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. 8876/04
by Marjam Popal HAYDARIE and Others
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 20 October 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Ms R. JAEGER,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 9 March 2004,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

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 applicants are a mother and her four children. They are all Afghan nationals. The first applicant, Mrs Marjam Popal Haydarie, was born in 1954 and is currently residing in the Netherlands together with her son Haydar, who was born in 1984. The other three children, Fatma, Yusuf and Ali, were born in, respectively, 1984, 1988 and 1989 and are currently

residing in Pakistan with a sister of their maternal grandmother. They are represented before the Court by Mrs E.L. Garnett, a lawyer practising in ‘s-Hertogenbosch. The Netherlands Government are represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

In October 1996, the applicants’ home in Kabul was searched and ransacked by the Taliban. A hand grenade thrown in their kitchen killed the first applicant’s mother and seriously injured her sister.

The first applicants’ husband and the other applicants’ father disappeared in January 1998, likely after having been arrested by the Taliban. One week after his disappearance, the applicants fled from Kabul to Jalalabad where they stayed in the home of the first applicant’s father. However, also in Jalalabad, the Taliban regularly visited and questioned them about the whereabouts of their husband/father. At an unspecified date, when trying to take the first applicant’s injured sister to hospital, the second applicant, Haydar, was stopped by the Taliban who beat him and broke his hand.

On 4 October 1998, in order to escape from the continuous Taliban harassment and as the first applicant’s sister could not obtain adequate medical treatment in Afghanistan, the first applicant together with her sister and Haydar fled to Pakistan. Fatma, Yusuf and Ali remained in Afghanistan in the care of their maternal grandfather. They were to join the first and second applicants in Pakistan as soon as possible. On 9 October 1998, with the assistance of a “travel agent” who had been paid by her father, the first applicant, her sister and Haydar travelled by air from Karachi to the Netherlands, where they applied for asylum.

On 15 June 1999, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the asylum request filed by the first applicant and her son Haydar, but did grant them a conditional residence permit (*voorwaardelijke vergunning tot verblijf*) valid until 10 October 1999 as – in light of the general situation in Afghanistan at that time – their expulsion to Afghanistan would entail undue hardship.

On 15 July 1999, the first applicant filed an objection (*bezwaar*) against this decision with the Deputy Minister.

On 13 September 1999, the validity of the first and second applicants’ conditional residence permit was prolonged by one year, i.e. until 10 October 2000.

On 23 March 2000, the Deputy Minister rejected the first applicant’s objection of 15 July 1999. The first applicant filed an appeal against this decision with the Regional Court of The Hague on 18 April 2000.

On 11 September 2000, the validity of the first and second applicants' conditional residence permit was again prolonged by one year, i.e. until 10 October 2001. As from 10 October 2000, the first applicant became entitled to work in the Netherlands. She further started attending Netherlands language and sewing courses. She successfully passed a first exam in both courses on 9 February 2001.

On 1 April 2001, pursuant to the terms and the transitory arrangements under the 2000 Aliens Act (*vreemdelingenwet*) which entered into force on that date and replaced the 1965 Aliens Act, the first and second applicants' conditional residence permit was automatically transformed into a residence permit for the purposes of asylum for a fixed period (*verblijfsvergunning asiel bepaalde tijd*).

In April 2001, the first applicant learned from a friend, who had gone to Pakistan for a family visit, that her three children – who had stayed behind in Afghanistan in the care of their maternal grandfather and with whom the first applicant had not had any contacts since she had left Afghanistan in 1998 – were living in Pakistan with a maternal aunt of the first applicant.

On 21 May 2001, the first applicant filed a request with the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) for a provisional residence visa (*machtiging tot voorlopig verblijf*) for the purposes of family reunion for her three children living in Pakistan. The first applicant was not able to produce these children's birth certificates but submitted four photographs of them, and declared to be willing to undergo DNA testing. She further declared that she had never been gainfully employed and was livinglived on benefits under the General Welfare Act (*Algemene Bijstandswet*).

By letter of 28 May 2001, she advised her three children in Pakistan to apply as soon as possible to the Netherlands consular authorities in Pakistan for the purposes of obtaining a provisional residence visa.

On an unspecified date and in accordance with the policy rule that after three years a temporary residence permit for the purposes of asylum is replaced by a residence permit for the purposes of asylum for an indefinite period (*verblijfsvergunning asiel voor onbepaalde tijd*), the temporary residence titles granted in the instant case were changed into permanent residence permits for the purposes of asylum.

On 12 July 2001, the first applicant passed a second exam in the Netherlands language and sewing courses attended by her.

On 21 November 2001, the first applicant withdrew the appeal that she had filed on 18 April 2000.

On 31 January 2002, the Minister of Foreign Affairs rejected the request of 21 May 2001, considering at the outset that the transformation of the first applicant's residence title from a conditional residence permit under the 1965 Aliens Act to a temporary residence permit for the purposes of asylum under the 2000 Aliens Act did not entail entitlement to a residence permit

under Article 29 § 1 (e) or (f) for family members having joined the person who has been granted asylum in the Netherlands within three months after the latter's arrival in the Netherlands. This rule applied only where it concerned a first issuance of a residence permit for the purposes of asylum, which was not the first applicant's case. Consequently, her request fell to be examined under the regular immigration rules on family reunion set out in Chapter B2/6 of the 2000 Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*).

The Minister further found that the first applicant's family tie with the three children had not been demonstrated by means of official documents as no birth certificates of the three children had been submitted. Although this requirement could be replaced by DNA testing, this possibility was only offered if all other conditions for family reunion were met. This did not apply to the instant case, as in addition the first applicant did not comply with the minimum income requirements under the applicable immigration rules. On this point, the Minister noted that her sole income consisted of general welfare benefits whereas, pursuant to Article 3.73 § 1 (c) of the 2000 Aliens Decree (*Vreemdelingenbesluit*) and the provisions of Chapter B1/2.2.3.1 of the 2000 Aliens Act Implementation Guidelines, benefits under the General Welfare Act are not accepted as constituting (a part of the) means of subsistence within the meaning of the immigration rules. The Minister further found no special circumstances on the grounds of which it should be held that the aim served by the income requirement under the immigration rules entailed disproportionate consequences for the first applicant.

As regards Article 8 of the Convention, the Minister acknowledged the possibility of the existence of an objective obstacle to family life being exercised in the country of origin. Although this possible obstacle weighed heavily in the balancing-of-interests exercise to be carried out under this provision, it was not necessarily decisive. The first applicant's personal interests were to be weighed against the general interest served by the restrictive immigration policy pursued by the Netherlands and in which context it was justified to require persons seeking family reunion to have, independently and lastingly, sufficient means of subsistence. The Minister considered – in order to avoid that the exercise of family life would become permanently impossible – that in balancing these interests it had to be assessed whether it was possible that the first applicant's personal situation would change within a reasonable time. The Minister was only prepared to accept the existence of a positive obligation under Article 8 when, despite serious efforts made by the first applicant, there were no real prospects for her to obtain, lastingly, sufficient and independent means of subsistence and, given the circumstances in which she was finding herself, it would be unreasonable to maintain the income requirement. Finding that it was not excluded that the first applicant would be able to comply with the income

requirement within a reasonable time, the Minister concluded that, for the time being, it could not be said that a hopeless situation had arisen in which it was impossible for the first applicant ever to comply with the requirements for family reunion. Consequently, the Minister concluded that the Netherlands authorities were not under a positive obligation to allow the three children in Pakistan to join the first applicant in the Netherlands.

On 27 February 2002, the three children filed an objection against this decision with the Minister of Foreign Affairs.

On 23 September 2002, after a hearing held on 13 August 2002 before an official committee (*ambtelijke commissie*), the Minister of Foreign Affairs rejected the objection in two separate decisions. The Minister noted that the family tie between the first applicant and the children had still not been demonstrated by means of official documents and that, as the first applicant did not comply with the income requirement, she and the children did not qualify for the possibility of DNA testing in lieu. Furthermore, as Fatma had come of age in the meantime, the first applicant's request was also to be examined under the policy rules on extended family reunion (*verruimde gezinshereniging*). The Minister noted that, according to the contents of a letter submitted, the three children had left Afghanistan after the death of their maternal grandfather and, since 15 January 2001, were staying in Pakistan with a maternal aunt of the first applicant. As her younger brothers were also not granted entry to the Netherlands, the Minister held that the refusal to grant Fatma entry to the Netherlands could not be regarded as entailing disproportionate hardship.

As regards Article 8 of the Convention, the Minister found no particular facts or circumstances on the basis of which the Netherlands were under a positive obligation to admit the three children. The Minister considered that, in view of the first applicant's personal situation in her country of origin, there was in any event a suspicion of an objective obstacle to family life being exercised in that country. Although this possible obstacle weighed heavily in the balancing exercise to be carried out, it was not necessarily decisive. The responsibility of the first applicant to ensure that she would comply with the requirements for family reunion also played an important role. In this context it was expected of the first applicant that, for a reasonable period of time, she would make serious efforts to find employment so that she would lastingly possess sufficient and independent means of subsistence. This reasonable period, of generally three years, had begun to run when the first applicant had become entitled to work in the Netherlands, i.e. on 10 October 2000. The Minister found no special circumstances on the basis of which this three-year period should be shortened in her case. The Minister further stated that the serious efforts asked from the first applicant required an active attitude on her part, implying actively looking for and accepting work even where a job would not correspond to her education or professional experience, registering at an

employment office (*arbeidsbureau*) and interim employment agencies indicating to be willing to accept any kind of work, reacting to vacancy announcements, intensive writing of (un)solicited job applications, and undertaking labour-market oriented studies. In so far as the first applicant had argued that she had to care for her wheel-chair bound sister who refused aid from strangers and that she did not wish to leave her sister alone in the house fearing that she might cause a fire, the Minister held that it was the first applicant's own choice to care for her sister and that she could appeal to aid providing bodies. Finding it not excluded that the first applicant would be able to comply with the income requirement within a reasonable time, the Minister held that it could not be said that a hopeless situation had arisen entailing a permanent impossibility for family reunion in the Netherlands and that, therefore, at present no positive obligation arose under Article 8 to allow the three children entry to the Netherlands. It could be expected from the first applicant that she would make serious efforts aimed at complying with the income requirement and, in all reasonableness, there was no reason in the present case to anticipate this by giving more weight to the personal interests of those concerned than to the general interest at issue.

On 16 October 2002, the three children filed an appeal with the Regional Court of The Hague.

On 23 March 2001, the applicant registered at the Maastricht office of the Centre for Work and Income (*Centrum voor Werk en Inkomen*).

In its judgment of 19 June 2003, following a hearing held on 8 May 2003, the Regional Court rejected the appeal of 16 October 2002. In so far as the appellants relied on Article 8 of the Convention, the Regional Court held:

> "Where, such as in this case, there is no interference [with the rights under Article 8 as the refusal at issue does not concern a withdrawal of a residence permit] the question arises whether there are facts and circumstances of such a nature that the right to respect for family life nevertheless gives rise to a positive obligation for the Minister to grant the appellants residence [in the Netherlands]. In order to determine that question, the interests [involved] ... must be balanced against each other. To strike a 'fair balance' between those interests is of primary importance, in which [exercise] the Minister enjoys a certain margin of appreciation.
>
> In the court's opinion, the Minister could in all reasonableness conclude that the appellants' interests did not outweigh the general interest of the Netherlands State. In this finding, the court takes into account that, given that at the present time there is no hopeless situation for the [first applicant] to comply eventually with the income requirement, there is no situation entailing a permanent impossibility of family reunion. The Minister has therefore considered on good grounds that there is no positive obligation to admit [the three children] under Article 8 of the Convention.
>
> In this, the court further takes into consideration that, in the present case, the Minister has held that, due to the [first applicant's] personal situation in her country of origin, there is a *suspicion* of an objective obstacle to the exercise of family life in the country of origin, but that this was not decisive in the context of the balancing of interests. In this connection the court further notes that [the appellants'] submission

made in the present proceedings that [the first applicant and Haydar] are recognised refugees and that the Minister – other than suspecting – has acknowledged the existence of an objective obstacle to the exercise of family life in Afghanistan finds no support in the documents.

Noting this and the improving human rights situation in Afghanistan after the removal of the Taliban regime and the prior, apparently ill-founded request [of the first applicant] for admission as refugee [under the Geneva Convention relating to the Status of Refugees], it cannot be excluded in the court's opinion that the [first applicant] can also exercise her family life in Afghanistan. This applies even more since the [first applicant] has submitted that she has been separated for a long time from her children and that she has difficulties integrating into the Netherlands society whereas she and [the children] are rooted in the Afghan culture.

In the court's opinion, the [Minister] did further in all reasonableness not have to see grounds to deviate from the guideline that within a reasonable period of three years everything should be undertaken to comply with the income requirement as meant in [Chapter] B2/13.2.3.1 of the 2000 Aliens Act Implementation Guidelines. The point of departure for the [Minister's] policy is that the main person with whom stay is sought bears his or her own responsibilities, also as regards his or her living expenses and those of the family members by whom he or she wishes to be joined. That is why it is expected from the main person that he or she has done everything during a lengthy period to find work and thus lastingly to dispose of sufficient and independent means of subsistence. In this an active attitude is expected from him or her.

The above-cited Chapter of the 2000 Aliens Act Implementation Guidelines also provides that in a special case the position in which the family members outside of the Netherlands find themselves, also if that position is not so harrowing (*schrijnend*) that already for that reason alone residency should be granted, may form a ground for applying a shorter period than three years. Also special circumstances in respect of the admitted main person can in principle lead to applying a shorter period.

The court is of the opinion that the [Minister] has correctly found no special circumstances as regards the [first applicant] which should lead to applying a shorter period. The court agrees with the [Minister] that it has not or at least insufficiently appeared that the [first applicant] has done the utmost to find work as meant in the 2000 Aliens Act Implementation Guidelines. She has not substantiated by means of concrete documents – such as for instance several negative written replies to job applications – that she has intensively applied for several existing job openings or has sought assistance in every feasible manner [in finding gainful employment].

On the other hand it has appeared that the [first applicant] has taken on the care for her disabled sister, which choice apparently entailed that she distanced herself from the labour market and thereby indirectly from her [three] children on account of failing to comply with the income requirement. In this connection the [Minister] has, in the court's opinion, justly considered that there is no hopeless situation in which the conditions for admission can never be met. In this [finding] the court takes into account that according to the case file documents the [first applicant] was allowed already since 10 October 2000 to look for work on the labour market and that the [Minister] could hold in all reasonableness that the [first applicant] could appeal to aid providing agencies for the care of her sister.

Consequently, the appellants' reliance on Article 8 of the Convention fails."

The three children's subsequent appeal to the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van*

State) was rejected on 21 October 2003. It upheld the impugned ruling of 19 June 2003. It held, *inter alia*, that the Regional Court had correctly concluded that it had not been established that the first applicant had made any effort to meet the income requirement. Further noting that the first applicant was not permanently and completely unfit for work and having found no indication that she would be permanently unable to meet the income requirement, it concluded that the Regional Court had correctly rejected the applicants' arguments under Article 8 of the Convention.

On an unspecified date, the first applicant and Haydar were granted Netherlands nationality and, on 28 December 2004, a Netherlands passport was issued to both of them.

On an unspecified date in 2005, the first applicant travelled to Pakistan in order to visit her youngest son Ali who had been admitted to hospital as he was suffering from serious diarrhoea. Two days after having arrived in Pakistan, the first applicant suffered a stroke, causing partial paralysis. She returned to the Netherlands, where she is currently staying in hospital. It is still uncertain whether the stroke she suffered will have any lasting effects. Her son Ali was discharged from hospital in Pakistan after three weeks.

B. Relevant domestic law and practice

The Netherlands Government pursue a restrictive admissions policy due to the population and employment situation in the Netherlands. Aliens are eligible for admission only on the basis of obligations under international law, if their presence serves an essential national interest, or for compelling humanitarian reasons, with most policy rules for admission being more detailed formulations of this last criterion. Until 1 April 2001, the admission, residence and expulsion of aliens were regulated by the 1965 Aliens Act (*Vreemdelingenwet*). Further rules were laid down in the Aliens Decree (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the 1994 Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*). On 1 April 2001, the 1965 Aliens Act was replaced by the 2000 Aliens Act ("the Act"). On the same date, the Aliens Decree, the Regulation on Aliens and the Aliens Act Implementation Guidelines were replaced by new versions based on the 2000 Aliens Act ("the Decree" and "the Implementation Guidelines").

Under the system in force until 1 April 2001, a person having been granted asylum in the Netherlands on grounds of being a "refugee" within the meaning of Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 was in principle entitled to family reunion if his or her family members had joined him or her within a period of six months after his or her admission to the Netherlands. For this specific category, no income requirement applied. However, a limited income requirement had to be met if it concerned family reunion with family members having joined

him or her in the Netherlands more than six months after his or her admission to the Netherlands. For persons having been granted a residence permit on any other ground, a higher income requirement applied when family reunion was sought. Persons having been granted a conditional residence permit were not entitled to family reunion under domestic law, as their residence title was only of a provisional nature.

Under the system in force after 1 April 2001, the income requirement for all categories of persons having been granted an "asylum-related" (i.e. on the basis of personal facts and circumstances, or the general situation in the country of origin) residence permit who seek family reunion in the Netherlands is identical. For a person holding an "asylum-related" residence permit, no income requirement applies if his or her family members have joined him or her within three months after his or her admission to the Netherlands. After this date, an income requirement must be met where family reunion is sought. Under the new system, also persons having been granted a temporary residence permit for the purposes of asylum are entitled to family reunion.

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. Such a visa is normally a prerequisite for the grant of a residence permit which confers more permanent residence rights. An application for a provisional residence visa is assessed on the basis of the same criteria as a residence permit.

Pursuant to Article 14 of the Act, a temporary residence permit (*verblijfsvergunning voor bepaalde tijd*) for the purpose of family reunion may be issued by the Minister for Immigration and Integration if a number of eligibility requirements – set out in Articles 3.13 to 3.22 of the Decree – have been satisfied. These requirements include, *inter alia*, the possession of a valid provisional residence visa, actual cohabitation in the country of origin ("*feitelijk behoren tot het gezin in het land van herkomst*"), possession of a valid international travel document, and the person in the Netherlands with whom family reunion is sought having sufficient means of subsistence as defined in Article 3.74 (a) of the Act, i.e. having a net income from work of at least the amount equal to benefits under the General Welfare Act for the corresponding category (such as for instance a single parent).

The Centre for Work and Income (*Centrum voor Werk en Inkomen*) is an independent administrative body that works on assignment from the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid*). It is centrally managed and has about 130 offices throughout the Netherlands. It invites employers to offer vacancies and helps and activates job seekers to find work in every possible way. It can further help job seekers to apply for unemployment or supplementary

benefits. If attempts to find work are unsuccessful, the municipal social services together with the Centre for Work and Income will do everything possible to provide the person concerned with work or training. If necessary, a route plan will be drawn up. This contains all concrete arrangements that have been made for job application courses, for example, acquiring work experience and participation in a social assimilation.

COMPLAINT

The applicants complained that the Netherlands authorities disrespected their rights under Article 8 of the Convention by refusing to grant a provisional residence visa to Fatma, Yusuf and Ali. They argued that they have sufficiently demonstrated the existence of family life between them and that the Netherlands authorities failed to strike a fair balance in their case.

THE LAW

The applicants complained that the Netherlands authorities violated their right to respect for family life guaranteed by Article 8 of the Convention by refusing to grant a provisional residence visa to Fatma, Yusuf and Ali. Article 8, in so far as relevant, reads:

> "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 in the first place that, to the extent that the application has been brought by Fatma, Yusuf and Ali, it was incompatible *ratione personae* with the provisions of the Convention, because these applicants, who are staying in Pakistan, do not fall within the jurisdiction of the State within the meaning of Article 1 of the Convention, which provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

The Government referred to the case-law of the Court (*Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001 XII), according to which it was only in exceptional cases that acts of Contracting States performed, or producing

effects, outside their territories could constitute an exercise of jurisdiction by those States. However, the act complained of in the present case – i.e. the refusal to grant a provisional residence visa to Fatma, Yusuf and Ali – came nowhere near the kind of situation in which the Court has been prepared to accept extraterritorial jurisdiction under the Convention. The State of the Netherlands had merely exercised its day-to-day responsibility of the regulation and control of the entry into its territory of aliens. To infer from such acts a direct responsibility of the State for the protection of the rights enshrined in the Convention to all those residing abroad and wishing to enter the Netherlands, would, according to the Government, extend the notion of jurisdiction to an unacceptable level.

The Government further submitted that they could not be regarded as being under a positive obligation under Article 8 to allow Fatma, Yusuf and Ali to stay in the Netherlands. Although acknowledging that it was unlikely that the first applicant – having been granted a permanent residence permit for the purposes of asylum – would return to Afghanistan, the Government considered that this did not necessarily lead to the conclusion that she and her children should be permitted to develop family life in the Netherlands. In order to determine this question, the applicants' interests in being reunited must be balanced against those of the Government in pursuing a restrictive immigration policy.

On this point, the Government submitted that it had not been demonstrated that the first applicant had made all possible efforts to secure a sufficient regular income from work in order to meet the income requirement under the domestic immigration rules. The Government further contended, referring to the considerations set out in the Regional Court's judgment of 19 June 2003 and the ruling given on 21 October 2003 by the Administrative Jurisdiction Division as regards the first applicant's efforts and ability to meet that income requirement, that there was nothing to suggest that this requirement would form a permanent obstacle for the applicants to be reunited. Lastly pointing out that, in the meantime, Fatma, Yusuf and Ali had reached the age of, respectively, 20, 17 and 15 and were still living with relatives in Pakistan, the Government considered that it could it not be said that an unfair balance had been struck between the competing interests.

The applicants contested the Government's argument that the application, in so far as brought by Fatma, Yusuf and Ali, should be rejected for being incompatible *ratione personae*, emphasising that the Court had accepted the admissibility of several applications brought by persons living outside the Contracting State and/or having no legal residence in that State (*Singh and Others v. the United Kingdom* (dec.), no. 60148/00, 3 September 2002; and *Tuquabo-Tekle v. the Netherlands* (dec.), no. 60665/00, 19 October 2004).

The applicants further submitted that their separation was never a free choice, that – as acknowledged by the Government – there was an objective obstacle for the enjoyment of their family life in Afghanistan, that Fatma, Yusuf and Ali were residing illegally in Pakistan, and that their mother and brother Haydar had been granted Netherlands nationality in the meantime. They further submitted that the first applicant had taken Dutch language courses to improve her chances on the labour market, that for administrative reasons it was not before October 2001 that she had been able to start the required Dutch language and citizenship course and that the Netherlands authorities had given insufficient weight to her moral responsibility and unpaid care labour in respect of her sister. The applicants lastly submitted that the Government had insufficiently explained why so much weight must be given to the fulfilment of the income requirement in their case whereas refugees, who had been recognised as such after the admission of the first two applicants to the Netherlands, did not have to meet this requirement.

The Court considers that, as regards the family life at issue in the present case – the existence of which is not in dispute –, no distinction can be drawn between the two applicants living in the Netherlands and the three others currently residing in Pakistan. In these circumstances, it does not find it necessary to determine the Government's argument that the three applicants in Pakistan cannot be regarded as finding themselves within the jurisdiction of the Netherlands State within the meaning of Article 1 of the Convention jurisdiction.

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, among other authorities, *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 174, § 38; and *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 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 aliens having been granted residence rights 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 (see (see *Gül*, cited above, p. 174, § 38; and *Ahmut*, cited above, p. 2033, § 67).

The instant case hinges on the question whether the Netherlands authorities were under a duty to allow the first applicant's children and the second applicant's siblings to settle with them in the Netherlands, thus enabling all of them to exercise their family life on their territory. For this reason the Court will view the case as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention.

Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to authorise family reunion in its territory. In order to establish the scope of the respondent State's obligations, the facts of the case must be considered. The Court notes in this context, however, that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with his or her children who, for the time being, have been left behind in their country of origin or a third country, and that it may be unreasonable to force the parent to choose between giving up the position which he or she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company which constitutes a fundamental element of family life (see *Mehemi v. France (no. 2)*, no. 53470/99, § 45, ECHR 2003-IV). The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants.

The Court notes that in the present case the crucial question is whether it could be expected from the first applicant to comply with the income requirement under the domestic immigration rules. On this point, the Court notes that, in order to meet this requirement, the applicant should have an independent and lasting income of an amount equal to benefits under the General Welfare Act to which she was entitled. The Court further understands that the Netherlands authorities would not maintain this income requirement if the first applicant could demonstrate to have made, during a period of three years, serious but unsuccessful efforts to find gainful employment, also bearing in mind the possible existence of an objective obstacle for the applicants' return to Afghanistan.

In principle, the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.

As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that the applicant has in fact actively sought gainful employment after 10 October 2000 when she became entitled to work in the Netherlands. Although it is true that her Netherlands language and sewing courses may have been helpful in this respect, there is no indication in the case-file that she has in

fact applied for any jobs. What does appear from the case-file is that she preferred to care for her wheel-chair bound sister at home. In this respect, the Court considers that it has not been demonstrated that it would have been impossible for the first applicant to call in and entrust the care for her sister to an agency providing care for handicapped persons as referred to in the Regional Court's judgment of 19 June 2003.

Having regard to the above considerations, the Court finds that it cannot be said that the Netherlands authorities failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration and public expenditure on the other. There is therefore no appearance of a violation of the applicants' right to respect for his family life within the meaning of Article 8 of the Convention.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President