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. 53102/99
by Roslina CHANDRA and Others
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 13 May 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 25 August 1999,

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 first applicant, Ms Roslina Chandra, is a Netherlands national of Indonesian origin, born in 1958 and living in Eindhoven. The second, third, fourth and fifth applicants, Henry, Willian, Ayreen and Nivula Tjonadi – the first applicant's children – are Indonesian nationals, born in 1979, 1980, 1983 and 1985 respectively. They currently live in Eindhoven with their mother. The applicants are represented before the Court by Mr I.K. Kolev, a lawyer practising in Hapert.

A. The circumstances of the case

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

In 1992 the first applicant ("the mother") was in the process of getting a divorce from her Indonesian husband, father of the other applicants ("the children"). She submitted that her husband did not meet his responsibilities as head of the family, was frequently inebriated, abused her and the children, did not provide for basic daily needs and repeatedly forced her out of the house at knifepoint. On 10 September 1992, while the divorce proceedings were still ongoing, the mother left Indonesia and came to the Netherlands where she met and settled with a Netherlands national. On 2 April 1993 she was granted a residence permit for the specific purpose of living with her partner. The father retained custody of the children who remained with him in Indonesia. The mother pursued legal proceedings from the Netherlands in order to obtain a divorce as well as custody of the children.

In October 1993 the mother was granted custody of the children, but this decision was appealed by the father. In a final decision of 29 April 1995 she was granted custody. According to the mother's submissions, she subsequently started preparations for the children to join her in the Netherlands. Her partner, however, was reluctant to have the four children coming to live with them.

On 22 July 1996 the mother obtained Netherlands nationality. In January 1997 the relationship between the mother and her partner ended and she settled in a place of her own.

In February 1997 the children were granted permission by their father to leave Indonesia in order to join their mother. On 20 March 1997 they entered the Netherlands on a short stay visa (*visum voor kort verblijf*), granted for the purpose of visiting their mother and valid for 90 days. They have been living with their mother since that time. On 12 May 1997 the children lodged a formal application for a residence permit (*vergunning tot verblijf*) in order to stay with their mother.

On 13 August 1997 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the children's request considering that the criteria for family reunion had not been met given that, firstly, the close family ties (*gezinsband*) between mother and children must be considered to have been severed and, secondly, the mother had insufficient means of subsistence. The Deputy Minister also found that this decision did not entail a breach of Article 8 of the Convention, since it did not prevent the applicants from continuing to exercise their family life as they had done prior to the children's arrival in the Netherlands. Furthermore, there were no impediments for the mother to follow her children to a place outside the Netherlands.

On 2 September 1997 the children filed an objection (*bezwaar*) against this decision. On 26 September 1997 the Deputy Minister informed the children that they were not allowed to await the outcome of their objection in the Netherlands. On 30 September 1997 the children filed a request with the Hague Regional Court (*arrondissementsrechtbank*) for a provisional measure (*voorlopige voorziening*) that would allow them to remain in the Netherlands pending the proceedings on their objection.

On 15 October 1997 the Deputy Minister rejected the objection. The children subsequently filed an appeal against that decision with the Hague Regional Court, amending their request for a provisional measure in that they now wished to be allowed to await the outcome of the appeal proceedings in the Netherlands.

On 10 March 1999 the Regional Court rejected the appeal, as well as the request for a provisional measure. It confirmed the Deputy Minister's assessment that the close family ties between the mother and the children had been severed. The Regional Court held in this respect that the mother had failed to show that close family ties with her children had been maintained either through parental decisions or through financial support, even after she had obtained custody of them. The Regional Court attached particular importance to the fact that it was only in 1997 that the mother had taken concrete steps to have her children join her in the Netherlands and not already in 1993 and 1995 when she had obtained custody of them.

The Regional Court saw no merit in the arguments that refusing the children residence would amount to a violation of Article 8 of the Convention. In this context it had regard to the fact that the proceedings concerned a request for a first admission (*eerste toelating*) to the Netherlands, rather than a refusal to extend existing residence. It further held that there were no objective obstacles to the applicants' family life being exercised elsewhere – the mother was free to develop family life with her children in Indonesia. The Regional Court concluded that a proper balance had been struck between the interests of the applicants and those of society as a whole, the latter interest being served by a restrictive immigration policy.

B. Relevant domestic law

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.

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.

Under Article 11 paragraph 5 of the Act, a residence permit may be refused on public interest grounds (*gronden aan het algemeen belang ontleend*).

In view of the situation in the Netherlands as regards population size and employment, Government immigration policy – defined at the time in the Aliens Circular 1994 ("the Circular" - *Vreemdelingencirculaire 1994*) – is aimed at restricting the number of aliens admitted to the Netherlands. In general, an application for a residence permit in the Netherlands is granted only if the individual's presence serves an essential national interest or if there are compelling humanitarian grounds to do so (Chapter A4/5.3 of the Circular).

The admission policy for family reunion purposes was laid down in Chapter B1 of the Circular. It provided that the following persons, where relevant, may qualify for family reunion if certain conditions (relating to matters such as public policy and means of subsistence) are met:

– a person's spouse,

– a minor child born of the marriage who actually belongs to the family unit (*gezin*), and

– a minor child born outside the marriage who actually belongs to the family unit (e.g. a child of one of the spouses from a previous marriage or a foster child).

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. Living together in the Netherlands without a permanent residence permit is not seen as restoring severed family ties.

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 the children by the Netherlands authorities, as a result of which they could not enjoy family life with their mother.

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, 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 there had been no interference with the applicants' right to respect for family life, since the authorities' refusal to allow the children to reside in the Netherlands did not amount to depriving them of a residence permit that enabled them to enjoy family life with their mother in the Netherlands. This was not altered by the fact that the applicants had in fact been living together in the Netherlands since 1997, given that the children were residing in the Netherlands illegally.

The Government were further of the opinion that no special facts or circumstances existed which placed them under a positive obligation to grant the children a residence permit. In this context they attached relevance, *inter alia*, to the fact that the mother had not applied for the children to be admitted to the Netherlands until 1997, that is five years after she had first arrived in the Netherlands, having made a conscious decision to settle in the Netherlands and leave her children with their father. The refusal to admit the children did not prevent the mother from continuing to enjoy family life in the same way and with the same intensity as she had elected to pursue when she had settled in the Netherlands without her children. In addition, it had not appeared that the children would have no one to care for them in Indonesia, in so far as they still required such care: apart from their father, other relatives – siblings of their mother – were also living there.

Finally, the Government were of the view that there was nothing to prevent the applicants from enjoying and strengthening their family life in Indonesia. If, as she submitted, the mother was afraid of her ex-husband and his family, she could choose to settle in another part of Indonesia.

The applicants maintained that the Netherlands authorities had failed to carry out a proper balancing exercise of all the interests involved. The mother had done everything in her power to continue to care for her children and meet her responsibilities as a parent after she had come to the Netherlands. She had also done everything possible to comply with Netherlands immigration rules as quickly as possible to ensure that the children could be reunited with her. The children had not been able to travel with her to the Netherlands in September 1992 since she did not have custody of them and her ex-husband had not given permission for the children to leave the country. Whilst in the Netherlands, the mother had held several jobs at a time in order to create a sound financial basis for herself and the children. She had obtained a Netherlands passport in July 1996, bought a house in December 1996 and two months later she had travelled to Indonesia to arrange for the necessary documents. She had returned to the Netherlands with her children. It would have been futile to request residence permits before she had legal custody, suitable accommodation and sufficient income.

Moreover, there was no question that the applicants had a free choice in the matter as to where to exercise their family life since returning to Indonesia was not an option for the mother. Apart from the problems she had experienced with her now ex-husband she had also suffered abuse at the hands of a senior police officer to whom she had turned for help. Events in Indonesia had left her traumatised and had caused her to seek psychiatric help in the Netherlands. According to a report from her psychiatrist, dated 11 September 2001, a return to Indonesia would lead to a deterioration of

her situation, and a separation of mother and children would be harmful to both.

The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 174-175, § 38, and *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports* 1996-VI, p. 2031, § 63).

The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. 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. Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory (see *Gül v. Switzerland*, cited above, loc. cit., *Ahmut v. the Netherlands*, cited above, § 67, and *P.R. v. the Netherlands* (dec.), no. 39391/98, 7 November 2000, unreported).

In order to establish the scope of the respondent State's obligations, the facts of the case must be considered.

The present case hinges on the question whether the Netherlands authorities were under a duty to allow the children to reside with their mother in the Netherlands, thus enabling the applicants to maintain and develop family life with each other there. The Court must examine whether in refusing to do so the respondent State can be said to have struck a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

The mother chose to leave Indonesia and settled with a Netherlands national, leaving her four children behind in the custody of her then husband. The children were then 12, 11, 8 and 7 years' old respectively. On 2 April 1993 she was granted a residence permit in the Netherlands for the specific purpose of living with her partner, which permit did not include any residency rights for the children. It was only on 12 May 1997 that the mother applied for permission for her children to join her in the Netherlands. The children were then 17, 16, 13 and 11 years' old respectively.

Prior to joining their mother in the Netherlands on a short stay visa in February 1997, the children had lived in Indonesia all their lives and had been cared for by their father. They must therefore be deemed to have strong links with the linguistic and cultural environment of that country. It is further to be noted that by the time a final decision had been taken on the children's request, two of them had attained the age of majority. The two youngest children had also reached an age – 15 and 13 respectively – where they were presumably not as much in need of care as younger children. It has not been argued that these children could not stay with their father and it further appears that they have other relatives living in Indonesia.

Although the Court appreciates that the applicants would now prefer to maintain and intensify their family life in the Netherlands, Article 8, as noted above, does not guarantee a right to choose the most suitable place to develop family life. Moreover, the Court is not persuaded by the applicants' claim that they would be unable to develop this family life in Indonesia. In this connection the Court considers, firstly, that it has not been established that the mother could not go back to Indonesia to settle with her children. Secondly, the applicants have failed to counter the valid argument advanced by the Government to the effect that they might settle at a location in Indonesia away from the mother's ex-husband.

The fact that the children have been staying with their mother in the Netherlands since 1997 does not impose a positive obligation on the State to allow the children to reside there since they had entered the Netherlands only for visiting purposes. Having chosen not to apply for a provisional residence visa from Indonesia prior to travelling to the Netherlands, the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a *fait accompli*, any right of residence would be conferred on them.

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 the present case discloses no appearance of a violation of Article 8 of the Convention on its facts, and that it must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President