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. 11005/03
by Florencia AFONSO and Maria Janete ANTONIO
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 8 July 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 26 March 2003,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mrs Florencia Afonso and her daughter Maria Janete Antonio, are Angolan nationals, who were born in 1967 and 1989 respectively and live in St. Oedenrode. They are represented before the Court by Mr J.J. Eizenga, a lawyer practising in 's-Hertogenbosch.

A. The circumstances of the case

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

On 7 May 1985, the first applicant married Mr Castelo Antonio in a traditional ceremony in Angola. They had three children, Engrazia Maya Antonio (born in 1984), Manuel Jacinto Antonio (born in 1986) and the second applicant.

In 1993, Mr Castelo Antonio fled from Angola to the Netherlands, where he applied for asylum. He was eventually granted a residence permit on grounds of a policy of tolerance (*gedoogdenbeleid*), i.e. where expulsion would entail undue hardship given the general situation in the country of origin. The first applicant and the three children continued to live in Luanda (Angola).

On 15 February 1999, the two applicants travelled from Angola to Portugal for which country they had obtained an entry visa. On 27 February 1999, they travelled from Portugal to the Netherlands, where on 5 March 1999 they applied for asylum. The two other children, Engrazia and Manuel, remained in Luanda in the care of a friend. When interviewed on 5 March 1999 by a Netherlands immigration official on the reasons for her asylum request, the first applicant stated that she had applied for asylum in the Netherlands because her husband was living there, of which fact she had become aware in 1998.

On 9 March 1999, the Netherlands Government requested that Portugal accept responsibility for the applicants' asylum request pursuant to the Dublin Convention. On 5 April 1999, the Portuguese authorities accepted that responsibility. The Netherlands Deputy Minister of Justice (*Staatssecretaris van Justitie*) subsequently declared inadmissible the applicants' asylum request. The applicants' appeal was rejected in a final decision taken by the Hague Regional Court (*arrondissementsrechtbank*) on 22 October 1999.

In the meantime, on 19 April 1999, the first applicant applied for a residence permit to stay with her husband. She also made this application on behalf of the second applicant. Holding that the first applicant had not established the existence of a legally valid marriage with Mr Castelo Antonio by way of authenticated official documents, and that Mr Castelo Antonio did not comply with the minimum income requirement under the

applicable immigration rules (i.e. the equivalent of 956.97 euros per month), the Deputy Minister of Justice rejected this request on 22 September 1999 and issued an order for the applicants' expulsion.

On 23 September 1999, the first applicant filed an objection (*bezwaar*) against this decision with the Deputy Minister and, on the same day, requested the President of the Hague Regional Court to issue an interim measure to the effect that she would not be expelled pending the proceedings on her objection.

On 14 December 1999, Mr Castelo Antonio was granted Netherlands nationality.

On 11 January 2001, considering that the Deputy Minister had considerably exceeded the statutory time-limit for determining the applicant's objection, and thus apparently attached no great importance to an expulsion at short notice, the President of the Hague Regional Court granted the interim measure requested by the first applicant.

On 1 June 2001, the Deputy Minister of Justice withdrew the policy decision in force since 20 August 1998 to stay expulsions to Angola given the general situation there. The decision to withdraw this moratorium was based on the official reports (*ambtsberichten*) of 26 June 2000 and 4 May 2001 of the Netherlands Ministry of Foreign Affairs, according to which the general situation in Angola had improved.

According to a further official report of 27 August 2002 of the Netherlands Ministry of Foreign Affairs, the security situation in Angola had considerably improved since 4 April 2002 when the warring Angolan Government forces and the UNITA rebel forces signed an official ceasefire agreement in the form of a Memorandum of Understanding in order to pave the way for further negotiations on a political level. The report stated that both the Government and UNITA forces respected the ceasefire agreement. However, some incidents of armed plundering, mostly caused by hungry former UNITA fighters, had still occurred, which incidents could not always be effectively countered by the Angolan police forces. Certain former unsafe areas could therefore not yet be classified as secure. Areas now classified as safe were the capital Luanda, the coastal areas of the provinces Namibe, Benguela, Kwanza Sul and Cabinda, and all the provincial capitals.

On 23 October 2001, the applicant was heard on her objection before an official committee (*ambtelijke commissie*). On 30 November 2001, the Deputy Minister of Justice rejected the applicant's objection and ordered her expulsion from the Netherlands. On 11 December 2001, the first applicant filed an appeal (*beroep*) against this decision with the Hague Regional Court and, on the same day, requested the President of the Hague Regional Court to issue an interim measure allowing her to remain in the Netherlands pending the proceedings on her appeal.

In its decision of 14 March 2003, following a hearing held on 31 January 2003, the Hague Regional Court sitting in 's-Hertogenbosch rejected the first applicant's appeal (*beroep*) against the decision of 30 November 2001.

It noted at the outset that the first applicant had failed to substantiate her marriage with Mr Castelo Antonio with authenticated documents. It further noted that, pursuant to the applicable statutory immigration rules and the pertaining immigration policy guidelines, it was a material condition for the admission of foreign spouses that the existence of a marriage be shown by official and authenticated documents.

As the first applicant had failed to submit such documents and had failed to undertake any attempts to contact her parents, other relatives or the (local) authorities in Angola in order to obtain official and authenticated documents proving her marriage with Mr Castelo Antonio, the Regional Court concluded that the Deputy Minister had correctly rejected the first applicant's request for a residence permit on the grounds of her purported marriage. This finding was not altered by the recording of her marital status, on the basis of an affidavit given by the first applicant, in the municipal personal records database (*gemeentelijke basisadministratie*) of the town where she lived in the Netherlands, as the statutory provisions on such municipal databases could not be regarded as a specific regulation aimed at implementing statutory immigration rules.

Insofar as the first applicant complained that the refusal to grant her a residence permit was contrary to her rights under Article 8 of the Convention, the Regional Court held:

> "It is not disputed that *in casu* there is family life within the meaning of Article 8 of the Convention between [the first applicant], her (purported) spouse Castelo Antonio and their daughter, Maria Janete Antonio.
>
> The [Deputy Minister] has correctly considered that there has been no interference as to the right to respect for family life as meant by Article 8 of the Convention as the refusal to allow residence [in the Netherlands] did not entail depriving [the first applicant] of a residence title enabling her to enjoy family life.
>
> The question thus arises whether there are facts and circumstances of such a nature that the right to respect for family life would give rise to a positive obligation for the [Deputy Minister] nevertheless to grant [the first applicant] residence [in the Netherlands]. In order to answer that question, the interests of the [Deputy Minister] must be balanced against the interests of [the first applicant]. It is of primary importance to attain a "fair balance" between those interests, in which the [Deputy Minister] enjoys a certain margin of appreciation. An important aspect of this balancing of interests is the question whether it is possible to exercise family life in the country of origin.
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> The Regional Court is of the opinion that the [Deputy Minister] could find in all reasonableness that the [first applicant's] interests did not outweigh the general interest. In this finding it is important that neither for [the first applicant] nor for the

other members of her family are there any objective obstacles to the exercise of family life outside the Netherlands or in Angola, the [first applicant's] country of origin. In this connection it is equally relevant that the (purported) spouse of [the first applicant], who has not been admitted to the Netherlands as a refugee, also originates from that country. Noting the official reports (*ambtsberichten*) of the Minister of Foreign Affairs of 26 June 2000 and 4 May 2001, the situation in Angola also does not form an obstacle.

As to the [first applicant's] argument, based on the judgment of the European Court of Human Rights of 2 August 2001 ... (Boultif v. Switzerland) ..., that in her case it should also be examined whether in all reasonableness it can be expected from her husband, in view of his Netherlands nationality, that he returns to Angola or goes [with her] to Portugal, the Regional Court considers that it can in all reasonableness be expected of the (purported) spouse that he returns to Angola or goes [with the first applicant] to Portugal to exercise family life there in view of the fact that he (originally) comes from Angola and that no objective obstacle has become apparent. Also the health problems advanced by [the first applicant] do not necessarily constitute an obstacle to the exercise of family life outside the Netherlands or in the country of origin as the family's separation was [partly] the cause of the [first applicant's] health problems. Furthermore, two children of the family still reside in Angola. Also on that ground, the Regional Court fails to see why family life could not be exercised there.

In view of the above considerations, the Regional Court is of the opinion that the [Deputy Minister} could in all reasonableness conclude that there was no positive obligation to grant [the first applicant] residence in the Netherlands on the grounds of Article 8 of the Convention."

On 14 March 2003, the provisional measures judge (*voorzieningenrechter*) of the Hague Regional Court sitting in 's-Hertogenbosch rejected the first applicant's request for an interim measure as her appeal against the decision of 30 November 2001 had been rejected by the Hague Regional Court.

COMPLAINTS

The applicants complained that the Netherlands authorities' refusal to grant them a residence permit was contrary to their rights under Article 8 of the Convention. They further complained that – given the past experiences of the family members in Angola, the current situation there as well as the psychological problems which are likely to occur, in particular as regards the first applicant, as a result of the family's separation if the applicants are forcibly returned to Angola – the refusal to grant them a residence permit also violated their rights under Article 3 of the Convention.

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 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 authorities were under a duty to allow the applicants to settle with Mr Castelo Antonio in the Netherlands, thus enabling them 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' rights under Article 8 of the Convention and its own interest in controlling immigration on the other.

The Court notes in the first place that the existence of a legally valid marriage between the first applicant and Mr Castelo has not been shown, as required by the domestic immigration rules in respect of requests for a residence permit on grounds of marriage, and there is no indication that the applicants have taken any initiatives to obtain the required official authenticated documents.

The Court further notes that the applicants, as well as Mr Castelo Antonio, have substantial links with Angola, where they were born and have lived for the most part of their lives. Although 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 as such to choose the most suitable place to develop family life. The Court observes that, according to the Netherlands official report of 27 August 2002, the Angolan capital of Luanda, where the applicants lived until their departure from Angola and where two other members of their family still reside, has been classified as safe, whereas it does not appear, and it has not been argued, that the applicants' relatives still residing there have encountered any problems as regards their personal safety.

In these circumstances, the Court does not find it established that the applicants would be unable to exercise their family life with Mr Castelo Antonio in Angola and considers that it cannot be said that the respondent Government failed to strike a fair balance between the applicants' interests on the one hand and their own interest in controlling immigration on the other.

It follows that the facts of the present case do not disclose any appearance of a violation of Article 8 of the Convention, and that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

The applicants further complained that their expulsion to Angola would be contrary to their rights under Article 3 of the Convention. This provision reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court observes at the outset that there is no indication in the case file that the applicants have raised a complaint under Article 3 of the Convention, either in form or substance, in the proceedings on their request for a residence permit on grounds of family reunification. However, even assuming that domestic remedies could be said to have been exhausted as required by Article 35 § 1 of the Convention, the Court finds no substantiation in the case file that the applicants face a real risk of being subjected to the kind of severe ill-treatment proscribed by Article 3 of the Convention if returned to Angola.

It follows that this part of the application must also be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President