing him with State-sponsored accommodation, social benefits and health insurance. Legal proceedings instituted by the applicant against this decision were to no avail.

On 1 September 2005 Ms van B. lost her job. As a result, the applicant is prevented from applying for a residence permit for the purpose of residing with his partner and children since one of the requirements for such a permit is that the partner who is already residing in the Netherlands is in employment and in receipt of a salary of at least 1,320 euros per month.

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 1965 (*Vreemdelingenwet 1965*). On 1 April 2001 a new Aliens Act entered into force but this has no bearing on the present case.

Under Article 11 paragraph 5 of the Aliens Act 1965 a residence permit could be refused on public interest grounds. The Government pursued – and still 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. Respect for family life is one of those obligations arising from international agreements. To implement this restrictive policy, further conditions have been drawn up relating to each of the various grounds for the admission of aliens wishing to stay in the Netherlands.

The admission policy for the purposes of forming a family was laid down in the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire 1994*). Section B1/11 of these Guidelines addressed the requirements of Article 8 of the Convention regarding initial admission and continued residence. It had to be determined whether family life existed within the meaning of Article 8, whether refusal to grant admission to the alien would constitute an interference with his or her right to respect for family life and whether the interference would be justified under Article 8 § 2.

COMPLAINT

The applicant complained under Article 8 of the Convention that the decision not to allow him to reside in the Netherlands constitutes an unjustified interference with his right to respect for family life. He submitted that the fact that he never officially lived together with his daughter is of relative importance only, given that he had, and still has, regular contact with her, and now also with his son. He further argued that it would be practically impossible for him to enjoy any kind of meaningful form of family life with his children if he had to do so from the FYR of Macedonia.

THE LAW

The applicant complained that the refusal by the authorities of the respondent State to allow him to reside in the Netherlands constituted a breach of Article 8 of the Convention, which provision, in so far as relevant, reads 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 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."

The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in so far as his complaint related to his relationship with his son, given that he had not taken any steps within the national system to obtain a residence permit for the purpose of staying with this child.

While accepting that family life within the meaning of Article 8 § 1 existed between the applicant and his daughter, the Government further contended that there had been no interference with that family life and that they were not under a positive obligation to permit the applicant to reside in the Netherlands. The fact that the applicant was at no time entitled to reside in the Netherlands, and that he never had a valid reason to expect that he would one day be so entitled, should, in their view, be regarded as a major factor to be taken into account in the balancing of the interests at stake in the present case. According to the Government, the applicant had no objectively justified reasons to expect that he would be allowed to continue his family life with his daughter in the Netherlands. Although it was true that this child had been born three months before the final decision on the applicant's asylum application was taken by the Regional Court on 12 April 1995, his residence in the Netherlands had already been illegal in the period prior to the Regional Court's judgment, as his appeal to that court against the decision on his request for revision did not suspend his obligation to leave the country.

The Government emphasised that the applicant's situation could not be equated with that of the applicant in the case of *Berrehab v. the Netherlands* (judgment of 21 June 1988, Series A no. 138), who had been residing lawfully in the Netherlands for several years in the period when his daughter was born and his family life with her began. In addition, Mr Berrehab had also been appointed auxiliary guardian of his daughter.

The applicant argued that a fresh application for a residence permit in order to be able to stay with his son would stand no chance of success. In this context he referred to the legislation in force as well as to the stance already taken by the Dutch immigration authorities and the courts in relation

to his request for a residence permit for the purpose of staying with his daughter.

The applicant further submitted that he had been permitted to stay in the Netherlands *de jure* while his applications for asylum and a residence permit were considered. Moreover, even when no proceedings were pending, the State had for a long time taken no action to expel him but had continued to provide him with social security, housing and health insurance, thereby creating a legally justified expectation that he would be allowed to stay in the country. He believed that it could not be denied or ignored that, during such a long presence in the Netherlands with the knowledge of, and social assistance of, the authorities, he had established relationships with other people that amounted to family life. Therefore, the impugned decision constituted an interference with his right to respect for that family life which could not be justified on the sole ground that he had not previously possessed a residence permit.

Furthermore, the Government had not struck a fair balance between the interests involved. In this context the applicant pointed to the facts that his children were still very young and needed to remain in contact with him; that he had never been found guilty of any criminal offence; and that his expulsion would entail substantial changes to long-settled family life, bearing in mind that his partner and children had all their ties with the Netherlands but no ties whatsoever with the FYR of Macedonia, a country whose language they did not speak and where it was far from certain they would be admitted.

The Court considers that it is not necessary to examine whether the applicant has complied with the requirement of exhaustion of domestic remedies since the application is in any event manifestly ill-founded for the following reasons.

As to the existence of "family life" within the meaning of Article 8 of the Convention in the present case, the Court reiterates that, as far as parent-child relationships are concerned, this notion is not confined to children born in wedlock. A child born from a relationship where the parents are living together out of wedlock is also *ipso jure* part of that "family" unit from the moment, and by the very fact, of its birth. Thus, there exists between the child and the parents a relationship amounting to family life (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, pp. 17-18, § 44; *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; and *Yousef v. the Netherlands*, no. 33711/96, § 51, ECHR 2002-VIII). Although, as a rule, cohabitation may be a requirement for such a relationship, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* "family ties" (see *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, § 30). The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending

upon the real existence in practice of close personal ties (see *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII).

In the present case it is not in dispute that such ties exist between the applicant and his children M. and J., whom he has recognised and in whose upbringing he takes an active part.

Next, the Court observes that the present case concerns the refusal of the domestic authorities to allow the applicant to reside in the Netherlands. Although he has been living in that country since 1992, the impugned decision did not constitute an interference with the applicant's exercise of the right to respect for his family life in that a residence permit, entitling him to remain in the Netherlands, was withdrawn. The question to be examined in the present case is rather whether the Netherlands authorities were under a duty to allow the applicant to reside in the Netherlands, thus enabling him to maintain and develop family life in their territory. For this reason the Court considers that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2031, § 63).

The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*Mitchell*

v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).

Turning to the circumstances of the present case, the Court notes that it is the applicant's submission that he was allowed to live in the Netherlands pending the proceedings on his asylum application and his subsequent application for a residence permit for compelling reasons of a humanitarian nature, i.e. a total period of just over five years. However, the Court is of the view that this cannot be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country. Therefore, the applicant's stay in the Netherlands was precarious for most of it, and illegal for the remainder.

The Court is aware that, where Contracting States tolerate the presence of aliens in their territory while the latter await a decision on an application for a residence permit, this enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. However, as set out above, this does not entail that the authorities of the Contracting State involved are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their country. In this context a parallel may be drawn with the situation where a person who, without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a *fait accompli*. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003). In the present case also, the applicant was never given any assurances that he would be granted a right of residence by the competent Netherlands authorities and he could therefore not at any time reasonably expect to be able to continue this family life in the Netherlands (cf. *Bouchelkia v. France*, judgment of 29 January 1997, *Reports* 1997-I, p. 65, § 53; and *Baghli v. France*, no. 34374/97, § 48, ECHR 1999-VIII).

Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant first entered the Netherlands in 1992 at the age of 27. Even though he has now been living in that country for a considerable time, he must still have links with the FYR of Macedonia, where he presumably grew up and underwent his schooling. Moreover, the Court has found no indication that there are any insurmountable obstacles for the applicant's partner to settle in the FYR of Macedonia with the children, even though this might entail a certain social hardship for them. Should she choose not to do so, it is in any event to be borne in mind that the distance between the Netherlands and the FYR of Macedonia is not so great as to render contacts between the applicant and his children virtually impossible.

In these circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President