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. 1869/04
by Sahra SAID BOTAN
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 12 May 2005 as a Chamber composed of:

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

Having regard to the above application lodged on 2 January 2004,

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, Ms Sahra Said Botan, is a Somali national, who was born in 1969 and lives in Nijmegen. She is represented before the Court by Ms J. van der Haar, a lawyer practising in Nijmegen. The respondent Government are represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

The applicant came to the Netherlands on 2 January 1995 and applied for asylum. Her request was rejected, the final decision in this respect being taken by the Regional Court (*arrondissementsrechtbank*) of The Hague on 17 April 1997.

The applicant submitted that, meanwhile, in 1996, she had started a relationship with a Mr Omer Farah Ali, also of Somali origin. In 1998 Mr Ali obtained Netherlands nationality. The applicant and Mr Ali were married on 30 January 2001. They have three children, born on 2 November 2000, 17 April 2002 and 5 October 2004 respectively, who have Netherlands nationality.

On 15 May 2001 the applicant requested a residence permit for the purpose of staying with her spouse, who was in full-time gainful employment. This request was denied by the Deputy Minister of Justice (*Staatssecretaris van Justitie*) on 15 October 2001 for the reason that the applicant did not hold the required provisional residence visa (*machtiging tot voorlopig verblijf*), which had to be applied for at a representation of the Netherlands in the country of origin or, if there was no such representation in the country of origin, at the representation situated closest to that country.

The applicant filed an objection (*bezwaar*) against this decision, arguing that she ought to be exempted from the visa requirement as she was unable to return to Somalia or, given that there were no representations of the Netherlands in that country, to one of Somalia's neighbouring countries. Not only would this contravene the rights of her Dutch children in the Netherlands, it was also realistically impossible for her to travel: as there was no functioning Somali Government, she could not obtain a travel document.

The objection was dismissed by the Deputy Minister on 27 February 2002. According to the Deputy Minister it was in general possible for Somali nationals to obtain Somali travel documents as well as to travel to a representation of the Netherlands in either Addis Abeba or Nairobi in order to apply for a provisional residence visa.

The applicant appealed to the Regional Court (*arrondissementsrechtbank*) of The Hague, sitting in Arnhem, which court upheld the appeal on 24 April 2003. Pending these proceedings the applicant had contacted a number of representations of Somalia in Europe with the request to be provided with a passport. These representations had either not reacted to her request or informed her it was not possible to comply with it. When the Minister for Immigration and Integration (*Minister voor Immigratie en Integratie*; the successor of the Deputy Minister of Justice) argued in the proceedings before the Regional Court

that the applicant could be provided with a so-called European Union *laissez-passer*, the applicant replied that such a document was accepted neither by the airline company which carried out flights to Somalia nor by local authorities in Somalia and Somaliland. The Regional Court considered that the Minister could not reasonably have taken the view that the circumstance of the applicant not holding, and not being able to obtain, travel documents in order to travel to a country neighbouring Somalia was insufficient to exempt her from the visa requirement.

The Minister lodged an appeal against the Regional Court's decision. In a decision of 18 July 2003, the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*; herein after "the Division) found in favour of the Minister. The Division reiterated that the ratio of the visa requirement lay in preventing the national authorities, prior to a decision on a person's request for admission having been taken, from being confronted with a *fait accompli* as a result of that person's illegal presence in the Netherlands. If an alien, who had entered the Netherlands without a visa but with the intention of settling there, could be exempted from the visa requirement simply by asserting that it was impossible to return, this would have serious negative repercussions on the policy. Noting that family life had been begun at a time when the applicant was not residing lawfully in the country, the Division further found that insisting on the visa requirement did not violate Article 8 of the Convention. It added that the impugned decision did not constitute a definite refusal of family life being exercised in the Netherlands, but merely an enforcement of legal requirements. Finally, it had not appeared that there were any objective impediments to family life being developed abroad. For these reasons, the Division quashed the decision of the Regional Court and rejected the appeal which the applicant had lodged with that latter court.

B. Relevant domestic law and practice

The Netherlands Government pursue a restrictive admissions policy. Aliens are eligible for admission only on the basis of obligations under international law, if their presence serves an essential national interest, or for compelling humanitarian reasons, with most policy rules for admission being more detailed formulations of this last criterion. Since 1 April 2001, the admission, residence and expulsion of aliens have been regulated by the Aliens Act 2000 (*Vreemdelingenwet 2000*, hereinafter "the Act"), the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*, "the Decree"), the Regulation on Aliens 2000 (*Voorschrift Vreemdelingen 2000*) and the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*, "the Implementation Guidelines").

Pursuant to Article 14 of the Act, a temporary residence permit for the purpose of family formation may be issued by the Minister for Immigration

and Integration if a number of eligibility requirements – set out in Articles 3.13 to 3.22 of the Decree – have been satisfied. These requirements include the possession of a valid provisional residence visa; cohabitation, running a joint household and registration of the marriage in the municipal personal records database; possession of a valid international travel document; not posing a danger to public order or national security; having been tested for tuberculosis; and having sufficient means of subsistence.

The absence of a valid international travel document does not constitute grounds for refusing a temporary residence permit if the alien has established that he or she is unable, or able no longer, to be issued with such a document by the Government of the country of origin (Article 3.72 of the Decree in conjunction with Article 16 § 1 (b) of the Act). Chapter B1/2.2.2 of the Implementation Guidelines states that as there is no internationally recognised central authority in Somalia, the Netherlands do not recognise Somali authorities or documents issued by them, including travel documents. Somali nationals are in general accepted to have established that they are unable, or no longer able, to be issued with a valid international travel document by the Government of their country of origin, in the sense of Article 3.72 of the Decree.

Pursuant to Article 3.71 § 1 of the Decree, an application for a temporary residence permit for the purpose of family formation shall be rejected if the alien does not hold a valid provisional residence visa. A number of categories of aliens is exempted from the requirement to hold a valid provisional residence visa (Article 17 § 1 of the Act in conjunction with Article 3.71 § 2 of the Decree). In addition, under Article 3.71 § 4 of the Decree – the so-called hardship clause –, the Minister for Immigration and Integration may decide not to apply the first paragraph of that provision if it is considered that its application will result in an exceptional case of extreme unfairness. Chapter B1/2.2.1 of the Implementation Guidelines sets out policy on the application of the hardship clause. For instance, the lack of a provisional residence visa is irrelevant to the question of whether a temporary residence permit may be issued to an unaccompanied minor asylum seeker, an alien who through no fault of his own cannot leave the Netherlands, or an asylum seeker whose application has been under consideration for three years or more. Cases that are not exceptions of this kind include those of a failed asylum seeker or an alien who claims that he or she cannot reasonably be expected to return to their country of origin but did not provide documentary evidence for this claim within a prescribed time limit, even though it would have been possible to do so.

The power to issue a provisional residence visa rests with the Minister of Foreign Affairs. An application for such a visa is assessed on the basis of the same criteria as a residence permit. It must be applied for in person from the Netherlands diplomatic or consular mission in the country of origin or of habitual residence. A country of habitual residence is a country where the

alien is entitled to reside for longer than three months on the basis of a residence permit. If there is no Netherlands diplomatic or consular mission, the provisional residence visa should be applied for in person from the mission in the country nearest to the country of origin or habitual residence where such a mission is located.

On 14 December 2004 the provisional-measures judge of the Regional Court of The Hague, sitting in Arnhem, granted an injunction to a Somali national whose request for a residence permit for the purposes of staying with his partner had been rejected because he did not have a provisional residence visa (Awb 04/31098). The judge considered that it had not appeared that the information, on which the Government based their claim that the appellant could apply for such a visa in either Kenya or Ethiopia, and which information dated from 2001 and 2001, was still correct. Bearing in mind that the Ministry of Foreign Affairs' official country report on Somalia of March 2004 stated that there were no longer any internationally recognised authorities in Somalia which issued passports, and that it mentioned that passports could be "bought" at the market, the judge was further of the opinion that the Government had failed to examine how and why a passport, which they claimed the appellant could obtain from Somali representations in Europe, might be of use. The Government were further found to have omitted to investigate whether the appellant would be able to travel to Kenya or Ethiopia and to stay there for a number of months, using an EU *laissez-passer*. In this context the judge took into account that it appeared from the aforementioned country report that Somali nationals were required to have a passport and a visa in order to enter the countries neighbouring Somalia.

COMPLAINT

The applicant complained that, despite the fact that she complied with all material conditions to be granted residence in the Netherlands, the national authorities were frustrating her right to respect for family life as guaranteed in Article 8 of the Convention by requiring her to travel to a country neighbouring her native Somalia to apply and wait for a provisional residence visa, which it was realistically impossible for her to do.

THE LAW

The applicant complained that her right to respect for family life was being frustrated, in breach of Article 8 of the Convention which provides, in so far as relevant:

> "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, ... or for the protection of the rights and freedoms of others."

The Government submitted that the rationale for requiring a provisional residence visa was that it made it possible to examine whether an alien fulfilled the requirements for a temporary residence permit before the person concerned came to the Netherlands, without confronting the State with his or her presence there as a *fait accompli*. In their view, such a requirement was not inherently incompatible with Article 8 of the Convention since a State was entitled to set certain conditions as part of its efforts to regulate the admission of aliens. An important consideration in this context was that the requirement at issue implied neither that family life could never again be enjoyed in the Netherlands nor that family life was ruptured; it simply meant that the nature of family life must change temporarily, that is for a few months.

On the basis of the documents provided by the applicant, it had not as yet been possible to determine whether she fulfilled the other requirements in order to be eligible for a temporary residence permit.

Even if it could be shown that the applicant had already been in a long-term relationship with her current husband prior to the decision on her asylum application becoming final – i.e. 17 April 1997 –, the Government submitted that she had never been given any guarantee that she would be allowed to remain in the Netherlands and develop and continue any family life enjoyed there. Family life with her children had only been created at a time when the applicant was residing illegally in the Netherlands. This family life could therefore not be brought to bear on the question whether the Government had acted in a way consistent with their obligations under the Convention when they rejected the applicant's request for a residence permit.

In rejecting that request for the reason that the applicant did not have a provisional residence visa, the national authorities had ascertained whether, under the relevant legislation, she belonged to one of the categories of aliens who were exempted from that requirement. It was found that this was not the case. In the view of the Government, the applicant's situation could also not be characterised as so very exceptional that the hardship clause ought to have been applied.

The Government were further of the opinion that it was possible for the applicant to travel to either Kenya or Ethiopia in order to apply for a provisional residence visa. To do so, she could either use the travel documents with which she had travelled from Somalia to the Netherlands, or a so-called European Union ("EU") *laissez-passer*, a travel document for the expulsion of third-country nationals. Somali nationals could also contact

the permanent Somali mission in Geneva or diplomatic missions in other parts of Europe.

The applicant did not dispute that, in general, it was legitimate for domestic authorities to examine an alien's eligibility for residence prior to that person entering the country. However, it was not the case that she had confronted the authorities with her presence in the Netherlands as a *fait accompli*, given that she had entered that country lawfully in order to apply for asylum within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees. Moreover, in January 1995, when she entered the Netherlands, no requirement to hold a provisional residence visa existed, as this only entered into force in December 1998.

She argued, as she had done throughout the proceedings in the Netherlands, that, apart from the provisional residence visa, she complied with all other requirements to be granted a residence permit allowing her to stay with her husband and children. It was true that she was not in possession of a valid international travel document, but as a Somali national she was exempted from that particular requirement pursuant to Chapter B1/2.2.1 of the Implementation Guidelines. Furthermore, although family life with her children had indeed been created at a time when her asylum application had been irrevocably rejected, it had to be borne in mind that the continued presence in the Netherlands of failed Somali asylum seekers had been tolerated by the authorities at that time and that no expulsions had taken place.

The applicant insisted that it was objectively impossible for her to obtain a provisional residence visa. When travelling to the Netherlands, she had been accompanied by a "travel agent" who had not let her have the travel documents that had been used. She had further already contacted "representations" of Somalia in Geneva and Rome and been informed that they could not issue her a travel document. An EU *laissez-passer* was not sufficient to gain entry to either Kenya or Ethiopia by land or sea, since this required a passport as well as a visa. Whilst the applicant also disputed that Somali nationals could cross into Kenya and Ethiopia from Somalia without documents, this would in any event entail that she travel to Somalia first. She would then only be able to enter Kenya from the part of Somalia which the Netherlands authorities themselves, in official country reports compiled by their Ministry of Foreign Affairs, considered unsafe. The only safe area from which Ethiopia could be entered was from the self-declared autonomous region of Somaliland, to which she had no access given that the local authorities there had declared that they did not accept EU *laissez-passers*. In this context the applicant referred to the decision of the provisional-measures judge of the Regional Court of The Hague, sitting in Arnhem, of 14 December 2004, who had found that the Government had insufficiently investigated whether it was indeed possible for Somali

nationals to obtain travel documents and to apply for a provisional residence visa in Kenya or Ethiopia.

In the view of the applicant, there was no reason why the hardship clause laid down in Article 3.71 § 4 of the Decree could not have been applied to her. She submitted that the extremely restrictive use that was being made of the hardship clause did not follow imperatively from the drafting history of that provision.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President