CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 44328/98
by Tunde SOLOMON
against the Netherlands

The European Court of Human Rights (First Section), sitting on 5 September 2000 as a Chamber composed of

Mr L. Ferrari Bravo, *President*,
Mrs W. Thomassen,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mr J. Casadevall,
Mr R. Maruste, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 30 October 1998 and registered on 13 November 1998,

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 is a Nigerian citizen, born in 1968 and residing in Zeist, the Netherlands. Before the Court he is represented by Ms A. Barada, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

The applicant first came to the Netherlands in 1993. He requested asylum or, alternatively, a residence for compelling reasons of a humanitarian nature. He submitted that he had been a corporal in the Nigerian army and that when assisting his uncle, a lieutenant colonel, in the preparations of a *coup d'état* he was arrested and subsequently sentenced to death. He claimed to have been the only one of the conspirators to escape, and that the others were all put to death.

The applicant's requests were rejected by the Deputy Minister of Justice (*Staatssecretaris voor Justitie*), as was his request for revision (*herziening*). The applicant then filed an appeal with the Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*) but his request for an interim measure was rejected on 22 December 1994 by the President of the Regional Court (*Arrondissementsrechtbank*) of The Hague sitting in 's-Hertogenbosch. This meant that he was not allowed to await the outcome of the proceedings before the Judicial Division of the Council of State on Netherlands territory. From this moment onwards he was therefore required to leave the Netherlands forthwith.

In 1994 or 1995 – the exact date has not been given – the applicant met a woman of Netherlands nationality with whom he subsequently entered into a relationship. On 29 February 1996 he requested a residence permit enabling him to reside in the Netherlands with his partner. This request was rejected in two instances by the Deputy Minister for Justice and in a final decision of 12 February 1997 by the President of the Regional Court of The Hague sitting in Amsterdam. The Regional Court considered that the applicant had failed to prove his identity and had failed to prove that he was not married already. In so holding it had regard to, among other things, the way in which the applicant had obtained his Nigerian passport: by post, instead of through official channels, which meant that e.g. the passport holder had not signed the passport in the presence of an authorised official. Other documents, including the applicant's birth certificate, contradicted each other and had not been verified.

The applicant's partner became pregnant. On 1 July 1997 the applicant again requested a residence permit enabling him to reside in the Netherlands with his partner and their soon to be born child.

In a final decision of 9 July 1997 the Judicial Division of the Council of State rejected the applicant's asylum claims as unsubstantiated in view of what it considered to be inconsistencies in the applicant's statement and supporting documentation. The credibility of the applicant's assessment was not accepted. The Council of State also found that there were no compelling reasons of a humanitarian nature to grant him a residence permit. The factor of the applicant's relationship with his partner did not play a role in this decision.

On 29 July 1997 the Deputy Minister rejected the applicant's request of 1 July 1997 for a residence permit. She held that, as had been the case at the time of the Regional Court's decision of 12 February 1997, the applicant was still not in possession of certified documents and as he had also not yet submitted a passport, his identity had not been properly established. The fact that the applicant had argued that he was attempting to obtain the required documents was not considered relevant since he had known for some eighteen months that he needed to produce them. The Deputy Minister further held that the refusal of a residence permit did not constitute an interference with the applicant's right to respect for family life since he had never held a residence permit enabling him legally to develop family life with his partner in the Netherlands. As his child had not yet been born, no family life existed between the applicant and the child.

The applicant filed an objection (*bezwaarschrift*) against this decision. On 12 September 1997 a daughter was born to the applicant and his partner. The daughter has Netherlands nationality.

The Deputy Minister rejected the applicant's objection on 5 November 1997, holding that despite the birth of the applicant's child a refusal of a residence permit did still not constitute an interference with the applicant's right to respect for family life since he had never held a residence permit enabling him legally to develop family life with his partner and his child in the Netherlands. Moreover, the Deputy Minister considered that there existed no objective obstacles for the applicant, his partner and their child preventing them from developing their family life in Nigeria, the more so as the applicant's asylum claims had been rejected, from which it followed that the applicant was not considered to be in any real danger if returned to Nigeria.

The applicant filed an appeal with the Regional Court of Amsterdam and also requested the President of that Court to grant him an interim measure so that he would not be expelled pending his appeal.

On 1 September 1998 the Regional Court rejected the appeal. It found that in the examination of the question whether Article 8 of the Convention imposed a positive obligation on the Netherlands to grant residence to the applicant, no decisive importance could be given to his daughter's right under Article 3 § 1 of Protocol No. 4 not to be expelled. However, given the girl's Netherlands nationality she was entitled to be raised and educated in the Netherlands and therefore her interests should be taken into account as well. Nevertheless, the Regional Court considered that the interest of protection of the national economic welfare outweighed those of the applicant and his daughter. In this respect the Regional Court took into account that the daughter had only been two months old when the Deputy Minister had rejected the applicant's objection and that the Deputy Minister's decision did not prevent the applicant from developing his family life in Nigeria. It had not appeared that his daughter would not be admitted to Nigeria and her residence there would not affect her right to enter the Netherlands. Moreover, the applicant's request for asylum did not constitute an objective obstacle to family life being developed in Nigeria as this request had been rejected.

The Regional Court accepted that if the applicant was to take his daughter with him to Nigeria this would constitute an interference with his partner's right to respect for family life with her child. However, the interest of protection of the national economic welfare also outweighed the interests of the partner. In this respect the Regional Court took into account that the partner had entered into the relationship with the applicant at a time when he was not allowed to reside in the Netherlands. There were, moreover, no objective obstacles preventing the partner from developing family life in Nigeria.

Also on 1 September 1998 the acting President of the Regional Court rejected the applicant's request for an interim measure.

B. Relevant domestic law and practice

Given the situation obtaining in the Netherlands with regard to population size and employment, Government policy was, and remains, aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens are only granted admission for residence purposes if: (a) the Netherlands are obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the Geneva Convention relating to the Status of Refugees; (b) this serves "essential interests of the Netherlands" (*wezenlijk Nederlands belang*), e.g. economic or cultural interests; (c) there are "cogent reasons of a humanitarian nature" (*klemmende redenen van humanitaire aard*). Relevant policy is defined in the Aliens Circular (*Vreemdelingencirculaire*) of 1994.

In Chapter B1, under 3, of the Aliens Circular it is laid down that the partner of a Netherlands national may be allowed to reside in the Netherlands within an existing non-marital relationship or, if both partners are at least eighteen years old, in a newly-formed relationship provided that both partners prove by means of legalised official documents that they are both unmarried and that they are not closely related. The requirement that both partners be unmarried is waived if the fact of being, or remaining, married to a third party cannot be imputed to the person concerned.

Chapter C4 of the Aliens Circular lists cases in which the requirement of legalisation can be waived, for instance if the person concerned is a genuine asylum seeker and therefore cannot be expected to contact the authorities of his country of origin. However, certain "problematic countries" are listed from which documents are not accepted, save in exceptional cases, without verification by competent Netherlands diplomatic or consular officials. Nigeria is one of these.

COMPLAINT

The applicant complains under Article 8 of the Convention that his expulsion would constitute an unjustified interference with his right to respect for his family life.

THE LAW

Article 8 of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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."

1. The Government considered, firstly, that the applicant's fears of ill-treatment or violent death if he were returned to Nigeria had not been established. They noted that the applicant's asylum claims had been rejected as unsubstantiated on 9 July 1997 by the Judicial Division of the Council of State.

The Government were further of the opinion that the applicant's identity and his marital status had not been satisfactorily established. Stating their experience that alleged official Nigerian documents were frequently unreliable, they pointed to, amongst other things, the circumstances in which his Nigerian passport had been issued (namely, not through normal official channels but through third parties), which in their view suggested that the passport was a forgery. In addition, the applicant had on various occasions in the course of the domestic proceedings given his surname as Solomo and Solomon, and his first name as Tunde and Tuyunde, and his place of birth variously as Lagos, Ibadan, Oyo, Oyo State and Nigeria. There were inconsistencies, too, as regards the applicant's family history and stated date of birth.

In the Government's submission, the interference complained of could reasonably be considered "necessary in a democratic society" in view of the demographic and employment situation obtaining in the Netherlands (the economic well-being of the country), the prevention of polygamy (the protection of morals) and establishing the identity of prospective immigrants (public safety).

In addition, there was, in the Government's view, nothing to prevent the applicant from continuing his "family life" with Ms V. and the child in Nigeria if so desired.

The applicant submitted that his statements were true. He noted in this regard that his passport had been examined by Netherlands officials and that this examination had not given rise to a criminal prosecution for forgery. He also stated that he was undergoing psychiatric treatment in connection with his suffering in Nigeria and his fears at the prospect of being returned to that country.

The applicant also argued on various grounds that distinctions should be made from the Court's Gül v. Switzerland judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, and its Ahmut v. the Netherlands judgment of 28 November 1996, *Reports* 1996-VI.

The Court notes that the application before it concerns only the allegation that Article 8 will be violated if the applicant is refused the right to reside in the Netherlands with his partner and the child of their union.

The Court further notes that the respondent Government do not deny that there has been an "interference" with the applicant's right to respect for his "family life". What remains to be seen, therefore, is whether this interference is in accordance with the requirements set out in Article 8 § 2.

For his part, the applicant does not deny that the interference was "in accordance with the law" and pursued a "legitimate aim".

The Court recalls that, while Article 8 of the Convention does not in itself guarantee a right to enter or remain in a particular country, issues may arise where a person is excluded, or removed from a country where his close relatives reside or have the right to reside. However, the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (see the Court's Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 94, § 68). This applies to non-marriage-based relationships also.

Whether removal or exclusion of a family member from a Contracting State is incompatible with the requirements of Article 8 will depend on a number of factors: the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (eg. history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see e.g. the Abdulaziz, Cabales and Balkandali judgment referred to above at § 68, the Court's Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, § 29, the Beldjoudi v. France judgment of 26 March 1992, Series A No. 234, p. 28, § 78, the Gül v. Switzerland judgment of 19 February 1996, Reports 1996-IV p. 159 at p. 176, § 42, and the Bouchelkia v. France judgment of 29 January 1997, *Reports of judgments and decisions* 1997-I, p. 65, §§ 50-53).

In the present case the Court takes into consideration that the applicant was never given any assurances that he would be granted a right of residence by the competent Netherlands authorities. He was allowed to await the Deputy Minister's decision on his asylum request in the Netherlands. After asylum was denied him, his request for a stay of expulsion was refused by the competent court on 22 December 1994. From then onwards, the applicant's residence in the Netherlands, which was already precarious, lost what little foundation it had had until then. Family life between the applicant and his Netherlands national partner – and later, with their child – was developed after this date. The Court is of the opinion that in these circumstances the applicant could not at any time reasonably expect to be able to continue this family life in the Netherlands (cf. the Bouchelkia judgment cited above, § 53; and *Baghli v. France*, no. 34374/97, § 48, to be published in ECHR 1999).

The Netherlands authorities were therefore entitled to consider the interference in question to be "necessary in a democratic society".

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Luigi Ferrari Bravo
President