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. 41226/98
by I.M.
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 25 March 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 with the European Commission of Human Rights on 25 February 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, I.M., has both Netherlands and Cape Verdean nationality. She was born in 1964 and is living in Rotterdam, the Netherlands. She is represented before the Court by Ms Y.M. Schrevelius, a lawyer practising in Rotterdam.

A. The circumstances of the case

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

On 10 November 1986 the applicant moved from the Cape Verde Islands to the Netherlands where she married a Netherlands national, Mr N.A.S. On the basis of that marriage she obtained a residence permit.

The applicant's daughter, S., who had been born into the relationship between the applicant and one Mr A.M.N. in the Cape Verde Islands on 4 March 1985, stayed behind in the care of her maternal grandparents.

On 26 April 1989 a son, E., was born to the applicant and one Mr M.A.

It had been the applicant's intention to send for her daughter in 1989, which seemed to her an appropriate moment as she expected to have found a job and to have completed a professional training course by that time. However, her marriage breaking down in September 1989 thwarted these plans. As she was no longer residing with her husband, she applied for an independent residence permit which was granted in October 1989.

The marriage was officially dissolved in 1990. The applicant acquired Netherlands nationality on 14 October 1991. She experienced difficulties obtaining proper accommodation, but this problem was solved in 1992. In the same year the applicant's father fell seriously ill in the Cape Verde Islands due to which, the applicant submitted, the grandparents were no longer capable of taking care of S.

In October 1992 the applicant addressed a letter to the Netherlands Ministry of Justice, stating that she wished for her daughter to grow up within her family, consisting of herself and her son E., in the Netherlands and that she would be able to take care of her daughter's upbringing. She appended a declaration made by S.'s father in which he consented to his daughter going to the Netherlands to live with the applicant. The case-file does not contain a reply to this letter.

On 20 April 1993 the applicant filed an official request for a provisional residence visa (*machtiging tot voorlopig verblijf)* for her daughter with the Visa Division of the Ministry of Foreign Affairs. This request was rejected on 9 June 1993 on the grounds that a stay of longer than three months was intended and that the application did not meet the relevant conditions laid down in Netherlands regulations. The applicant's objection (*bezwaar*) against this refusal was rejected on 9 November 1993. Her subsequent

appeal to the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) was rejected on 21 June 1996 by the latter as unsubstantiated since the close family ties (*gezinsband*) between the applicant and her daughter were considered to have ceased to exist.

On 2 November 1994 the applicant filed a new request for a provisional residence visa for S. This was rejected on 16 December 1994. The applicant did not apply any legal remedies against this decision

On 12 June 1995 the applicant applied for a third time for a provisional residence visa, which was rejected on 6 November 1995. Again, the applicant did not have recourse to any legal remedies against this decision.

On 4 July 1995 S. entered the Netherlands on a short stay visa (*visum voor kort verblijf*), granted for the purpose of visiting relatives.

On 4 September 1995 the applicant filed a request for a residence permit (*vergunning tot verblijf*) for S. On 11 September 1996 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected this request, by concluding that the applicant relied on the same facts as those submitted in respect of her earlier requests for a provisional residence visa and that the reasons to reject those requests remained pertinent. The decision underlined that the applicant's daughter had entered the country on a short stay visa whereas the aim and the intended duration of her stay were not in compliance with the purposes of such a visa. The Deputy Minister held that this breached a rule of general interest.

Referring to the need for a restrictive immigration policy, the decision further stated that, unless international law obliged the Netherlands to grant admission, aliens could be allowed residence only if this served "essential interests of the Netherlands" (*wezenlijk Nederlands belang*) or in case of compelling reasons of a humanitarian nature (*klemmende redenen van humanitaire aard*). Neither of these conditions was met in the case of S.

On 21 October 1996 the applicant filed an objection (*bezwaar*) through counsel with the Deputy Minister of Justice, underlining that her child could not have a normal existence in the Cape Verde Islands and that there were solid reasons why the applicant had been unable to bring her child to the Netherlands before 1992.

On 21 January 1997 the Deputy Minister rejected the applicant's objection concluding that there were no grounds to justify a reversal of the initial decision since no new facts or other circumstances had been adduced and the grounds for rejection had been correct.

On behalf of S. the applicant lodged an appeal against the decision of the Deputy Minister with the Aliens Chamber of the Hague Regional Court sitting in Haarlem (*arrondissementsrechtbank te 's-Gravenhage nevenzittingsplaats Haarlem, Enkelvoudige Kamer voor Vreemdelingenzaken*). She requested an interim measure (*voorlopige voorziening*) to the effect that her daughter would not be expelled while the

appeal was pending and invoked Article 8 of the Convention in support of her claim.

On 29 August 1997 the Regional Court rejected the appeal as unsubstantiated. It agreed with the opinion of the Administrative Jurisdiction Division of the Council of State of 21 June 1996 as regards the rupture of the close family ties. It concluded that refusing the applicant's daughter residence did not amount to a violation of Article 8 of the Convention in view of the facts and circumstances of the case and having regard to the fact that it concerned a request for a first admission (*eerste toelating*) to the Netherlands, rather than a refusal to prolong an existing right of residence. The Regional Court rejected the request for a provisional measure.

The Regional Court's decision was final and not subject to appeal.

B. Relevant domestic law

As a rule, anyone wishing to apply for a residence permit in the Netherlands must first apply from his or her country of origin to the Netherlands Minister of Foreign Affairs for a provisional residence visa. 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 evaluated on the basis of the same criteria as a residence permit.

In general, the Minister of Justice (*Minister van Justitie*) decides on requests lodged by aliens for residence in the Netherlands (Article 11 of the 1994 Aliens Act (*Vreemdelingenwet 1994*)). The Minister of Justice can refuse entry and residence on general interest grounds (*gronden aan het algemeen belang ontleend*).

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

The policy for admission for family reunion purposes was laid down in Chapter B1 of the 1994 Aliens Circular. It provided that the following persons, where relevant, may qualify for family reunion if certain conditions (relating to matters such as public policy and means of subsistence) are met:

– a person's spouse,

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

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

The phrase "actually belonging to the family unit" (*"feitelijk behoren tot het gezin"*) used in Netherlands law overlaps only partly with the term "family life" in Article 8 of the Convention. The former is understood to mean, for instance, that the close family ties (*gezinsband*) between the child and its parents whom it wishes to join in the Netherlands already existed in another country and have been maintained. For the rest, the question of whether the close family ties should be deemed to have been severed is answered on the basis of the facts and circumstances of each specific case. Factors taken into consideration include the length of time during which parent and child have been separated and the reasons for the separation, the way in which the relationship between parent and child has been developed during the separation, the parent's involvement in the child's care and upbringing, custody arrangements, the amount and frequency of the parent's financial contributions to the child's care and upbringing, the parent's intention to send for the child from the Netherlands as soon as possible and his/her efforts to do so, and the length of time that the child has lived in a family other than with the parent. Living together in the Netherlands without a permanent residence permit is not seen as restoring severed family ties.

If it is established that the conditions set in national policy have not been met, an independent investigation is then carried out to ascertain whether family life exists within the meaning of Article 8 of the Convention and, if so, whether this provision of international law imposes on the State Party an obligation, given the specific circumstances of the case, to permit residence in the Netherlands.

COMPLAINT

The applicant complained under Article 8 of the Convention that residence in the Netherlands, for the purpose of family reunion, was refused to her daughter S. by the Netherlands authorities, due to which they could not enjoy family life together.

THE LAW

The applicant complained of an unjustified interference with her right to respect for family life. She 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 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 that there had been no interference with the applicant's right to respect for family life, since the authorities' refusal to allow S. to reside in the Netherlands did not amount to depriving her of a residence permit that enabled her to enjoy family life with the applicant in the Netherlands. This was not altered by the fact that the applicant and her daughter had in fact been living together in the Netherlands since 1995, given that S. was residing in the Netherlands illegally.

The Government were further of the opinion that no special facts or circumstances existed which placed them under a positive obligation to grant S. a residence permit. In this context they attached relevance, *inter alia*, to the fact that the applicant had not asked for S. to be sent to her until 1993, that is six years after she had first arrived in the Netherlands, having made a conscious decision to settle in the Netherlands and leave her daughter with her grandparents. The refusal to admit S. did not prevent the applicant from continuing to enjoy family life in the same way and with the same intensity as she had elected to pursue when she had settled in the Netherlands without her daughter. In addition, it had not appeared that S. would have no one to care for her in the Cape Verde Islands: apart from her grandparents, ten other relatives – the applicant's siblings – were also living there, as well as S.'s father.

Although the Government acknowledged the dilemma faced by the applicant if she were forced to choose between staying in the Netherlands on account of her son E. who had been born and bred there or returning to the Cape Verde Islands on account of S., they considered that this situation had come about as a result of the applicant's deliberate choice to settle in the Netherlands without her daughter.

The applicant maintained that the Netherlands authorities had failed to carry out a proper balancing exercise of all the interests involved. She had first informed the authorities of her wish to bring her daughter to the Netherlands in 1992, when S. had just been seven and a half years old. S. had only been eight years old at the time the first request for a provisional residence visa was refused. The Government could not have taken S.'s age

into account, since it was obvious that a child of such a young age would not be able to stand on her own feet.

In the meantime, S. had completed secondary school in the Netherlands and was currently pursuing intermediate vocational education. She was in receipt of a student grant, was covered by the national health service and registered at Rotterdam city hall. According to the applicant, these circumstances did not suggest that S.'s situation was illegal.

Finally, it was not possible for the applicant to return to the Cape Verde Islands with S. and her son E. E. had only Netherlands nationality, was being educated in the Netherlands and had regular contact with his biological father, Mr M.A., a Netherlands national residing in that country.

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

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

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

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

S. was born in the Cape Verde Islands in March 1985. When the applicant left the Cape Verde Islands in November 1986 to settle, marry and start a new family in the Netherlands, she decided voluntarily to leave S., who was 20 months' old at the time and completely dependent on others. She went along with her new husband's wishes to the effect that S. should not come to the Netherlands to form part of their new family unit. Even after the break-up of her marriage, in 1989, the applicant did not take any steps to have S. join her until October 1992, and an official application for a provisional residence visa for S. was not filed until April 1993. Altogether, it was only after six and a half years that the applicant took steps to take up the care and daily responsibility for her daughter.

Although the Court appreciates that the applicant would now prefer to maintain and intensify her family life with S. in the Netherlands, Article 8, as noted above, does not guarantee a right to choose the most suitable place to develop family life. Moreover, the applicant, who still possesses Cape Verdean nationality, has failed to substantiate her claim that she would be unable to develop this family life in the Cape Verde Islands. It is further to be noted that by the time a final decision had been taken on the applicant's request, S. had reached an age where she was presumably not as much in need of care as a young child, and also that she has a considerable number of relatives living in the Cape Verde Islands.

The fact that the applicant's daughter has been staying with her mother in the Netherlands since 1995 does not impose a positive obligation on the State to allow S. to reside with the applicant since S. entered the Netherlands only for the purposes of visiting relatives. At that time the applicant was fully aware that S. would not be permitted to stay with her given that several requests for a residence permit for S. had already been refused.

As to the fact, lastly, that the applicant's son E. has Netherlands nationality only and that he has regular contact with his Dutch biological father who is residing in the Netherlands, the Court notes that the applicant only raised this argument in the present proceedings in her observations in reply to those of the respondent Government. Moreover, it does not appear from the case-file that the applicant argued in the domestic proceedings that her son E. constituted an obstacle to her returning to the Cape Verde Islands. The Court further observes that the applicant did not bring the present application on behalf of her son, and neither is her son's biological father a party to these proceedings.

In these circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other.

It follows that no violation of Article 8 can be found on the facts of the present case and that the application is to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President