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

THIRD SECTION

CASE OF IBRAHIM MOHAMED v. THE NETHERLANDS

(Application no. 1872/04)

JUDGMENT
(Striking out)

STRASBOURG

10 March 2009

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 Ibrahim Mohamed v. the Netherlands,

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 1872/04) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Somali national, Mr Abdullahi Ibrahim Mohamed (“the applicant”).

2. The applicant was represented by Ms J. van der Haar, a lawyer practising in Nijmegen. The Dutch Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant alleged that the obligation to leave the Netherlands in order to apply and wait for a provisional residence visa in Somalia or a neighbouring country infringed his right to respect for his family life.

4. By a decision of 12 May 2005, the Court declared the application admissible.

5. The applicant, but not the Government, filed further written observations (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicant was born in 1970 and lives in Nijmegen.

7. He came to the Netherlands on 16 August 1998 and applied for asylum. Although his request was rejected, he was granted a provisional residence permit (*voorwaardelijke vergunning tot verblijf*). On 8 January 2001 his request for renewal of this permit was denied. The applicant's objection against this refusal was dismissed, as was his subsequent appeal. The final decision in these proceedings was taken on 11 July 2002 by the Regional Court (*rechtbank*) of The Hague.

8. Meanwhile, in 1998, the applicant had started a relationship with a Ms A.A., a settled immigrant of Somali origin. The couple had two children, born on 11 November 1999 and 27 February 2002 respectively. The applicant and Ms A.A. were married on 4 November 2002.

9. On 21 August 2002 the applicant requested a residence permit for the purpose of residing in the Netherlands with his (future) spouse. This request was denied by the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) on 28 November 2002 for the reason that the applicant did not hold the required provisional residence visa (*machtiging tot voorlopig verblijf*), which had to be applied for at a representation of the Netherlands in the country of origin or, if there was no such representation in the country of origin, at the representation situated closest to that country.

10. The applicant filed an objection (*bezwaar*) against this decision, arguing that he ought to be exempted from the visa requirement as he was unable to return to Somalia or, given that there were no representations of the Netherlands in that country, to one of Somalia's neighbouring countries. In addition, his wife was disabled and required his assistance in the care for their two children.

11. In order to be able to await the outcome of the objection proceedings in the Netherlands, the applicant also applied for a provisional measure (*voorlopige voorziening*). By a decision of 5 November 2003, the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague, sitting in Arnhem, rejected the request for a provisional measure and, at the same time, dismissed the applicant's objection. The judge reiterated that the ratio of the visa requirement lay in preventing the national authorities, prior to a decision on a person's request for admission having been taken, from being confronted with a *fait accompli* as a result of

that person's illegal presence in the Netherlands. If an alien, who had entered the Netherlands without a visa but with the intention of settling there, could be exempted from the visa requirement simply by asserting that it was impossible to return, this would have serious negative repercussions on the policy. Finally, the Regional Court considered that the refusal to exempt the applicant from the obligation of first applying for a visa did not constitute an interference with his right to respect for family life because this refusal did not deprive him of a residence permit on the basis of which he had been able to have family life in the Netherlands. Neither were the authorities under a positive obligation to exempt the applicant from the visa requirement, as it could reasonably be expected that he apply for a visa in his country of origin and await the outcome of that application there. The applicant had not substantiated his claim that such would not be possible for him, but had merely argued that he had to assist his disabled partner in the care for their children, which, in the view of the Regional Court, was insufficient. It had not appeared that there were any objective impediments to family life being developed in the country of origin. Finally, the Regional Court added that the impugned decision did not constitute a definite refusal of family life being exercised in the Netherlands.

No further appeal lay against this decision.

B. Developments after the application was declared admissible

12. On 4 November 2005 the respondent Government informed the Court that the applicant had been granted a residence permit for the purpose of asylum pursuant to a temporary “policy of protection for certain categories” (*categoriaal beschermingsbeleid*, see paragraph 13 below) adopted by the Minister on 24 June 2005 in respect of asylum seekers coming from certain parts of Somalia.

II. RELEVANT DOMESTIC LAW

13. A temporary residence permit for the purpose of asylum may be issued to persons whose return to their country of origin is considered by the responsible (Deputy) Minister to constitute exceptional harshness in view of the general situation pertaining in that country (article 29(1)(d) of the Aliens Act 2000 (*Vreemdelingenwet 2000*)). Pursuant to this provision, the (Deputy) Minister may pursue a policy of protection for a particular category of asylum seekers. The criterion of exceptional harshness, laid down in this provision, is not a formal one, such as the declaration of a state of siege, a state of war or the existence of some form of armed conflict, but a material one. It relates to whether the risks that could arise on a person's return, in connection, *inter alia*, with armed conflict or the like would be unreasonable from a humanitarian perspective or from the perspective of the

law of armed conflict. In general, protection for certain categories is justified only if armed conflict (including armed civil conflict) has disrupted daily life to such an extent that such humanitarian risks arise.

14. A person who has held a temporary permit pursuant to article 29(1)(d) of the Aliens Act 2000 for a period of five years may be eligible for an indefinite residence permit for the purpose of asylum (article 34(4) of the Aliens Act 2000).

15. The requirement to hold a provisional residence visa when an application is made for a residence permit for non-asylum related purposes (for the purpose of exercising family life, for example) does not apply when the person concerned held a temporary or indefinite residence permit for the purpose of asylum immediately prior to the lodging of that application (article 17(1)(e) of the Aliens Act 2000).

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

16. The applicant claimed to be the victim of a violation of Article 8 of the Convention, the relevant parts of which provide:

> "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."

17. The Court notes that the applicant has been granted a residence permit (see paragraph 12 above) and the question therefore arises whether there is an objective justification for continuing to examine this complaint or whether it is appropriate to apply Article 37 § 1 of the Convention, which provides as follows:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

18. In a letter of 25 November 2005, the applicant requested the Court to continue its examination of the present application, notwithstanding the fact that he was now residing lawfully in the Netherlands. In the opinion of the applicant, the residence permit he had been granted provided insufficient protection of his right to respect for family life, given that it could be withdrawn whenever the Minister decided that the situation in Somalia no longer justified pursuing a protection policy.

19. As it is thus clear that the applicant wishes to pursue his application, the Court must, in order to ascertain whether Article 37 § 1 (b) applies to the present case, answer two questions in turn: first, whether the circumstances complained of directly by the applicant still obtain and, second, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 97, 15 January 2007, and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 30, 20 December 2007). In the present case, that entails first of all establishing whether the applicant is still required to apply for a provisional residence visa in Somalia or a neighbouring country before he may be eligible for a residence permit allowing him to reside with his wife and children in the Netherlands; after that, the Court must consider whether the measures taken by the authorities constitute sufficient redress for the applicant's complaint.

20. As to the first question, it is clear that the applicant is currently lawfully residing in the Netherlands and that there is no question of his having to apply for a provisional residence visa.

21. As regards the second question, the Court reaffirms that Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone (see *Sisojeva and Others*, cited above, § 91).

22. In this context the Court notes that although the residence permit granted to the applicant may not have been issued for the specific purpose of allowing him to reside in the Netherlands with his wife and children, it nevertheless enables the applicant to enjoy family life in the Netherlands. Moreover, while the policy pursuant to which the applicant was granted a

residence permit may, at some point in the future, be amended or revoked, it is far from certain that the applicant will then once again be required to apply for a provisional residence visa abroad (see paragraphs 14-15 above) or that, in the circumstances pertaining at that time, such a requirement would be capable of raising an issue under Article 8 of the Convention.

23. Having regard to the fact, therefore, that the applicant has been granted a residence permit in the Netherlands, enabling him to exercise freely in that country his right to respect for his family life as protected by Article 8 of the Convention and interpreted in the Court's established case-law (see, *mutatis mutandis*, *Boughanemi v. France*, judgment of 24 April 1996, *Reports* 1996-II, pp. 607-08, § 35; *C. v. Belgium*, judgment of 7 August 1996, *Reports* 1996-III, pp. 922-23, § 25; *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2263, § 36; and *Buscemi v. Italy*, no. 29569/95, § 53, ECHR 1999-VI), the Court considers that his complaint has been adequately and sufficiently remedied (see *Sisojeva and Others*, cited above, § 102).

24. Consequently, the Court finds that both conditions for the application of Article 37 § 1 (b) of the Convention are met. The matter giving rise to the applicant's complaint can therefore now be considered to be "resolved" within the meaning of Article 37 § 1 (b). Finally, no particular reason relating to respect for human rights as defined in the Convention requires the Court to continue its examination of the application under Article 37 § 1 *in fine*.

25. Accordingly, the application should be struck out of the Court's list of cases.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that the matter giving rise to the applicant's complaint has been resolved and *decides* to strike the application out of its list of cases.

Done in English, and notified in writing on 10 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada Josep Casadevall
Registrar President