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

THIRD SECTION

DECISION

Application no. 39670/11
F.A.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 9 February 2016 as a Committee composed of:

Helen Keller, *President,*
Johannes Silvis,
Alena Poláčková, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 28 June 2011,

Having regard to the interim measures indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that these interim measures have been complied with,

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

1. The applicant, Ms F.A., is an Iranian national, who was born in 1981 and lives in Eindhoven. The President decided that the applicant's identity should not be disclosed to the public (Rule 47 § 4 of Rules of the Court). She was represented before the Court by Mr P.J. van den Hoogen, a lawyer practising in Eindhoven.

2. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and their former Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

4. The applicant left Iran on 13 September 2001 and entered the Netherlands on the same day. Before leaving Iran the applicant had been issued a provisional residence visa (*machtiging tot voorlopig verblijf*) by the representation of the Netherlands in Iran. Such a visa is a prerequisite for the grant of a residence permit and must be applied for at a representation of the Netherlands in the country of origin. The applicant travelled on an Iranian passport that was valid until 21 April 2005.

5. On 17 September 2001 the applicant applied for a residence permit based on family life with her partner – who was Iranian by birth, had been recognised as a refugee in the Netherlands and had since obtained Dutch nationality –, which application was granted by decision of 10 October 2001. The permit was valid from 17 September 2001 to 16 September 2002. It was subsequently renewed until 20 March 2005.

6. The applicant claimed that, in 2005, she applied, by normal mail, for an extension of her residence permit.

7. In 2006 a daughter was born, who has Dutch nationality.

8. In 2008 it became clear to the applicant that the request for extension had never been received by the immigration authorities. The applicant was notified that she no longer had legal residence and that she had to leave the Netherlands.

9. Hereupon the applicant submitted an application for asylum. She stated, *inter alia*, that she and her partner were not married and that she had been living out of wedlock with him since her arrival in the Netherlands, that one child had been born of this relationship and that if she returned to Iran to apply for a provisional residence visa, she would be accused of having sexual relations out of wedlock and would be prosecuted by the Iranian authorities for adultery.

10. On 25 December 2009 a second child was born, who also has Dutch nationality.

11. By decision of 3 February 2010 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) refused the applicant's asylum application. It was considered that the applicant had failed to establish a real and personal risk of a violation of Article 3 if she returned to Iran. The applicant's claim that she could not apply for a residence permit because she was not in possession of a provisional residence visa, could not be considered as constituting a reason for requiring asylum. It was further considered that the applicant had failed to establish that the Iranian authorities were aware of the fact that she had been living out of wedlock in the Netherlands.

12. On 25 August 2010, the Regional Court of The Hague sitting in Zwolle, accepted the applicant's appeal, quashed the decision of 3 February

2010 and ordered the Minister of Justice (*Minister van Justitie*) to take a fresh decision. The court concluded that the impugned decision failed to provide sufficient reasons as to why the applicant would not run a real and personal risk upon return to Iran. It took account, *inter alia*, that the applicant would be a single woman in Iran as her partner would be unable to accompany her given that he was a recognised Iranian refugee, and that it was likely that the Iranian authorities would associate the applicant with her partner in view of the fact that her children bore his surname.

13. On 22 September 2010 the Minister lodged an appeal with the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Council of State *(Raad van State*). The Minister argued that the applicant had never claimed nor substantiated that her partner was a recognised refugee. By taking this element into account, the Regional Court had overstepped its boundaries. He further held that if the applicant was of the opinion that she should not be separated from her children, she should apply for a residence permit based on family life. In the assessment of such an application, it would be considered whether the applicant's family circumstances warranted exempting her from the requirement of obtaining a new provisional residence visa.

14. On 27 April 2011 the Administrative Jurisdiction Division accepted the Minister's appeal, quashed the judgment of 25 August 2010 and dismissed the applicant's initial appeal. The Administrative Jurisdiction Division held that although the applicant had mentioned in her first interview that her partner was a recognised refugee, she had not relied on this fact in the subsequent proceedings. By taking this aspect into account of its own volition, the Regional Court had gone beyond the legal dispute in issue. The Administrative Jurisdiction Division further considered that the applicant had failed to substantiate her claim that she would run a real and personal risk of a violation of Article 3 of the Convention upon her return to Iran.

B. Developments after the introduction of the application

15. The application was lodged with the Court on 28 June 2011. On 1 July 2011 the Acting President of the Section decided to indicate to the Government of the Netherlands that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to expel the applicant to Iran for the duration of the proceedings before it (Rule 39 of the Rules of Court). The Acting President further decided, under Rule 54 § 2 (b) of the Rules of Court, that the Government should be invited to submit written observations on the admissibility and merits of the case. The applicant replied to the observations submitted by the Government. Subsequently, questions were put to the Government on 11 December 2012,

to which they replied on 21 January 2013, and to the applicant on 20 February 2015, to which she replied on 19 March 2015.

COMPLAINTS

16. The applicant complained under Article 1 of the Convention that the Netherlands had not secured to her the rights and freedoms defined in Section 1 of the Convention.

17. The applicant also complained under Articles 2 and 3 of the Convention, claiming that there were substantial grounds for believing that she would be subjected to treatment prohibited by these provisions if she were expelled to Iran.

18. She further complained under Article 8 of the Convention that her expulsion from the Netherlands would amount to a disproportionate interference with her right to respect for her family life in the Netherlands.

19. Invoking Article 13 of the Convention, she lastly complained that she did not have an effective remedy at her disposal in respect of the alleged breach of Article 3.

THE LAW

A. Complaint under Article 8 of the Convention

20. The applicant complained that her expulsion to Iran would be contrary to Article 8 of the Convention which, in so far as relevant, provides:

> "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."

21. The Government argued that the applicant had failed to exhaust domestic remedies. In this connection they pointed out that in national law a distinction was made between residence based on asylum grounds and residence based on regular, that is to say not asylum-related grounds. This being the case, a claim that a refusal of a residence permit for the purpose of asylum would entail a breach of Article 8 of the Convention could not be assessed in the examination of an asylum application.

22. According to the Government, the applicant had failed to demonstrate that she had genuinely submitted an application for the renewal of her temporary regular residence permit. Were she to make such an application now, an assessment would be made of whether the failure to seek renewal in time should be ascribed to her. But even if the applicant was held responsible for not submitting the renewal application in time, an examination would still be carried out of the question whether she should be exempted from the requirement to apply for a provisional residence visa from Iran for the reason that Article 8 of the Convention stood in the way of her expulsion to that country. In the opinion of the Government, therefore, an application for renewal was the appropriate way to prompt an assessment of whether any rights might be derived from Article 8 of the Convention. In the absence of such an application, the Government were not aware of all the relevant facts and circumstances and thus unable to weigh all the interests concerned in the framework of Article 8 of the Convention.

23. The Government submitted that the applicant would be allowed to await a decision on an application for a regular residence permit in the Netherlands. In case her request was refused, she might – depending on the reasons for that refusal – be allowed to await the outcome of an objection in the Netherlands, but if that was not the case she would in any event be able to apply for a provisional measure in order to obtain a stay of removal pending the proceedings on her objection. In the event of the objection being dismissed, the applicant had the option of lodging an appeal and subsequently a further appeal to, respectively, the Regional Court of The Hague and the Administrative Jurisdiction Division of the Council of State. While the applicant would not be allowed to remain in the Netherlands pending those proceedings, it would be open to her to apply for a provisional measure in order to obtain a stay of removal.

24. The applicant submitted that she had not lodged a fresh application for the renewal of her residence permit or for a new residence permit based on her family life after the rejection of her request for asylum. She argued that it was too formalistic of the Government to require her to submit an application for the renewal of her regular residence permit before an assessment of her arguments pertaining to Article 8 could be made. She had raised those arguments in the proceedings on her asylum request and, given that she had apprised the authorities of all relevant facts and circumstances relating to her family life in those proceedings, there was no reason why an assessment of her claim that a refusal of a residence permit would amount to a breach of her right to respect for her family life could not have taken place at that time.

25. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it can only deal with a matter after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against

them before those allegations are submitted to the Court. Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. The rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged (see, amongst many authorities, *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009).

26. The Court notes that after the applicant's residence permit had expired in 2005 – regardless of whether this was due to a failure on her part to lodge an application for renewal or to such an application not having been received by the immigration authorities – she only lodged an application for asylum and did not apply either for renewal of her expired residence permit or for a new regular residence permit. However, as the Government have set out, the assessment of a request for asylum in the Netherlands does not include an examination of a claim that removal would lead to a breach of the right to respect for family life. Therefore, an asylum application cannot be considered a remedy capable of affording redress in respect of an alleged violation of Article 8 of the Convention. It nevertheless appears that the applicant is able to obtain an assessment of whether Article 8 precludes her expulsion to Iran by lodging an application for the renewal of her expired residence permit or for a new residence permit based on her family life with her partner and children in the Netherlands. The Court considers, on the basis of the observations of the Government, that it cannot be said from the outset that such an application would stand no chance of success, especially as the applicant was previously granted a residence permit for the purpose of exercising family life, as that family now also includes children, and as her partner cannot return to Iran.

27. In the circumstances of the present case the Court sees no reason why it could not be expected of the applicant to lodge an application for either the renewal of her expired residence permit or a new regular residence permit, which would afford the national authorities the opportunity to examine her allegation of a violation of Article 8 and, if that allegation were to be considered well-founded, to prevent or put right that violation.

28. Therefore, the applicant has prevented the domestic authorities from addressing the matter. She has thus failed to exhaust an effective domestic remedy.

29. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Complaints under Articles 2 and 3 of the Convention

30. The applicant complained that her forced return to Iran would be contrary to Articles 2 and 3 of the Convention. These provisions, in so far as relevant, read:

Article 2

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law..."

Article 3

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

31. In the view of the Government, the applicant had not established that, if expelled to Iran, she would have reason to fear for her life or that she would run a real risk of being subjected to treatment contrary to Article 3 of the Convention. In any event, the rejection of the applicant's request for asylum did not necessarily entail that she must first obtain a provisional residence visa in her country of origin in order to be entitled to reside in the Netherlands on the basis of her family life there. The question whether or not she must obtain such a visa would be assessed in the procedure following a request for a regular residence permit.

32. The applicant replied that if she was to return to Iran to request a provisional residence visa she would run the risk of treatment contrary to Article 3 as she would have to take her children to Iran, in the absence of any family members in the Netherlands to take care of them. Returning to Iran would therefore draw the attention of the Iranian authorities to the fact that she was unmarried and had children born out of wedlock.

33. The Court reiterates at the outset that, according to its established case-law in cases concerning the expulsion of an applicant from a respondent State, in the absence of a risk of the applicant being expelled from that State, it considers the case to have been resolved and strikes it out of its list of cases, whether or not the applicant agrees (see *M.E. v. Sweden* (striking out) [GC], no. 71398/12, § 32, 8 April 2015).

34. Although it is true that, following the expiry of her residence permit and rejection of her asylum application, the applicant's stay in the Netherlands no longer had any legal basis, the Court observes that she had – and still has – it in her power at least to defer an expulsion to Iran through the lodging of an application for the renewal of her original residence permit or for a new residence permit for the purpose of residing with her family. In this context the Court further refers to the information submitted by the Government to the effect that the applicant would be entitled to remain in the Netherlands pending the assessment of such an application for a residence permit, and that, should that application be rejected, she would be

able to apply for a provisional measure in order to obtain a stay of removal pending subsequent proceedings (see paragraph 23 above).

35. The Court notes that, in the present case, the applicant's claim that her expulsion to Iran would expose her to a risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention is closely bound up with her complaint under Article 8. In these circumstances it considers that it may be expected of the applicant to lodge an application for renewal of her residence permit or for a new residence permit, so as to avert, at least for the time being, her being removed to Iran and the possible materialisation of any of the alleged risks. Moreover, while the outcome of any such application can clearly not be foretold, the Court has already found that it cannot from the outset be concluded that it would be bound to fail (see paragraph 26 above).

36. The applicant herself thus being able to prevent, at least temporarily, her expulsion from the Netherlands, the Court considers that her complaints under Articles 2 and 3 of the Convention must at the present time be regarded as premature and that they should therefore be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

37. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

C. Complaint under Article 13 of the Convention

38. The applicant complained that she had not had an effective remedy for the alleged violation of Article 3 of the Convention in that neither the immigration authorities nor the Administrative Jurisdiction Division had taken account of information she had submitted in support of her request for asylum. She invoked Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

39. According to the Court's established case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

40. Having regard to the Court's findings above that the applicant's complaint under Article 3 was premature, the Court concludes that the applicant did not have an "arguable claim", and that therefore Article 13 is inapplicable to the case.

41. It follows that this complaint must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. Other complaint

42. The applicant also alleged a violation of her rights under Article 1 of the Convention. Having regard to all the material in its possession, and in so far as this complaint falls within its competence, the Court finds that there is no appearance of a violation of the provision invoked. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 10 March 2016.

Marialena Tsirli
Deputy Registrar

Helen Keller
President