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

THIRD SECTION

CASE OF SAID BOTAN v. THE NETHERLANDS

(Application no. 1869/04)

JUDGMENT
(Striking out)

STRASBOURG

10 March 2009

FINAL

10/06/2009

This judgment may be subject to editorial revision.

In the case of Said Botan v. the Netherlands,

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 17 February 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1869/04) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Somali national, Mrs Sahra Said Botan ("the applicant").

2. The applicant was represented by Ms J. van der Haar, a lawyer practising in Nijmegen. The Dutch Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant alleged that the obligation to leave the Netherlands in order to apply and wait for a provisional residence visa in Somalia or a neighbouring country infringed her right to respect for her family life.

4. By a decision of 12 May 2005, the Court declared the application admissible.

5. The applicant, but not the Government, filed further written observations (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicant was born in 1969 and lives in Nijmegen.

7. 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.

8. Meanwhile, in 1996, the applicant had started a relationship with a Mr F.A., also of Somali origin. In 1998 Mr F.A. obtained Netherlands nationality. The applicant and Mr F.A. were married on 30 January 2001. They had three children, born on 2 November 2000, 17 April 2002 and 5 October 2004 respectively, who have Netherlands nationality.

9. 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.

10. 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.

11. After the Deputy Minister rejected her objection on 27 February 2002, the applicant appealed to the Regional Court of The Hague, sitting in Arnhem, which court upheld the appeal on 24 April 2003.

12. The Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*; the successor to the Deputy Minister of Justice) 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 started 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. Developments after the application was declared admissible

13. On 4 November 2005 the respondent Government informed the Court that the applicant had been granted a residence permit for the purpose of asylum pursuant to a temporary "policy of protection for certain categories" (*categoriaal beschermingsbeleid*, see paragraph 14 below) adopted by the Minister on 24 June 2005 in respect of asylum seekers coming from certain parts of Somalia.

II. RELEVANT DOMESTIC LAW

14. A temporary residence permit for the purpose of asylum may be issued to persons whose return to their country of origin is considered by the responsible (Deputy) Minister to constitute exceptional harshness in view of the general situation pertaining in that country (article 29(1)(d) of the Aliens Act 2000 (*Vreemdelingenwet 2000*)). Pursuant to this provision, the (Deputy) Minister may pursue a policy of protection for a particular category of asylum seekers. The criterion of exceptional harshness, laid down in this provision, is not a formal one, such as the declaration of a state of siege, a state of war or the existence of some form of armed conflict, but a material one. It relates to whether the risks that could arise on a person's return, in connection, *inter alia*, with armed conflict or the like would be unreasonable from a humanitarian perspective or from the perspective of the law of armed conflict. In general, protection for certain categories is justified only if armed conflict (including armed civil conflict) has disrupted daily life to such an extent that such humanitarian risks arise.

15. A person who has held a temporary permit pursuant to article 29(1)(d) of the Aliens Act 2000 for a period of five years may be

eligible for an indefinite residence permit for the purpose of asylum (article 34(4) of the Aliens Act 2000).

16. The requirement to hold a provisional residence visa when an application is made for a residence permit for non-asylum related purposes (for the purpose of exercising family life, for example) does not apply when the person concerned held a temporary or indefinite residence permit for the purpose of asylum immediately prior to the lodging of that application (article 17(1)(e) of the Aliens Act 2000).

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

17. The applicant claimed to be the victim of a violation of Article 8 of the Convention, the relevant parts of which provide:

> "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."

18. The Court notes that the applicant has been granted a residence permit (see paragraph 13 above) and the question therefore arises whether there is an objective justification for continuing to examine this complaint or whether it is appropriate to apply Article 37 § 1 of the Convention, which provides as follows:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

19. In a letter of 25 November 2005, the applicant requested the Court to continue its examination of the present application, notwithstanding the fact that she was now residing lawfully in the Netherlands. In the opinion of the

applicant, the residence permit she had been granted provided insufficient protection of her right to respect for family life, given that it could be withdrawn whenever the Minister decided that the situation in Somalia no longer justified pursuing a protection policy.

20. As it is thus clear that the applicant wishes to pursue her application, the Court must, in order to ascertain whether Article 37 § 1 (b) applies to the present case, answer two questions in turn: first, whether the circumstances complained of directly by the applicant still obtain and, second, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 97, 15 January 2007, and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 30, 20 December 2007). In the present case, that entails first of all establishing whether the applicant is still required to apply for a provisional residence visa in either Somalia or a neighbouring country before she may be eligible for a residence permit allowing her to reside with her husband and children in the Netherlands; after that, the Court must consider whether the measures taken by the authorities constitute sufficient redress for the applicant's complaint.

21. As to the first question, it is clear that the applicant is currently lawfully residing in the Netherlands and that there is no question of her having to apply for a provisional residence visa.

22. As regards the second question, the Court reaffirms that Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone (see *Sisojeva and Others*, cited above, § 91).

23. In this context the Court notes that although the residence permit granted to the applicant may not have been issued for the specific purpose of allowing her to reside in the Netherlands with her husband and children, it nevertheless enables the applicant to enjoy family life in the Netherlands. Moreover, while the policy pursuant to which the applicant was granted a residence permit may, at some point in the future, be amended or revoked, it is far from certain that the applicant will then once again be required to apply for a provisional residence visa abroad (see paragraphs 15-16 above) or that, in the circumstances pertaining at that time, such a requirement would be capable of raising an issue under Article 8 of the Convention.

24. Having regard to the fact, therefore, that the applicant has been granted a residence permit in the Netherlands, enabling her to exercise freely in that country her right to respect for her family life as protected by Article 8 of the Convention and interpreted in the Court's established case-law (see, *mutatis mutandis*, *Boughanemi v. France*, judgment of 24 April 1996, *Reports* 1996-II, pp. 607-08, § 35; *C. v. Belgium*, judgment of 7 August 1996, *Reports* 1996-III, pp. 922-23, § 25; *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2263, § 36; and *Buscemi v. Italy*, no. 29569/95, § 53, ECHR 1999-VI), the Court considers that her complaint has been adequately and sufficiently remedied (see *Sisojeva and Others*, cited above, § 102).

25. Consequently, the Court finds that both conditions for the application of Article 37 § 1 (b) of the Convention are met. The matter giving rise to the applicant's complaint can therefore now be considered to be "resolved" within the meaning of Article 37 § 1 (b). Finally, no particular reason relating to respect for human rights as defined in the Convention requires the Court to continue its examination of the application under Article 37 § 1 *in fine*.

26. Accordingly, the application should be struck out of the Court's list of cases.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that the matter giving rise to the applicant's complaint has been resolved and *decides* to strike the application out of its list of cases.

Done in English, and notified in writing on 10 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President