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. 43786/04
by Latifa BENAMAR and Others
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 5 April 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Ms R. JAEGER,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 8 December 2004,

Having deliberated, decides as follows:

## THE FACTS

The applicants are four siblings, Latifa, Hanan, Abdelouahab and Abdelhak Benamar, and their mother Mrs Rachida Boudhan. The latter was born in 1961 and the other applicants in 1979, 1981, 1983 and 1985, respectively. All applicants are Moroccan nationals and live in Oosterhout. They were represented before the Court by Mr J.M.M. Verstrepen, a lawyer practising in Oosterhout.

## A. The circumstances of the case

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

On 12 September 1978, Mrs Boudhan (the fifth applicant) married Mr Benamar in Morocco, where both of them were living and continued to live after their marriage. The first four applicants were born out of this marriage.

On 3 August 1988, Mrs Boudhan's marriage with Mr Benamar was dissolved in Morocco. Mrs Boudhan waived her rights and obligations vis-à-vis her husband and the four children. The court that pronounced the divorce entrusted the care and custody of the four children to Mr Benamar.

On 4 June 1991, Mrs Boudhan remarried in the Netherlands. Her new husband, Mr Airaki, is a Moroccan national living in the Netherlands and holder of a permanent residence permit. On the basis of this marriage, Mrs Boudhan was granted a Netherlands residence permit.

On 22 June 1997, Mr Benamar died in Morocco. On 12 July 1997, after a Moroccan court had entrusted her with the care and custody of the four children, Mrs Boudhan travelled to Morocco and, on 30 August 1997, returned to the Netherlands with the four children.

On 13 September 1997, the four children applied for a Netherlands residence permit for the purpose of stay with their mother.

In four separate decisions taken on 21 November 1997, the head of police (*korpschef*) of the Middle and West Brabant region rejected these requests. The head of police noted at the outset that the four children did not hold the required provisional residence visa (*machtiging tot voorlopig verblijf*) issued by the Netherlands authorities in Morocco. Such a visa is normally a prerequisite for the grant of a residence permit which confers more permanent residence rights. The head of police further held that a number of requirements for a residence permit for the purpose of (extended) family reunion were not met. On this point, the head of police concluded that it had not been established that – between June 1991 and 30 August 1997 – there had been close family ties (*gezinsband*) between the children and Mrs Boudhan, since the children had been living in another family unit, i.e. that of their father, and Mrs Boudhan had been unable to demonstrate that, during that period, she had financially contributed to the children's care and upbringing. Furthermore, Mrs Boudhan did not comply with the requirement of having adequate housing. The head of police further considered that the children's presence in the Netherlands did not serve an essential national interest, that there were no grounds for granting their request for compelling reasons of a humanitarian nature, and that no obligation for the Netherlands authorities to allow family reunion on its territory could be derived from Article 8 of the Convention.

On 24 December 1997, the four children filed an administrative appeal with the Deputy Minister of Justice (*Staatssecretaris of Justitie*). On 9 February 1998, after the Deputy Minister had decided that they were not allowed to remain in the Netherlands pending the determination of their appeal, the children requested the President of the Regional Court (*arrondissementsrechtbank*) of The Hague to issue an interim measure to the effect that they would not be expelled pending the proceedings on their appeal.

On 7 December 1999, the President of the Regional Court granted the children's request for an interim measure. Having noted that twenty-two months had elapsed since the administrative appeal had been filed and that it was still pending, the President considered that the Deputy Minister apparently did not attach great importance to an expulsion at short notice whereas it was plausible that the children had a great interest in being allowed to remain in the Netherlands pending the determination of their appeal.

On 29 May 2001, the first applicant and Mrs Boudhan – who were assisted by their lawyer – were heard before an official commission (*ambtelijke commissie*) on the appeal filed against the decisions of 21 November 1997. In the course of this hearing, Mrs Boudhan stated *inter alia* that, after she had moved to the Netherlands, she had remained in contact with her four children in Morocco, both through annual visits and through telephone conversations. Her ex-husband had been an alcoholic and had died as a consequence thereof. He and the children had lived in the house of a sister of her ex-husband who had also lived there. Her oldest daughter had cooked and cared for the other three children. Her parents, who also lived in the Netherlands, owned a house in Morocco and she had stayed in that house during her visits to Morocco. Six of her seven siblings were living in the Netherlands; one sister still lived in Morocco but not near the place where her ex-husband had been living. She had also contributed financially and materially to the children's care and upbringing, by sending them money and clothes via friends and relatives.

On 1 November 2001, the Deputy Minister rejected the administrative appeal brought by the four children. The Deputy Minister found that the criteria for family reunion had not been met given that the factual close family ties (*feitelijke gezinsband*) between the children and Mrs Boudhan had to be regarded as having been severed, at least since 1991 when Mrs Boudhan – leaving the four children with her ex-husband in Morocco – had moved to the Netherlands where she had founded a new family unit with Mr Airaki of which the four children did not form a part, whereas this situation had been intended as being a permanent arrangement. The Deputy Minister further considered that it had not been established that close family ties had been maintained by Mrs Boudhan after 1991, either through financial support or parental decisions. The Deputy Minister also found that

it had not been established that it had been impossible for Mrs Boudhan to have custody of the children transferred to her sooner and that, for this reason, it had not been possible to seek reunion earlier. As to the children's argument that, since their arrival in the Netherlands, they had formed a part of Mrs Boudhan's family unit there, the Deputy Minister held that admission for family reunion was only possible if the actual close family ties between a parent and a child had never been severed. The Deputy Minister therefore concluded that the four children were not eligible for a residence permit for family reunion under the domestic immigration rules.

As to the question whether a refusal to admit the children to the Netherlands would entail disproportionate hardship, the Deputy Minister noted that the first applicant was born and raised in Morocco where she had lived for eighteen years before coming to the Netherlands, and considered that she could be expected to fend for herself independently in Morocco. The Minister further held that it had not appeared that she had integrated into Netherlands society and become alienated from Moroccan society to such an extent that it could not be asked of her to return to Morocco, or that prior to her arrival in the Netherlands she had encountered such problems that it would be unreasonable to expect her to return to Morocco. On this point, the Deputy Minister noted that, although her father had died, it had appeared during the hearing before the official commission that the first applicant – without any help from her father – already regularly had had to assume the care for herself and her siblings, and found that it had not been established that she would not have, according to local standards, acceptable future prospects in Morocco. As regards the other children, the Deputy Minister held that they could return to Morocco together with their oldest sister who could – like she had already done prior to their arrival in the Netherlands and in so far as necessary – provide them with (a part of) the necessary care. The Deputy Minister further considered that her brothers Hanan and Abdelouahab – given their age – would be less and less dependent on their oldest sister as regards their actual daily care and would to an increasing degree be able to fend for themselves independently. In this context, the Deputy Minister further pointed out that financial support for the children's living expenses could be provided by transferring money from the Netherlands. Although the children's situation in Morocco would be less favourable than in the Netherlands, the Deputy Minister did not find this a reason to deviate from the applicable immigration rules.

In so far as the children relied on Article 8 of the Convention, the Deputy Minister held, as regards the first applicant, that she had already come of age when she applied for a residence permit. As her relationship with Mrs Boudhan was one between adult relatives, and having found no indication that this relationship comprised more than the normal emotional ties that exist between parents and adult children, the Deputy Minister held that their relationship did not constitute family life within the meaning of

Article 8. On this point, the Deputy Minister did not find it established that the care provided by Mrs Boudhan to the first applicant had been of such a nature that it could not be regarded as the normal care with which parents should provide their children. The Deputy Minister further considered it of importance that their separation had resulted from Mrs Boudhan's free choice to settle in the Netherlands, and that another indication for the absence of a special relationship of dependency between them was formed by the fact that Mrs Boudhan had been living in the Netherlands since 1991 whereas it was not until 1997 that she had made demonstrable efforts to be reunited with the first applicant in the Netherlands. As regards the other three children, the Deputy Minister accepted that there was family life within the meaning of Article 8 between them and Mrs Boudhan, but that the interests of the Netherlands authorities in maintaining a restrictive immigration policy outweighed the children's interests in exercising their family life with Mrs Boudhan in the Netherlands. On this point, the Deputy Minister considered that a refusal to admit the children to the Netherlands did not prevent them from exercising their family life with Mrs Boudhan in the way they had before they came to the Netherlands and that Mrs Boudhan had made a conscious decision at the time to leave Morocco and to leave her children behind. Consequently, their separation had not been caused by any public authority's involvement. The Deputy Minister held that in a situation like that of the applicants, where family life had been voluntarily reduced to the present level, it could not be required from the Netherlands authorities to make provisions allowing to deepen and intensify family life. The Deputy Minister further considered that no objective obstacles had appeared to the family life at issue being exercised outside the Netherlands.

On 23 November 2001, the four children filed an appeal with the Regional Court of The Hague.

In its ruling of 1 July 2004, following a hearing held on 1 June 2004, the Regional Court of The Hague rejected the children's appeal. It did point out that the Deputy Minister had incorrectly found that there was no family life within the meaning of Article 8 of the Convention between Mrs Boudhan and the first applicant, but did not conclude that this constituted a ground for declaring the appeal well-founded in view of the reasons stated by the Deputy Minister for holding that Article 8 had not been violated. No further appeal lay against this decision.

### B. Relevant domestic law and practice

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. 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.

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 (*machtiging tot voorlopig verblijf*). Only once such a visa has been issued abroad may a residence permit for the Netherlands be granted. An application for a provisional residence visa is assessed on the basis of the same criteria as a residence permit.

The Government pursue a restrictive immigration policy due to the population and employment situation in the Netherlands. Aliens are eligible for admission only on the basis of obligations arising from international agreements, or if their presence serves an essential national interest, or on compelling humanitarian grounds.

The admission policy for family reunion purposes was laid down in the Aliens Act Implementation Guidelines. The phrase "actually belonging to the family unit" ("*feitelijk behoren tot het gezin*") used in Netherlands law only partly overlaps 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 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.

The burden of proving that the close family ties between parent and child have not been severed rests with the parent residing in the Netherlands. The longer the parent and child have been separated, the heavier the burden of proof on the person in the Netherlands becomes. It is then incumbent on the parent to present sound reasons as to why he or she did not seek to bring the child to the Netherlands sooner.

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 an

obligation, given the specific circumstances of the case, to permit residence in the Netherlands.

## COMPLAINT

The applicants complained that the Netherlands authorities' refusal to grant the children's request for a residence permit violated their right to respect for their family life as guaranteed by Article 8 of the Convention.

## THE LAW

The applicants complained that the Netherlands authorities disrespected their right to respect for their 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).

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 of whether the Netherlands authorities were under a duty to allow the children to reside with their mother in the Netherlands, thus enabling the applicants 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' interests on the one hand and its own interest in controlling immigration on the other.

The mother chose to leave Morocco in 1991 and settled in the Netherlands with a Moroccan national residing there, leaving her four children behind in the care and custody of her ex-husband. The children were then 12, 10, 8 and 6 years' old, respectively. It was only on 13 September 1997, after the children's father had died, that the children applied for permission to join their mother in the Netherlands. The children were then 18, 16, 14 and 12 years' old respectively.

Prior to joining their mother in the Netherlands in August 1997, the children had lived in Morocco all their lives in the care and custody of their father. They must therefore be deemed to have strong links with the linguistic and cultural environment of that country. It is further to be noted that by the time a final decision had been taken on the children's request, all of them had come of age. It has not been argued that the children could not stay in the house in Morocco owned by their maternal grandparents and the Court has found no reason for holding that the first applicant would be unable to fend for herself and to care for her adolescent siblings like she already did prior to their arrival in the Netherlands, if need be with the financial support of their mother. It further appears that the children have a maternal aunt living in Morocco.

Although the Court appreciates that 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 to choose the most suitable place to develop family life (see *Gül v. Switzerland*, cited above, § 46, and *Ahmut v. the Netherlands*, cited above, § 63). Moreover, the Court has found no indication of any insurmountable objective obstacle for the applicants to develop this family life in Morocco. In this connection the Court considers that it has not been established that it would be impossible for the mother and her present husband, both being Moroccan nationals, to return to Morocco to settle with the children.

The fact that the children have been staying with their mother in the Netherlands since 1997 does not impose a positive obligation on the State to allow the children to reside there since they had illegally entered the

Netherlands, i.e. without holding a provisional residence visa. Having chosen not to apply for a provisional residence visa from Morocco prior to travelling to the Netherlands, the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a *fait accompli*, any right of residence would be conferred on them.

In these circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other (see *Ramos Andrade v. the Netherlands* (dec.), no. 53675/00, 6 July 2004; *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; *Adnane v. the Netherlands* (dec.), no. 50568/99, 6 November 2001; *Mensah v. the Netherlands* (dec.), no. 47042/99, 9 October 2001; *Lahnifi v. the Netherlands* (dec.), no. 39329/98; 13 February 2001; and *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000).

It follows that the present case discloses no appearance of a violation of Article 8 of the Convention on its facts, and that it must 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.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President