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

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 59186/00
by Tarek ISMAIL EBRAHIM and Wafaa SERHAN EBRAHIM
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 18 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 on 5 June 2000,

Having regard to the partial decision of 12 April 2001,

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 first applicant is a stateless person of Palestinian origin. He was born in Lebanon in 1981. The second applicant is his mother. She is a naturalised Dutch national of Palestinian origin and was born in Lebanon in 1961. The applicants, who are currently both residing in the Netherlands, are represented before the Court by Ms L. Mentink, a lawyer practising in Alkmaar. The respondent Government are represented by their Agents, Mr R.A.A. Böcker and Mrs J. Schukking, 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.

After the death of the first applicant's father, who was active for the Palestine Liberation Organisation ("PLO") in Lebanon, the second applicant married A.E. Ebrahim, the brother of her husband. Between June 1982 and November 1983, the latter was detained by the Israeli authorities because of his PLO activities. After his release, he was accused by the PLO of espionage for Israel. In 1986, A.E. Ebrahim and his family, consisting of the two applicants and a baby born in the meantime, left Lebanon for Germany, where they applied for asylum.

After having stayed in Germany and subsequently Denmark, the family moved to the Netherlands where, on 24 May 1991, the second applicant (also on behalf of her children) and her husband applied for asylum or, alternatively, a residence permit on humanitarian grounds. On 16 March 1992, the State Secretary of Justice rejected these requests. The objection filed by the couple was rejected by the State Secretary on 16 September 1992. On 22 October 1992, the second applicant and her husband filed an appeal against the decision of 16 September 1992 with the Judicial Division (*Afdeling Rechtspraak*) of the Council of State.

During their stay in the Netherlands, in the course of which three more children were born to the couple, serious tensions arose between the first applicant and his stepfather. In the latter's opinion, the first applicant misbehaved by, *inter alia*, playing truant and having undesirable friends. He felt that he had no longer any authority over the first applicant. After the first applicant had broken into his school where he committed acts of vandalism, his stepfather decided to send him temporarily back to Lebanon. The second applicant thought that the first applicant would only go to Lebanon for a short period in order to become acquainted with his native country and culture. On 25 October 1994, without having been granted a re-entry visa (*terugkeervisum*) the first applicant travelled to Lebanon, where he moved in with his maternal grandmother in a refugee camp in

South-Lebanon. The first applicant's school and the Netherlands immigration authorities were informed of this fact.

On 17 July 1995, pending the appeal proceedings before the Judicial Division, and in accordance with Dutch policy in asylum cases that have not been dealt with within a certain time span, the State Secretary informed the second applicant and her husband that the objections against their residence in the Netherlands had been withdrawn and that instructions had been issued to provide them and the second applicant's minor children with a residence permit. The second applicant and her husband subsequently withdrew their appeal pending before the Judicial Division.

On 1 September 1995, the second applicant reapplied for a residence permit on humanitarian grounds. This permit, also valid for her minor children living with her, was granted on the same day.

On an unspecified date the second applicant and her husband filed a petition for naturalisation. In this petition, they further requested the co-naturalisation (*medenaturalisatie*) of their four minor children. This request did not include the first applicant. By Royal Decree (*Koninklijk Besluit*) of 16 November 1996, the second applicant, her husband and their four children were granted Dutch citizenship.

Wishing to return to the Netherlands, the first applicant requested the Netherlands authorities in Lebanon on 23 October 1997 for a temporary residence permit (*machtiging tot voorlopig verblijf*) on grounds of family reunification.

On 23 July 1998, as his visa application remained undetermined, the first applicant filed an objection (*bezwaar*) with the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) against the implied refusal (*fictieve weigering*) to grant him a temporary residence permit.

On the same day, the first applicant further requested the President of the Hague Regional Court (*arrondissementsrechtbank*) to issue an interim measure (*voorlopige voorziening*) ordering the Minister of Foreign Affairs to issue a temporary residence permit or a *laissez-passer* allowing him to travel to the Netherlands together with the second applicant, who at that time was visiting him in Lebanon.

On 14 August 1998 the Hague Regional Court set a deadline of 10 September 1998 for the Visa Department (*Visadienst*) of the Ministry of Foreign Affairs to determine the first applicant's request for a visa.

On 2 September 1998, in the context of the objection filed on 23 July 1998, the second applicant was heard by a commission of the Immigration and Naturalisation Department (*Immigratie- en Naturalisatiedienst*) concerning the first applicant's request to enter the Netherlands. At that hearing, she declared *inter alia* that the first applicant had been sent to Lebanon after family tensions had arisen in the Netherlands because of the first applicant's westernisation. It was thought desirable that

he learn his language and culture and become acquainted with his family living in Lebanon.

In an undated decision taken on or around 10 September 1997, the Minister of Foreign Affairs rejected the first applicant's objection of 23 July 1998. On 17 September 1998, the first applicant filed an appeal against this decision with the Hague Regional Court. He further requested the President of the Hague Regional Court to issue an interim measure allowing him to travel to the Netherlands.

On 6 November 1998, the President of the Hague Regional Court rejected the request for an interim measure. The President did not find it established that the first applicant's situation was of such gravity that he should be allowed to enter the Netherlands as a matter of urgency.

On 19 May 1999, following a hearing held on 18 February 1999, the Hague Regional Court declared the first applicant's appeal of 17 September 1998 partly founded. Although the Regional Court agreed with the Minister of Foreign Affairs that, under the Netherlands immigration rules, the first applicant did not qualify for a temporary residence permit on grounds of family reunification, it held, as to the first applicant's complaint under Article 8 of the Convention, that the preparation of the decision taken by the Minister of Foreign Affairs had been negligent and that this decision lacked sufficient reasoning. It was found that the Minister had failed to examine the question of the Netherlands' positive obligations under Article 8 of the Convention in a satisfactory manner, in that a number of important elements had not, or not sufficiently, been taken into account. Consequently, it quashed the impugned decision and ordered the Minister of Foreign Affairs to take a new decision.

As none was taken within the prescribed statutory delay of six weeks, the first applicant filed an appeal on 5 July 1999 with the Hague Regional Court against this failure and requested accelerated proceedings (*versnelde behandeling*).

In the course of the hearing held on 29 July 1999, the first applicant further requested the President of the Hague Regional Court to issue an interim measure allowing him to travel to the Netherlands. In its decision of 6 August 1999, the Hague Regional Court ordered the Minister of Foreign Affairs to determine the first applicant's objection of 23 July 1998 within a period of ten weeks. It rejected the applicant's other claims.

On 29 October 1999, the first applicant again appealed to the Hague Regional Court as no fresh decision had been taken within the set time-limit and requested accelerated proceedings.

In its decision of 30 November 1999, the Hague Regional Court noted that no new decision had been taken by the Minister of Foreign Affairs. It further noted that, on 24 November 1999, the second applicant had been heard by a commission of the Immigration and Naturalisation Department

but apparently this hearing did not result in a determination of the first applicant's objection. In the absence of a new decision on the merits of the objection, the Regional Court could only find that the Minister of Foreign Affairs had again failed to determine the objection timely. Consequently, it declared the first applicant's appeal founded and ordered the Minister to determine the first applicant's objection within two weeks.

On 14 December 1999 the Minister of Foreign Affairs rejected the first applicant's objection of 23 July 1998. The Minister recalled that, in its decision of 19 May 1999, the Hague Regional Court had accepted that the first applicant did not qualify for a residence permit on grounds of family reunification under the relevant domestic immigration rules. Insofar as the first applicant relied on Article 8 of the Convention, the Minister accepted that there was family life between the first applicant and his family living in the Netherlands, but did not find that there were such facts or circumstances which might give rise to a positive obligation on the Government to grant the first applicant a residence permit. On this point the Minister considered that the fact that the first applicant's family had lived in the Netherlands since 1991 and held the Netherlands nationality did not in itself create such an obligation.

Further noting that the choice to return the first applicant to Lebanon for a year had apparently been a conscious one, the Minister considered that the applicants should have realised that this choice entailed a risk that the first applicant would not be readmitted to the Netherlands. Having noted, *inter alia*, that the second applicant had visited the first applicant several times in Lebanon, the Minister did not find it established that there were any objective obstacles to the exercise of the applicants' family life in Lebanon. As to the fact that the first applicant's siblings held the Netherlands nationality and were attending school in the Netherlands, the Minister held that this was a subjective rather than an objective obstacle for the exercise of family life elsewhere. Finally, noting that the first applicant had attained the age of eighteen in the meantime, and that, as from a young age, he had taken independent decisions, including the termination of his schooling and his relocation within Lebanon, the Minister held that the first applicant could be regarded as being quite capable of maintaining himself, and concluded that the general interests of the Netherlands in pursuing a restrictive immigration policy outweighed the applicants' interests.

The first applicant filed an appeal with the Hague Regional Court, before which a hearing was held on 17 March 2000.

In its decision of 7 April 2000, the Hague Regional Court rejected the appeal. It accepted the finding of the Minister that it had not been established that, on the basis of his personal circumstances, the applicant could not be expected to remain in Lebanon and should be admitted to the Netherlands on humanitarian grounds. It did not find it established that the first applicant was in fact wanted by El Fatah and for that reason was

continuously forced into hiding, as he had alleged. Noting that the first applicant was housed and financially supported by his uncle, that other members of his family are living in Lebanon and that the second applicant could continue to provide him with support, the Regional Court concluded that the finding of the Minister could not be regarded as unjust.

As to the argument raised under Article 8 of the Convention, the Regional Court concluded that, in the light of its findings as to the first applicant's personal situation, the interests of the Netherlands Government in pursuing a restrictive immigration policy outweighed the applicants' interests in exercising their family life in the Netherlands. The Regional Court did not find it established that there were any objective obstacles preventing the applicants from enjoying their family life in Lebanon. It noted on this point that the asylum request of the first applicant's stepfather had been rejected but that he had subsequently obtained a residence permit because of a special policy allowing asylum seekers to remain when asylum proceedings had lasted more than three years. The Regional Court further rejected the argument that the siblings' integration into Dutch society should be regarded as an objective obstacle to the whole family's return to Lebanon.

On 6 January 2001, the first applicant travelled on a false passport via Senegal to Belgium intending to continue to the Netherlands. He was arrested in Belgium and placed in aliens' detention.

He subsequently applied for asylum in Belgium. On 9 January 2001, via his lawyer in the Netherlands, the first applicant requested the Netherlands authorities to take over his asylum request from Belgium. On 11 January 2001, the first applicant's lawyer further filed a new request for a temporary residence permit for the first applicant.

After the Belgian authorities had rejected the first applicant's request for asylum, he was expelled to Senegal on 16 February 2001.

Upon his arrival in Senegal, the first applicant was detained as he held no documents allowing him to stay in Senegal. The Senegalese authorities allowed him to telephone the second applicant. On 19 February 2001, the first applicant – via his lawyer in the Netherlands – informed the Netherlands authorities of his situation, requesting them to intervene and allow him to travel to the Netherlands. After the second applicant had sent money to Senegal, the first applicant was released on 9 March 2001 and was told to leave Senegal within three months. On 16 May 2001, the first applicant travelled to the Netherlands, where he has resided since.

On 14 June 2001, the Minister of Foreign Affairs rejected the first applicant's application of 11 January 2001 for a temporary residence permit, finding that such a permit cannot be granted when the person concerned has already entered the Netherlands. The first applicant's objection to this decision, in which he only argued that he should be regarded as exempted from the obligation to have a temporary residence permit and did not raise

any arguments concerning the reasons for the rejection of 14 June 2001, was dismissed by the Minister of Foreign Affairs on 31 July 2001. Although an appeal against this decision could be filed with the Regional Court, it does not appear that the first applicant availed himself of this possibility.

In the meantime, on 28 February 2001, the first applicant's lawyer requested the Hague Regional Court to declare that, on the basis of the Royal Decree of 16 November 1986 and at that time being a minor son of the second applicant, the first applicant is a Dutch national.

On 1 August 2001, following a hearing held on 4 July 2001, the Hague Regional Court rejected the first applicant's request. It noted that the first applicant had already left for Lebanon when his mother, stepfather and their children were granted a Dutch residence permit and that, subsequently, the second applicant and her husband were granted Dutch nationality, it being stipulated that Dutch nationality was withheld from minor children who did not hold a Dutch residence permit. On this point the Regional Court also noted that the request for naturalisation, resulting in the Royal Decree of 16 November 1996, had not included the first applicant. It therefore concluded that no misunderstanding could have arisen about the first applicant's exclusion from the naturalisation decision. It further rejected as unestablished the first applicant's argument that, in departing for Lebanon, he had not intended to alter his principal place of residence (*hoofdverblijf*) in the Netherlands or to sever his family tie. On this point the Regional Court noted that, at the time of naturalisation, the first applicant had already resided for two years in Lebanon with different relatives. In addition, the Regional Court took into account the reasons for his return to Lebanon given by the second applicant before the commission of the Immigration and Naturalisation Department, namely family tensions caused by his westernisation, and the need for him to learn the language and the culture, and to become acquainted with his family in Lebanon.

B. Relevant domestic law and practice

The admission, residence and expulsion of aliens were regulated at the material time by the Aliens Act 1994 (*Vreemdelingenwet*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act 1994 Implementation Guidelines (*Vreemdelingencirculaire*; "the Guidelines"), being directives drawn up and published by the Ministry of Justice.

On 1 April 2001, the Aliens Act 2000 entered into force – replacing the 1994 Aliens Act – along with a new Regulation on Aliens and new Guidelines.

The Netherlands authorities pursue a restrictive immigration policy in view of the high population density in the Netherlands and the problems to which this gives rise. In general and under the legal rules in force until 1 April 2001, aliens are only granted admission for residence purposes if:

(a) the Netherlands are obliged under international law to do so; (b) this serves the “essential interests of the Netherlands”, e.g. economic or cultural interests; and (c) there are “cogent reasons of a humanitarian nature” (Chapter A4/5.3 of the Guidelines). No right to admission to the Netherlands can be derived from the fact that a non-Dutch national is living there without a residence permit.

An alien wishing to enter and stay in the Netherlands for more than three months must have a temporary residence permit. An application for such a permit can be made to the Netherlands authorities in the alien’s country of origin. The resident in the Netherlands with whom an alien seeking admission is planning to stay, can also apply to the chief of the local police for an official opinion. An application for a temporary residence permit is determined on the basis of the same requirements as a residence permit. These requirements differ depending on the grounds on which an alien seeks admission and residence.

The policy for admission for family reunification purposes was at the relevant time laid down in Chapter B1/5 of the Aliens Circular. This provides, insofar as relevant, that a residence permit for the purposes of family reunification may be granted in respect of minor children of a Dutch national when, *inter alia*, the children factually belong to his/her family and the family ties with the parent already existed abroad and have been maintained. Family ties are considered to have been severed by the long-term integration of the child into another family when the parents no longer exercise parental authority and no longer provide for the costs of the upbringing and care of the child.

Aliens who are allowed to remain in the Netherlands pending a decision on their residence status may under certain conditions, with the consent of the Dutch authorities, return to their countries of origin for short periods. If they meet the requirements, being at least compelling reasons of a humanitarian nature, such as a serious illness or the death of close relatives, they may be granted a re-entry visa, which affirms the right of the holder to return to the Netherlands. No re-entry visas for a temporary return to their country of origin are granted to asylum seekers.

COMPLAINT

The applicants complain that the refusal by the Netherlands authorities to allow the first applicant to be reunited with his family in the Netherlands is in violation of their right to respect for their family life within the meaning of Article 8 of the Convention.

THE LAW

The applicants complain that the refusal by the Netherlands authorities to grant the first applicant a residence permit on grounds of family reunification is contrary to their rights under Article 8 of the Convention.

This provision, insofar as relevant, reads as follows:

> “1. Everyone has the right to respect for his private and 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 Government submit that there has been no interference with the applicants’ rights under Article 8 of the Convention as the first applicant had already been sent back to Lebanon by the second applicant and her husband before the latter were granted residence permits. The Government therefore consider that the case concerns the question whether the Netherlands were under a positive obligation under Article 8 to grant the first applicant a residence permit for family reunification when he wished to return to the Netherlands after the second applicant and her family had been granted residence permits.

According to the Government, the refusal to admit the first applicant does not prevent the second applicant from continuing to enjoy family life with the first applicant in the same way and intensity as chosen by her when she sent the first applicant back to Lebanon. The second applicant can visit him in Lebanon, as she has done several times in the past. Furthermore the first applicant has now reached the age of twenty and can, therefore, be expected to provide for himself independently in Lebanon, where he has many relatives. The Government submit that, although the applicants would now prefer to enjoy and intensify their family life in the Netherlands, Article 8 does not guarantee, as such, a right to choose the most suitable place to develop family life.

The applicants submit that the first applicant, who now resides in the Netherlands, cannot return to Lebanon since the Lebanese authorities refuse to (re-)admit any male stateless Palestinians who have applied for asylum abroad. He is furthermore viewed with suspicion by the Palestinians in Lebanon for not wishing to join the Palestinian Liberation Organisation (“the PLO”). The Belgian authorities expelled the first applicant to Senegal, as in their view there was no possibility to deport him to Lebanon. The applicants further claim that it is currently no longer possible for the first applicant’s mother and siblings to travel to Lebanon, as the Lebanese authorities are presently less inclined to grant visas to (formerly stateless) Palestinians, and that it is impossible for the first applicant’s stepfather to

return to Lebanon without running a real risk of treatment contrary to Article 3 of the Convention because of his previous PLO activities.

The applicants further submit that it was not the second applicant's choice to send the first applicant back to Lebanon in 1994. Given the situation of authority within the family, the second applicant had no option but to agree with her husband's choice. Furthermore, the second applicant remained in regular contact with the first applicant in Lebanon by telephone and he was financially supported by his family in the Netherlands.

The applicants finally claim that the first applicant will be in a hopeless situation if he is not allowed to stay in the Netherlands.

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, § 38, and *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports* 1996-VI, § 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 to its territory (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 114, 20 June 2002, unreported).

The instant case hinges on the question whether the Netherlands authorities were under a duty to allow the first applicant – after his voluntary departure for Lebanon in 1994 – to return to the Netherlands to resume the family life he had had with his mother, siblings and stepfather before he left in 1994. 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.

Where immigration is concerned, Article 8 of the Convention cannot be considered to impose on a State a general obligation to respect an immigrant's choice of the country of matrimonial residence or 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 her child who, for the time being, finds himself in

the country of origin, and that it may be unreasonable to force the parent to choose between giving up the position which 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 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 68). 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.

As regards the refusal of the first applicant's request for a temporary residence permit filed on 23 October 1997, the Court notes that the applicants' separation in 1994 was the result of a conscious decision taken by the second applicant and her husband to send the first applicant back to Lebanon, i.e. before the second applicant, her husband and their children were granted a residence permit and subsequently Dutch citizenship. This is not altered by the reasons the second applicant and her husband may have had for deciding to send the first applicant back. Furthermore, it was only three years later that the first applicant, having attained the age of sixteen, sought to return to the Netherlands.

The Court is of the opinion that the refusal by the Netherlands' authorities to admit the first applicant did not prevent the applicants from maintaining the degree of family life they had prior to 1997. Although the applicants would have preferred 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 the first applicant returned in 1994 to Lebanon, where he was being housed by relatives, where he received financial support from his family in the Netherlands and where he was visited on several occasions by the second applicant.

In these circumstances, the Court finds that, as regards the applicant's request for a temporary residence permit filed on 23 October 1997, it cannot be said that the Netherlands State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other. There is, therefore, no appearance of a violation of the applicants' right to respect for their family life within the meaning of Article 8 § 1 of the Convention in this respect.

Insofar as the applicants now claim that the first applicant would be unable to return to Lebanon as a stateless person of Palestinian origin, and that his mother, stepfather and siblings would be unable to visit him there or to return to Lebanon, the Court notes that the applicant filed a further request for a temporary residence permit on 11 January 2001, which was rejected by the Minister of Foreign Affairs on 31 July 2001. As it has not been submitted and as it does not appear that the applicant has availed himself of the possibility to file an appeal against this decision, the Court is of the opinion that, in respect of this part of the application, the applicant

has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

It follows that the application must be rejected pursuant to Article 35 §§ 1, 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