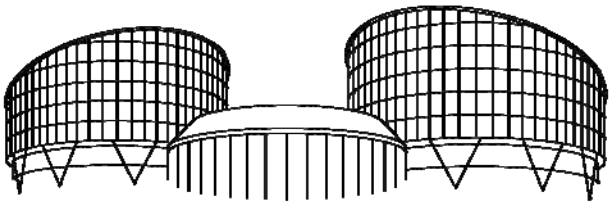

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38165/07
by Esmail NARENJI HAGHIGHI
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 14 April 2009 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Luis López Guerra,
Ann Power, *judges,*

and Stanley Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 31 August 2007,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Esmail Narenji Haghighi, is an Iranian national who was born in 1969 and lives in Teheran. He was represented before the Court by Mr G.J. van der Graaf, a lawyer practising in Arnhem.

A. The circumstances of the case

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

The applicant first entered the Netherlands on 18 July 1994. On 9 August 1994 he applied for asylum. His request was denied in final instance on 10 September 1996.

On 24 May 1997 the applicant was convicted of shoplifting and sentenced to a fine of 50 Netherlands guilders (NLG) (22.73 Euros (EUR)).

On 14 January 1998 the applicant filed a second request for asylum.

That same year the applicant started cohabiting with a Dutch national with whom he had started a relationship. The applicant's partner suffers from a psychiatric disorder.

On 26 July 1999 the applicant accepted a deal proposed by the public prosecutor and paid NLG 240 (EUR 109.10) in relation to an offence of shoplifting committed on 16 June 1999.

His second request for asylum was denied in final instance on 15 August 2000. However, the applicant did not at that time leave the country and neither was he forcibly expelled.

On 27 July 2001 the applicant was convicted of defamation, destruction and attempted aggravated assault, committed on 29 November 1999, and sentenced to a suspended term of two months' imprisonment as well as to 100 hours' community service.

In March 2002 the applicant married his partner and on 14 August 2002 he applied for a residence permit for the purpose of residing with his wife (*verblijfsvergunning regulier voor bepaalde tijd voor verblijf bij echtgenote*).

On 29 January 2004 the applicant's request was rejected by the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*). The Minister considered that the applicant was not in possession of a provisional residence visa (*machtiging tot voorlopig verblijf*). Such a visa is normally a prerequisite for the grant of a residence permit, which confers more permanent residence rights, and it has to be applied for in a person's country of origin. The Minister further considered that the applicant was not in possession of a valid document to cross international borders (*document voor grensoverschrijding*). The applicant lodged an objection (*bezwaar*) against this decision.

He subsequently returned to Iran and filed a request for a provisional residence visa with the Dutch representation in Teheran on 4 May 2005. On 1 August 2005 the applicant's request was rejected by the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*), who considered that the applicant had repeatedly committed criminal offences and that he had already committed his first offence two years after arriving in the Netherlands. Furthermore the applicant had continued to commit criminal

offences even after he had started cohabiting with his partner. The Minister of Foreign Affairs therefore also dismissed the applicant's argument that he should be granted a residence permit in view of the medical condition of his wife, as he should have realised that the commission of criminal offences would affect his chances of a residence permit. Furthermore, it was considered that the applicant had never had legal residence in the Netherlands and it was thus for him to bear the risks involved in starting family life at that time. The Minister of Foreign Affairs therefore found that, in these circumstances, Article 8 of the Convention did not impose a positive obligation on the State of the Netherlands to allow the applicant to reside in that country. Moreover, it had not appeared that there was an objective obstacle standing in the way of family life being enjoyed outside of the Netherlands.

On 19 August 2005 the applicant filed an objection (*bezwaar*) against the decision to deny him a provisional residence visa. He argued that the offences he had committed were only minor ones and that he had not reoffended since his last conviction of 27 July 2001. In the view of the applicant, his and his wife's interests in being able to enjoy family life in the Netherlands outweighed public order interests. In this context he also pointed to a letter drawn up by a social-psychiatric nurse to his lawyer, saying that the applicant's wife was suffering from a schizoaffective disorder, bipolar type, and that she had had to be admitted to a closed ward of a clinic after her husband had returned to Iran as the stress, loneliness and despair concerning the uncertainty about his return had become too much and had led her to take an overdose of pills. According to the nurse, it was realistic to expect that her situation would improve if her husband returned as he was the only stable factor in her life and exerted a positive influence on her. Although the nurse stated that a long-term stay of the applicant's wife in Iran hardly appeared to be an option, this was ultimately for her to decide.

On 30 March 2006 the Minister of Foreign Affairs dismissed the applicant's objection, considering that the situation of the applicant's wife had already been taken into account in the original decision and the applicant had not submitted any new facts or circumstances leading to the conclusion that the condition of his wife should be deemed a special circumstance. Moreover the Minister considered that the criminal offences carried a certain gravity, regardless of the fact that it had been five years since the last offence had been committed. Finally, the Minister concluded that sufficient consideration had been given to the applicant's family life in the balancing of the public and private interests involved.

In his subsequent appeal (*beroep*) against this decision, the applicant argued that the Minister of Foreign Affairs had failed to motivate properly why the condition of his wife did not constitute a special circumstance.

According to the applicant, the Minister had not correctly balanced the interests at issue.

The objection which the applicant had lodged against the decision to refuse him a residence permit was rejected by the Minister for Immigration and Integration on 11 May 2006. The Minister considered that the mere fact that the applicant was now in possession of a valid passport did not qualify him for a residence permit as he still did not posses the required provisional residence visa.

On 19 May 2006 the applicant filed an appeal against this decision also, arguing that it was contrary to the principle of fair play to refuse him a residence permit for the sole reason that he did not hold a provisional residence visa. The applicant further submitted that the interests at stake had not been properly balanced since his and his wife's interests ought to outweigh the interest served by the mere formality of obtaining a provisional residence visa.

On 24 October 2006 the Regional Court (*rechtbank*) of The Hague, sitting in Arnhem, delivered its verdict in both the appeal against the refusal of a residence permit and the appeal against the refusal of a provisional residence visa. Regarding the application for a residence permit the Regional Court considered that this had been rejected on the basis of the legal provisions in force at the time the application had been lodged, and which required that the applicant hold a provisional residence visa. The court further held that the question whether or not Article 8 of the Convention should lead to the applicant being admitted to the Netherlands fell to be determined in the proceedings relating to the provisional residence visa rather than in the context of the question whether or not the lack of such a visa should be held against the applicant.

In its second decision of 24 October 2006, relating to the refusal to issue the applicant a provisional residence visa, the Regional Court considered that the Minister had had sufficient regard to the psychological problems of the applicant's wife. It further found that it had not been unreasonable for the Minister to attach more weight to the interests of the community than to the private interests of the applicant. The Regional Court took into account that the applicant had been convicted of a number of criminal offences; that he had not held a residence permit when he started a relationship in 1998 or when he married in 2002; that he had committed offences during the time he had been cohabiting; that the applicant's wife was thus aware of the fact that she was living with, and subsequently married, a repeat offender; and that it could not be said that the applicant had committed minor offences only. In the opinion of the court, the State was also not under a positive obligation to admit the applicant. In this context it *inter alia* considered that it had not appeared that there were any objective obstacles to family life being continued in Iran, the mere claim that settlement in the latter country was not a realistic option for the applicant's wife not having been substantiated.

On 23 November 2006 the applicant lodged a further appeal (*hoger beroep*) against both judgments of the Regional Court to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*). In his appeal in the procedure against the Minister for Immigration and Integration, the applicant argued *inter alia* that the Minister was obliged to examine the application for a residence permit also in the light of Article 8 instead of restricting that examination to the proceedings relating to the request for a provisional residence visa.

In the accompanying appeal in the procedure to deny him a provisional residence visa, the applicant argued that insufficient account had been taken of his wife's psychological problems, that the Regional Court had failed to acknowledge that the original decision by the Minister of Foreign Affairs did not contain a proper balancing of the interests involved and that no weight had been given to the fact that the applicant and his wife were married. The applicant further submitted that no proper examination had been conducted of the question whether Article 8 entailed the existence of a positive obligation for the Dutch authorities in the present case. Furthermore the Regional Court had failed to conclude that the original decision did not contain a proper motivation as to why the applicant's (suspended) sentences could lead to the conclusion that public order grounds carried more weight than the personal interests of the applicant and his ill wife, especially considering that the applicant had not re-offended since 16 February 2000.

On 7 March 2007 the Council dismissed both appeals on summary grounds for not raising any points of law.

It appears from the case file that the applicant's wife has visited her husband in Iran a number of times.

B. Relevant domestic law and practice

The admission, residence and expulsion of aliens are regulated by the Aliens Act 2000 (*Vreemdelingenwet 2000*). Further rules are set out *inter alia* in the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*).

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. 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 owing 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.

Pursuant to article 3.20 of the Aliens Decree 2000, a residence permit for the purposes of family reunion or family formation can be refused if the alien constitutes a threat to public order or national security. In this respect, article 3.77 paragraph 1 sub c of the Aliens Decree 2000 reads in its relevant part that a threat to public order exists when:

> "c. the alien has been convicted of a criminal offence and sentenced to either a non-suspended prison sentence or custodial measure, a community service order or non-suspended financial penalty, or if, in relation to a criminal offence, the alien has accepted an out-of-court settlement or if a punishment order has been issued against him by a public prosecutor."

Under the relevant provisions of the Criminal Code (*Wetboek van Strafrecht*), shoplifting attracts a prison sentence of up to four years (article 310), attempted aggravated assault, a prison sentence of up to 5 years and 4 months (article 311), destruction, a prison sentence of up to 2 years (article 350) and defamation, a prison sentence of up to 3 months (article 266).

COMPLAINT

The applicant complained under Article 8 of the Convention that the refusal to allow him to stay with his wife in the Netherlands violated his right to respect for his family life. He argued that the limited seriousness of the offences committed by him, the duration of his stay in the Netherlands as well as the relationship with his wife, the absence of any ties of his wife with Iran and the fact that his wife's psychiatric disorder stood in the way of her settling in Iran should outweigh the interests of the Dutch authorities in protecting public order.

THE LAW

The applicant argued 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, insofar 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 Court observes that the present case concerns the refusal of the domestic authorities to allow the applicant to reside in the Netherlands. Although he lived in that country between 1994 and 2005, he did not do so on the basis of a residence permit issued to him by the Dutch authorities. Even though it appears that during some of this time his presence in the country was tolerated while he awaited decisions on his applications for asylum, this cannot be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country (see *Useinov v. the Netherlands* (dec.), no. 61292/00, 11 April 2006). The instant case is therefore to be distinguished from cases concerning settled migrants, i.e. persons who have already been granted a right of residence in a host country. A subsequent withdrawal of that right – for example because the person concerned has been convicted of a criminal offence –, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8 (see *Üner v. the Netherlands* [GC], no. 46410/99, § 59, 18 October 2006). In such cases, the Court will examine whether effective respect for private and/or family life entails that the respondent State refrain from withdrawing the right of residence in question, and the Court will do so by considering whether or not the interference is justified under paragraph 2 of Article 8 (see, amongst many others, *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX; *Üner v. the Netherlands*, cited above; and *Maslov v. Austria* [GC], no. 1638/03, 23 June 2008).

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, enabling him to maintain and develop family life in their territory; the case thus concerns not only family life but immigration as well. 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, the Court has held that Article 8 cannot be considered as imposing a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 94, § 68). 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. 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 (see *Rodrigues da Silva and Hoogkamer v. the Netherland*s, no. 50435/99, § 39, ECHR 2006-I).

Turning once more to the circumstances of the present case, the Court notes, as regards the extent of the applicant's ties in the Netherlands, that he came from his native Iran to the Netherlands in 1994 at the age of 25. Even though he lived in the Netherlands for quite some time, it is presumed therefore that the applicant still has considerable links with Iran where he grew up and where he underwent his schooling. This presumption is supported by the fact that the applicant has once more been living in Iran for some time. The Court further observes that, when his presence in the Netherlands was tolerated while he was awaiting decisions on his applications for asylum, the applicant took part in Dutch society, formed a relationship and created a family there. However, as set out above, confronting the Dutch authorities with that family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in their country. 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 *Useinov*, cited above, and *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003).

It is, moreover, to be noted that the relationship relied on by the applicant was created at a time and developed during a period when the persons involved were aware that his immigration status was uncertain and that the persistence of that family life within the Netherlands was thus precarious. This situation however did not prevent the applicant from committing a number of criminal offences even though he must have been aware of the adverse effects these events would have on his applications for a residence permit as well as the opportunity to continue living with his wife.

As to the extent to which family life will effectively be ruptured as a result of the decision not to allow the applicant to reside in the Netherlands, the Court considers that it has not been convincingly argued that there are any insurmountable obstacles for the applicant's wife to settle in Iran, even though this might entail a certain social hardship for her, or that treatment of her psychiatric disorder would not be available there.

Taking the foregoing considerations into account, the Court considers that they are sufficient to enable it to conclude that it cannot be said that the Dutch authorities failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and preventing disorder or crime 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.

Stanley Naismith	Josep Casadevall
Deputy Registrar	President