

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

GRAND CHAMBER

CASE OF JEUNESSE v. THE NETHERLANDS

(Application no. 12738/10)

JUDGMENT

STRASBOURG

3 October 2014

This judgment is final but may be subject to editorial revision.

In the case of Jeunesse v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Ann Power-Forde,
Işıl Karakaş,
Vincent A. De Gaetano,
Paul Mahoney,
Johannes Silvis,
Krzysztof Wojtyczek, *judges,*
and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 13 November 2013 and on 2 July 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 12738/10) 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 Surinamese national, Ms Meriam Margriet Jeunesse ("the applicant"), on 1 March 2010.

2. The applicant was represented by Ms G. Later, a lawyer practising in The Hague. The Netherlands Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicant alleged that the refusal to exempt her from the obligation to hold a provisional residence visa and the refusal to admit her to the Netherlands violated her rights under Article 8 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 4 December 2012 it was declared partly admissible by a Chamber of that Section composed of the following

judges: Josep Casadevall, President, Alvina Gyulumyan, Corneliu Bîrsan, Ján Šikuta, Luis López Guerra, Nona Tsotsoria and Johannes Silvis, judges, and Santiago Quesada, Section Registrar. On 14 May 2013 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

6. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from the non-governmental organisations Defence for Children and the Immigrant Council of Ireland – Independent Law Centre, the President having authorised them to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 November 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms L. EGMOND, Ministry of Foreign Affairs, *Deputy Agent*,
Ms C. COERT, Ministry of Security and Justice,
Ms L. HANSEN, Immigration and Naturalisation Service,
Ms N. JANSEN, Immigration and Naturalisation Service, *Advisers*;

(b) *for the applicant*
Ms G. LATER,
Mr A. EERTINK, *Counsel*,
Ms M. MARCHESE, *Adviser*.

The Court heard addresses by Ms Later and Ms Egmond as well as answers given by Ms Later, Mr Eertink and Ms Egmond to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1967 and is living in The Hague.

9. In March 1987 the applicant met and started a relationship with Mr W., who – like the applicant – was born and had always lived in Suriname. Both of them had acquired Surinamese nationality in 1975 when

Suriname gained its independence (Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (*Toescheidingsovereenkomst inzake nationaliteiten tussen het Koninkrijk der Nederlanden en de Republiek Suriname*), see paragraph 62 below). In September 1989, the applicant and Mr W. started to cohabit in the house of the latter's paternal grandfather in Suriname.

10. On 19 October 1991, Mr W. travelled from Suriname to the Netherlands, holding a Netherlands visa for the purpose of stay with his father in the Netherlands. In 1993, Mr W. was granted Netherlands nationality which entailed the renunciation of his Surinamese nationality.

11. Mr W. has one sister, two brothers and one half-brother who are living in the Netherlands. Two other half-brothers and one half-sister are living in Suriname. The applicant has one brother, G., who was expelled from the Netherlands to Suriname in 2009. The applicant has also one half-brother and one half-sister who are living in the Netherlands. She has another half-sister who is living in Suriname.

A. The applicant's requests for a Netherlands residence permit

12. Between 1991 and 1995, the applicant filed five unsuccessful requests for a Netherlands visa for the purpose of visiting a relative. These requests were rejected because her sponsor (*referent*) was insufficiently solvent, had failed to sign the required affidavit of support (*garantverklaring*) or had failed to supply sufficient information required for the assessment of the visa request. The applicant did not challenge any of these rejections in administrative appeal proceedings.

13. On 19 November 1996 the applicant filed a sixth visa request for the purpose of visiting a relative. After this request had been granted on 4 March 1997, the applicant entered the Netherlands on 12 March 1997 and did not return to Suriname when her visa expired 45 days later. To date, she has been staying in the Netherlands. She lived in Rotterdam until 20 July 1998, when she moved to The Hague. Since 17 December 1998 she has been living at the same address in The Hague.

1. The request of 20 October 1997

14. On 20 October 1997, the applicant applied for a residence permit. According to the applicant, she had done so for the purpose of taking up residence with her Netherlands-national partner Mr W. According to the Government, the applicant's stated aim had been to take up "paid employment". On 16 February 1998, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) decided not to process the application (*buiten behandeling stellen*) as the applicant had on two occasions failed to appear in person before the immigration authorities for the purpose of giving

further information about her application. When, on 13 February 1998, the applicant's lawyer had requested a new appointment on the ground that she would be unable to attend the interview scheduled for 16 February 1998, she was informed by the immigration authorities that – despite her lawyer's absence – the applicant should appear in person. The applicant did not appear on 16 February 1998. The Deputy Minister's decision of 16 February 1998 was notified to the applicant on 23 February 1998 and she was ordered to leave the Netherlands within seven days.

15. The applicant filed an objection (*bezwaar*) against the decision of 16 February 1998. As this objection was denied suspensive effect, she applied for a provisional measure (*voorlopige voorziening*) in the form of a court injunction preventing her expulsion pending the determination of her objection. This application was rejected on 23 December 1999 by the Acting President of the Regional Court (*rechtbank*) of The Hague sitting in Haarlem. The applicant's objection against the decision of 16 February 1998 was rejected by the Deputy Minister on 17 January 2000. The applicant's appeal against this decision to the Regional Court of The Hague and her accompanying application for a provisional measure were rejected on 12 July 2001 by the Regional Court of The Hague sitting in Utrecht. No further appeal lay against this ruling.

16. In the meantime, the applicant had married Mr W. on 25 June 1999 and, in September 2000, a son was born of this marriage. Under the Netherlands nationality rules, the applicant's child is a Netherlands national. Since the child was unwell, he required lengthy treatment in hospital. He is currently attending secondary school and has no health problems.

2. The request of 20 April 2001

17. On 20 April 2001, the applicant applied unsuccessfully for a residence permit on the basis of the so-called three-year policy (*driejarenbeleid*) or for compelling reasons of a humanitarian nature. Under this three-year policy a residence permit could be granted if a request for such a permit had not been determined within a period of three years for reasons not imputable to the petitioner and provided that there were no contra-indications such as, for instance, a criminal record. In the course of the proceedings on this request, the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Amsterdam granted the applicant's request for a provisional measure (injunction on removal) on 23 February 2004. The final decision was given on 17 May 2004 by the Regional Court of The Hague sitting in Amsterdam.

18. On 10 December 2005, a second child was born of the applicant's marriage. This child also holds Netherlands nationality.

3. The request of 23 January 2007

19. On 23 January 2007, the applicant filed a request for a residence permit for the purpose of stay with her children in the Netherlands. This request was rejected because the applicant did not hold the required provisional residence visa (*machtiging tot voorlopig verblijf*). Such a visa has to be applied for at a Netherlands mission in the petitioner's country of origin and it is a prerequisite for the grant of a residence permit (*verblijfsvergunning*) which confers more permanent residence rights. The applicant was not exempted from the obligation to hold a provisional residence visa. She challenged this decision unsuccessfully in administrative appeal proceedings in which the final decision was taken by the Regional Court of The Hague sitting in Haarlem on 19 April 2007.

20. On 7 May 2007, the applicant requested the Deputy Minister of Justice to reconsider (*heroverwegen*) the negative decision on her last request. On 28 September 2007, the applicant filed a complaint with the Deputy Minister on account of the latter's failure to reply to her request for reconsideration. By letter of 12 November 2007, the Deputy Minister informed the applicant that although her complaint concerning delay was well-founded there was no reason for a reconsideration of the decision.

4. The request of 28 September 2007

21. On 28 September 2007, the applicant applied for a grant of a residence permit at the discretion of the Deputy Minister (*conform beschikking staatssecretaris*) based on grounds of special and individual circumstances (*vanwege bijzondere en individuele omstandigheden*).

22. On 7 July 2008, the Deputy Minister of Justice rejected this application. The applicant filed an objection with the Deputy Minister against this decision as well as an application to the Regional Court of The Hague for a provisional measure (injunction on removal pending the objection proceedings). On 17 November 2008, having noted that this request was not opposed by the Deputy Minister, the Regional Court of The Hague granted the provisional measure. On 11 March 2009, after a hearing on the applicant's objection held on 15 January 2009, the Deputy Minister rejected the applicant's objection.

23. The applicant's appeal against the decision of 11 March 2009 to the Regional Court of The Hague and her accompanying application for a provisional measure in the form of an injunction on her removal pending the determination of her appeal were rejected on 8 December 2009 by the provisional-measures judge of the Regional Court of The Hague sitting in Haarlem. In its relevant part, this ruling reads as follows:

> "2.11 It is not in dispute that the appellant does not hold a valid provisional residence visa and that she is not eligible for an exemption from the requirement to hold such a visa under section 17 § 1 of the Aliens Act 2000 (*Vreemdelingenwet 2000*) or section 3.71 § 2 of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*). It is

only in dispute whether reason dictates that the defendant should exempt the appellant from the obligation to hold a provisional residence visa on the basis of section 3.71 § 4 of the Aliens Decree [for reasons of exceptional hardship (*onbillijkheid van overwegende aard*)].

2.12 The Regional Court finds that the defendant could reasonably conclude that in the present case there are no special and individual circumstances on the basis of which insistence on compliance with the visa requirement would entail exceptional hardship. ...

2.18 The appellant's reliance on Article 8 of the Convention fails. There is family life between the appellant and her husband and her minor children, but the defendant's refusal to exempt her from the obligation to hold a provisional residence visa does not constitute an interference with the right to respect for family life as the defendant's decision did not deprive her of a residence permit enabling her to enjoy her family life in the Netherlands.

2.19 It does not appear that there is a positive obligation for the Netherlands State under Article 8 of the Convention to exempt the applicant, contrary to the policy pursued in this area, from the obligation to hold a provisional residence visa. It is of importance at the outset that there has been no appearance of any objective obstacle to the enjoyment of family life outside the Netherlands. Taking into account the young age of the appellant's children, it can also reasonably be expected that they would follow the appellant to Suriname for the duration of the proceedings relating to the provisional residence visa. This is not altered by the fact that both children are Netherlands nationals. The fact that the appellant's husband is currently being detained gives no cause for finding that ... there is an objective obstacle.

2.20 The appellant has cited the judgments of the European Court of Human Rights in the cases of *Rodrigues da Silva* [*and Hoogkamer v. the Netherlands*, no. 50435/99, ECHR 2006-I], *Said Botan* [*v. the Netherlands* (striking out), no. 1869/04, 10 March 2009] and *Ibrahim Mohamed* [*v. the Netherlands* (striking out), no. 1872/04, 10 March 2009]. This cannot succeed, for the following reasons. The case of *Rodrigues da Silva* did not concern a temporary separation in connection with maintaining the requirement to hold a provisional residence visa, so the case cannot be said to be comparable. In the cases of *Said Botan* and *Ibrahim Mohamed* the European Court found that the reasons for lodging the complaints had been removed, because a residence permit had been granted to the complainants in those cases. For that reason, their complaints were not considered further. The Regional Court fails to see in what manner the European Court's findings in those two cases could be of relevance to the appellant's case.

2.21 The appellant has further invoked Article 2 of the International Convention on the Rights of the Child. In so far as the provisions invoked entail a directly applicable norm, they have no further implications beyond the fact that in proceedings such as those at hand, the interests of the children concerned must be taken into account. In the decision of 11 March 2009, the situation of the appellant's two minor children was explicitly taken into account in the assessment. As the provisions invoked do not contain a norm as regards the weight that must be given in a concrete case to the interests of a child, there is no ground for finding that those provisions have been violated.

2.22 The Regional Court will declare the appeal unfounded."

24. On 2 August 2009, upon his return to the Netherlands from a trip to Suriname for the funeral of his foster mother, the applicant's husband had

been found to have swallowed cocaine pellets. He was placed in pre-trial detention. On 8 October 2009, a single-judge chamber (*politierechter*) of the Haarlem Regional Court convicted him of offences under the Opium Act (*Opiumwet*) and sentenced him to seven months' imprisonment. On the basis of this conviction, the Netherlands Royal Constabulary (*Koninklijke Marechaussee*) included his name on a blacklist provided to airline companies operating direct flights between the Netherlands and Aruba, the former Netherlands Antilles, Suriname and Venezuela. His name was to remain on the list for a period of three years, the aim being to prevent him from reoffending. On 31 December 2009, after having served his sentence, the applicant's husband was released from prison. His name was removed from the airline blacklist on 2 August 2012.

25. The applicant's appeal of 7 January 2010 to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) against the judgment of 8 December 2009 of the provisional-measures judge of the Regional Court of The Hague was dismissed on 6 July 2010. The Administrative Jurisdiction Division found that the appeal did not provide grounds for quashing the impugned ruling (*kan niet tot vernietiging van de aangevallen uitspraak leiden*). Having regard to section 91 § 2 of the Aliens Act 2000, no further reasoning was called for as the arguments submitted did not raise any questions requiring a determination in the interest of legal unity, legal development or legal protection in the general sense. No further appeal lay against this decision.

5. The request of 16 April 2010

26. In the meantime, the applicant filed a fifth request on 16 April 2010 for a residence permit with the Minister of Justice (*Minister van Justitie*) for the purpose of stay with a child, arguing that she should be exempted from the obligation to hold a provisional residence visa on grounds of special and individual circumstances.

27. This request was rejected on 11 May 2010 by the Minister, who held that there was no reason to exempt the applicant from the obligation to hold a provisional residence visa and that the refusal of a residence permit was not contrary to Article 8 of the Convention. While accepting that there was family life within the meaning of Article 8 between the applicant, her husband and their children, the Minister found that there was no interference with the right to respect for family life as the refusal to grant the applicant's request for exemption did not deprive her of a residence permit which enabled her to exercise her family life in the Netherlands.

28. As to the question whether the applicant's rights under Article 8 entailed a positive obligation for the Netherlands to grant her a residence permit, the Minister found that the interests of the Netherlands State in pursuing a restrictive immigration policy outweighed the applicant's personal interest in exercising her right to family life in the Netherlands. In

balancing these competing interests, the Minister took into account the following: already in Suriname and before her arrival in the Netherlands the applicant had been in a relationship with her current spouse; she had entered the Netherlands without having been granted entry clearance for joining her partner as required under the relevant immigration rules; and she had created her family in the Netherlands without holding a residence permit. When it transpired in the course of the proceedings that the applicant was pregnant, the Minister further held that it had not been established, nor did it appear that the applicant would be unable – should hospitalisation be necessary – to give birth in a hospital in Suriname or that there would be any insurmountable objective obstacles to the exercise of family life in Suriname. On this point, the Minister noted that Dutch was spoken in Suriname and that the transition would not therefore be particularly difficult for the applicant's children, who could continue their education in Suriname in a normal manner.

29. The Minister added that the mere fact that the applicant's spouse and children were Netherlands nationals did not entail an automatic obligation for the Netherlands authorities to grant the applicant a residence permit, or lead to the conclusion that the exercise of family life would only be possible in the Netherlands. The Netherlands authorities could not be held responsible for the consequences of the applicant's personal choice to come to, settle and create a family in the Netherlands without any certainty as to her entitlement to permanent residence. In the balancing exercise, the Minister attributed decisive weight to the fact that the applicant had never resided lawfully in the Netherlands and that there was no indication whatsoever that it would be impossible to exercise family life in Suriname.

30. The Minister further rejected the applicant's argument that she ought to be exempted from the visa requirement, on the basis that *inter alia* the length of the applicant's stay in the Netherlands was a consequence of her personal choice to continue to remain there. She had met with several refusals of her applications for a Netherlands residence permit but had nevertheless opted each time to file a fresh request, thus accepting the risk that, at some point in time, she would have to leave the Netherlands, at least, temporarily. The Minister further considered that the applicant had been born and raised in Suriname where she had resided most of her life and, given her age, she should be regarded as capable of returning to and fending for herself in Suriname, if need be with financial and/or material support from the Netherlands, pending the determination of an application for a provisional residence visa to be filed by her in Suriname. The Minister concluded on this point that the case disclosed no circumstances warranting a finding that the decision not to exempt the applicant from the visa requirement constituted exceptional hardship within the meaning of section 3.71 § 4 of the Aliens Decree 2000.

31. On 17 May 2010, the applicant filed an objection against this decision with the Minister. She filed additional grounds for her objection and furnished further information by letters of 20 and 25 May and 8 June 2010.

32. On 2 July 2010, the applicant requested the Regional Court of The Hague to issue a provisional measure (injunction on expulsion pending the outcome of the objection proceedings).

33. On 3 August 2010, following a court hearing held on 28 July 2010 and having regard to pending proceedings taken by the applicant seeking deferral of her removal under section 64 of the Aliens Act 2000 (see paragraph 53 below), the provisional-measures judge of the Regional Court of The Hague sitting in Amsterdam rejected the request for a provisional measure on the basis that it was moot.

34. On 19 December 2011 the Minister rejected the applicant's objection of 17 May 2010. An appeal by the applicant against that decision was rejected on 17 July 2012 by the Regional Court of The Hague sitting in Dordrecht. In so far as relevant, its judgment reads:

> "2.4.1. It must be examined whether the defendant could have refused to exempt the appellant from the obligation to hold a provisional residence visa, as required under section 3.71 § 1 of the Aliens Decree 2000, on the ground that removal is not contrary to Article 8 of the Convention.
>
> 2.4.2. It is not in dispute between the parties that there is family life between the appellant and her husband and their three minor children. Refusing the application [for a residence permit] does not constitute interference within the meaning of Article 8 § 2 of the Convention. No residence permit which actually enabled the appellant to enjoy family life in the Netherlands has been taken away from her. The subsequent question arises whether there exist such facts and circumstances that the right to respect for family life may be said to entail a positive obligation for the defendant to allow the applicant to reside [in the Netherlands]. In making this assessment, a 'fair balance' must be found between, on the one hand, the interests of the alien concerned in enjoying family life in the Netherlands and, on the other, the general interest of the Netherlands State in pursuing a restrictive immigration policy. In this balancing exercise, the defendant has a certain margin of appreciation.
>
> 2.4.3. It was reasonable for the defendant to attach more weight to the general interest of the Netherlands State than to the personal interests of the appellant and her family members. The defendant did not have to accept an obligation to grant the appellant residence in the Netherlands on the basis of Article 8 of the Convention. In this balancing exercise, the defendant was entitled to weigh heavily to the appellant's disadvantage the fact that she had started family life in the Netherlands when she had not been granted a residence permit for this purpose, and that she had further intensified her family life despite the refusal of her requests for residence. This is not altered by the fact that for a certain period the appellant was lawfully resident while awaiting the outcome of proceedings concerning a request for a residence permit.
>
> 2.4.4. The defendant was entitled to take the position that the consequences of the appellant's choices were at her own risk. According to the case-law of the European Court of Human Rights (*Rodrigues da Silva and Hoogkamer v. the Netherlands* [no. 50435/99, ECHR 2006-I]), where family life has started while no residence

permit for that purpose has been granted, removal will lead to a violation of Article 8 only in the most exceptional circumstances. The appellant has not established that, as regards her and her family, there are such exceptional circumstances. Her reliance on the judgments in *Rodrigues da Silva and Hoogkamer* and *Nunez v. Norway* (no. 55597/09, 28 June 2011) fails, as her situation is not comparable to the one in the cases of *Rodrigues da Silva* and *Nunez*. In those cases it was established that the children could not follow their mother to the country of origin. With the removal of the mother, contact with the children would become impossible. However, in the appellant's case, it has not become sufficiently apparent that her husband and children could not follow her to her country of origin to continue family life there. The appellant has insufficiently demonstrated that her family members will encounter difficulties in entering Suriname. The consequence of her husband's inclusion on a blacklist is that airlines can refuse to allow him on direct flights from the Netherlands to the Netherlands Antilles, Aruba, Suriname and Venezuela during the period between 2 August 2009 and 2 August 2012. This does not mean that it is self-evident that the husband will not be admitted to Suriname. The appellant has not established that it would be impossible for her husband to travel to Suriname in another manner. In addition, it is important to note that registration on the blacklist is only of a temporary nature.

2.4.5. No other circumstances have appeared on the basis of which the existence of an objective obstacle to continued family life in Suriname must be accepted. There is also no question of excessive formalism. The appellant's situation is not comparable to the one in the case of *Rodrigues da Silva.* The defendant has taken the interests of the minor children sufficiently into account in the balancing exercise. The children were all born in the Netherlands and hold Netherlands nationality. At the time the impugned decision was taken, they were respectively eleven, six and one year old. The children have always lived in the Netherlands. Although the oldest child has built up bonds with the Netherlands, the defendant did not have to accept this as a basis for holding that the children could not take root in Suriname. In this connection it is also relevant that Dutch is spoken in Suriname and that both parents hail from Suriname.

2.4.6. This is not altered by the fact that the appellant's husband and children hold Netherlands nationality and, on the basis of Article 20 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), can derive rights from their EU citizenship. It can be deduced from the considerations of the Court of Justice of the European Union (hereinafter 'ECJ') in the *Dereci et al.* judgment of 15 November 2011 (C-256/11), in which a further explanation is given of the *Ruiz Zambrano* judgment of 8 March 2011 (C-34/09), that in answering the question whether a citizen of the EU who enjoys family life with a third-country national will be denied the right to reside in EU territory flowing directly from Article 20 of the TFEU, only a limited importance is given to the right to respect for family life. As follows from paragraphs 68 and 69 of the *Dereci* judgment, this right is not, as such, protected by Article 20 of the TFEU but by other international, EU and domestic rules and regulations, such as Article 8 of the Convention, Article 7 of the Charter of Fundamental Rights of the European Union, EU Directives and section 15 of the Aliens Act 2000. In answering this question the desire of family members to reside as a nuclear family unit in the Netherlands or the European Union is, *inter alia*, also of limited importance.

2.4.7. The situation of an EU citizen being denied the right to reside in EU territory arises only when the EU citizen is so dependent on the third-country national that, as a consequence of the decision by the defendant, he has no other choice than to stay with that national outside EU territory. In the appellant's case, that has not occurred. The appellant's children can be cared for by their father. The father also has Netherlands

nationality. The appellant's husband and children are not obliged or actually compelled to go with her to Suriname in connection with the application for a provisional residence visa. Their rights as EU citizens are thus not breached.

2.4.8. It was reasonable for the defendant to take the view that there was no appearance of very special individual circumstances leading to undue hardship. The proceedings concerning the appellant's previous requests for a residence permit and the course of events during her placement in aliens' detention for removal purposes cannot be regarded as such. The lawfulness of the decisions taken in those proceedings cannot be examined in the present appeal proceedings. The appellant has further not substantiated her claim that, when she submitted her first request for a residence permit, she complied with all the requirements and that she should then have been granted a residence permit. ..."

The Regional Court went on to find that the applicant had not substantiated her alleged medical problems or why these problems should lead to exempting her from the obligation to hold a provisional residence visa. The court further found that the applicant had not demonstrated her claim that, apart from the requirement to hold a provisional residence visa, she met all requirements for the issuance of a residence permit.

35. On 14 August 2012, the applicant filed a further appeal with the Administrative Jurisdiction Division. No further information about the proceedings on this latest request for a residence permit has been submitted by the parties.

B. Main steps taken aimed at the applicant's removal from the Netherlands and her placement in aliens' detention

36. On 5 January 2007, the aliens' police ordered the applicant to report to them on 10 January 2007 so that she could be served with notice to leave the country within two weeks. This order was withdrawn owing to the applicant's third request for a residence permit filed on 23 January 2007 (see paragraph 19 above).

37. On 26 February 2010, the applicant's lawyer was informed by the aliens' police that – as the applicant's appeal against the judgment of 8 December 2009 (see paragraphs 23 and 25 above) did not have suspensive effect – they would proceed with the applicant's removal.

38. On 10 April 2010, having failed to respond to a summons of 4 March 2010 to report to the aliens' police, the applicant was placed in aliens' detention (*vreemdelingenbewaring*) for removal purposes in accordance with section 59 § 1 (a) of the Aliens Act 2000. She was taken to the Zeist detention centre where she was found to be pregnant, her due date being 14 December 2010.

39. The applicant's three successive release requests were rejected by the Regional Court of The Hague sitting in Rotterdam on 27 April, 1 June and 8 July 2010, respectively. In each decision, the Regional Court found

that there were sufficient prospects of expulsion within a reasonable time frame and that the Netherlands authorities were pursuing the applicant's removal with sufficient diligence. In its rulings, the Regional Court also rejected the applicant's arguments that her pregnancy rendered her detention contrary to Article 3 and that, against that background, her conditions of detention were incompatible with that provision. In this context, in a letter of 29 June 2010 and addressed to the applicant's lawyer who submitted it in the proceedings to the Regional Court, the Netherlands section of Amnesty International expressed its concern about the applicant's placement in aliens' detention. Although aware that the applicant had failed to respect the duty to report imposed on her, Amnesty International considered that a less severe measure than deprivation of liberty would be appropriate in the particular circumstances of the applicant's case.

40. In the course of her placement in aliens' detention, the applicant, on 28 June, 15 July and 3 August 2010, also filed complaints about her conditions of detention with the competent Supervisory Board (*Commissie van Toezicht*) of the two detention centres where she was held. These complaints were decided in two decisions given on 12 and 29 November 2010, respectively. Apart from the applicant's complaint of 28 June 2010 that she had been required to wear restraints during transports to hospital, which was accepted as well-founded in the decision of 29 November 2010, the applicant's complaints were dismissed. On 6 June 2011 the Appeals Board (*beroepscommissie*) of the Council for the Administration of Criminal Justice and Juvenile Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*) gave final decisions on the applicant's appeals against the decisions of 12 and 29 November 2010. It held that the use of restraints for pregnant women was impermissible. It also held that the applicant had received too little supplementary nutrition upon arrival at the Rotterdam detention centre. These complaints were considered by the Court in its decision on admissibility of 4 December 2012 (see paragraph 4 above) and were declared inadmissible for the reasons set out therein.

41. The applicant was released from aliens' detention on 5 August 2010 and her third child was born on 28 November 2010.

42. On 25 September 2012, the Consulate General of Suriname in Amsterdam issued a Surinamese passport to the applicant, which is valid until 25 September 2017.

II. RELEVANT DOMESTIC AND SURINAMESE LAW

A. Dutch immigration law and policy

43. Until 1 April 2001, the admission, residence and expulsion of foreign nationals were regulated by the Aliens Act 1965 (*Vreemdelingenwet 1965*). Further rules were laid down in the Aliens Decree

(*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applied to proceedings under the Aliens Act 1965, unless indicated otherwise in this Act.

44. Under section 4:5 § 1 of the General Administrative Law Act, an administrative authority may decide not to process a petition where the petitioner has failed to comply with any statutory rule for processing the petition or where the information and documents provided are insufficient for assessing the petition, provided that the petitioner has been given the opportunity to complete the petition within a period fixed by the administrative authority concerned.

45. Under section 41 § 1 (c) of the Aliens Decree 1965, foreign nationals wishing to reside in the Netherlands for more than three months were required to hold, for admission to the Netherlands, a valid passport containing a valid provisional residence visa issued by a diplomatic or consular mission of the Netherlands in the country of origin or permanent residence, or failing that, the nearest country in which such a mission is established. The purpose of the requirement of this visa was, *inter alia*, to prevent unauthorised entry and residence in the Netherlands. Failing a provisional residence visa, entry and residence in the Netherlands were contrary to the provisions of the Aliens Act 1965. However, lack of a provisional residence visa could not lead to a refusal of a residence permit if, at the time of the application, all the other conditions had been met.

46. On 1 April 2001, the Aliens Act 1965 was replaced by the Aliens Act 2000. 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 Aliens Act 2000. Unless indicated otherwise in the Aliens Act 2000, the General Administrative Law Act continued to apply to proceedings on requests by aliens for admission and residence.

47. According to the transitional rules, set out in section 11 of the Aliens Act 2000, an application for a residence permit which was being processed at the time this Act entered into force was to be considered as an application under the provisions of the Aliens Act 2000. Because no transitional rules were laid down for the substantive provisions of the aliens' law, the substantive provisions of the Aliens Act 2000 took effect immediately.

48. Section 1 (h) of the Aliens Act 2000, as in force at the material time, provided:

> "In this Act and the provisions based upon it the following expressions shall have the following meanings: ...
>
> (h) provisional residence visa: a visa issued by a Netherlands diplomatic or consular mission in the country of origin or in the country of ordinary residence or by the Office of the Governor of the Netherlands Antilles or by the Office of the Governor of

Aruba in those countries, with the prior authorisation of Our Minister for Foreign Affairs, for a stay of longer than three months;"

49. Section 8(a), (f), (h) and (j) of the Aliens Act 2000 states:

"An alien is lawfully resident in the Netherlands only:

(a) on the ground of a residence permit for a fixed period as referred to in section 14 [of this Act, i.e. a residence permit granted for another purpose than asylum]; ...

(c) on the ground of a residence permit for a fixed period as referred to in section 28 [of the Act; i.e. a residence permit granted for asylum]; ...

(f) pending a decision on an application for the issue of a residence permit as referred to in sections 14 and 28 in circumstances where, by or pursuant to this Act or on the ground of a judicial decision, expulsion of the applicant should not take place until the decision on the application has been given; ...

(h) pending a decision on a notice of objection, review or appeal, in circumstances where, by or pursuant to this Act or on the grounds of a judicial decision, expulsion of the applicant should not take place until the decision on the notice of objection or notice of appeal has been given; ...

(j) if there are obstacles to the expulsion as referred to in section 64; ..."

50. Section 16 § 1(a) of the Aliens Act 2000 reads:

"1. An application for the issue of a residence permit for a fixed period as referred to in section 14 may be rejected if:

(a) the alien does not possess a valid provisional residence visa which corresponds to the purpose of the residence for which application has been made for a residence permit;"

51. Section 27 of the Aliens Act 2000 provides, in its relevant part, as follows:

"1. The consequences of a decision rejecting an application for the issue of a residence permit for a fixed period as referred to in section 14 or a residence permit for an indefinite period as referred to in section 20 shall be, by operation of law, that:

(a) the alien is no longer lawfully resident, unless another legal ground for lawful residence exists;

(b) the alien should leave the Netherlands of his own volition within the time limit prescribed in section 62, failing which the alien may be expelled, and

(c) the aliens supervision officers are authorised, after the expiry of the time limit within which the alien must leave the Netherlands of his own volition, to enter every place, including a dwelling, without the consent of the occupant, in order to expel the alien.

2. Paragraph 1 shall apply *mutatis mutandis* if:

(a) it has been decided under section 24 or under section 4:5 of the General Administrative Law Act that the application will not be processed; ..."

52. Section 62 § 1 of the Aliens Act 2000 reads:

"After the lawful residence of an alien has ended, he must leave the Netherlands of his own volition within four weeks."

53. Section 64 of the Aliens Act 2000 provides:

> "An alien shall not be expelled as long as his health or that of any of the members of his family would make it inadvisable for him to travel."

54. Section 3.71 § 1 of the Aliens Decree 2000 reads:

> "The application for a fixed-term residence permit, as referred to in section 14 of the Act shall be rejected if the alien does not hold a valid provisional residence visa."

55. According to section 3.1 § 1 of the Aliens Decree 2000, a foreign national who has made an application for a residence permit is not to be expelled, unless that application, according to the Minister, merely repeats an earlier application.

56. Under the Aliens Act Implementation Guidelines 2000, the obligation for a foreign national to obtain a provisional residence visa allows the Netherlands authorities to check that the foreign applicant meets all the conditions for the grant of that visa prior to his or her entry into national territory. The power to grant a provisional residence visa is vested in the Netherlands Minister of Foreign Affairs. An application for a provisional residence visa is, in principle, assessed on the basis of the same criteria as a residence permit. Only once such a visa has been issued abroad may the holder travel to the Netherlands and apply for a Netherlands residence permit. In the absence of a provisional residence visa, an alien's entry into and residence in the Netherlands are unlawful.

57. The Netherlands 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 directly applicable international agreements, or if their presence serves an essential Dutch interest, or for compelling reasons of a humanitarian nature (section 13 of the Aliens Act 2000). Respect for family life as guaranteed by Article 8 of the Convention constitutes an obligation under an international agreement.

58. The admission policy for family formation (*gezinsvorming*) and family reunification (*gezinshereniging*) purposes is laid down in Chapter B1 of the Aliens Act Implementation Guidelines 2000. A partner or spouse of a Netherlands national is, in principle, eligible for admission, if certain further conditions relating to matters, such as, public policy and means of subsistence are met.

59. Pursuant to section 3.71 § 1 of the Aliens Decree 2000, a petition for a residence permit for the purpose of family formation shall be rejected if the foreign petitioner 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 (section 17 § 1 of the Aliens Act 2000 in conjunction with section 3.71 § 2 of the Aliens Decree 2000), one of these categories being aliens whose removal is contrary to Article 8 of the Convention. In addition, under section 3.71 § 4 of the Aliens Decree 2000, the competent Minister may decide not to apply the first paragraph of that

provision if it is considered that its application will result in exceptional hardship (*onbillijkheid van overwegende aard*). Chapter B1/2.2.1 of the Aliens Act Implementation Guidelines 2000 sets out the policy on the application of the hardship clause.

60. Pursuant to Chapter A4/7.6 of the Aliens Act Implementation Guidelines 2000, pregnant women are not expelled by aircraft within the six weeks prior to delivery. The same provision applies to any woman in the first six weeks after having given birth. Outside this period, pregnancy – in the absence of medical complications – is not a reason for postponing expulsion.

61. According to section 6:83 of Book 1 of the Netherlands Civil Code (*Burgerlijk Wetboek*), as in force when the applicant married Mr W. on 25 June 1999, cohabitation of spouses was in principle obligatory. This provision was removed from the Civil Code by the Act of 31 May 2001 amending the rights and obligations of spouses and registered partners. This Act entered into force on 22 June 2001.

B. The Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality

62. Formerly a country (*land*) within the Kingdom of the Netherlands, Suriname became an independent republic on 25 November 1975. The Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality of 25 November 1975, *Tractatenblad* (Netherlands Treaty Series) 1975, no. 132, [1976] 997 United Nations Treaty Series (UNTS) no. 14598, as amended by the Protocol of 14 November 1994, *Tractatenblad* 1994, no. 280, in its relevant parts, provides as follows:

> "**Article 2**
>
> 1. The acquisition of Surinamese nationality pursuant to this Agreement shall entail the loss of Netherlands nationality.
>
> 2. The acquisition of Netherlands nationality pursuant to this Agreement shall entail the loss of Surinamese nationality.
>
> **Article 3**
>
> All Netherlands nationals of full age who were born in Suriname and whose domicile or place of actual residence is in Suriname on the date of the entry into force of this Agreement shall acquire Surinamese nationality. ..."

C. Surinamese immigration law and policy

63. The following information was taken from the Internet web pages of the Surinamese Ministry of Police and Justice (*Ministerie van Politie en*

Justitie), Department of Aliens' Affairs (*Hoofdafdeling Vreemdelingenzaken*) and the Surinamese Consulate General in Amsterdam. Aliens subject to visa requirements (*visumplichtige vreemdelingen*) may enter Suriname on a tourist visa for up to ninety days. If they wish to remain in Suriname for longer, they must first obtain a short-residence visa (*machtiging voor kort verblijf*, "MKV") via a Surinamese embassy or consulate in their country of origin. This document enables the alien to request a residence permit after arriving in Suriname.

64. The short-residence visa requirement is waived in respect of aliens of Surinamese origin. They may enter Suriname on a tourist's travel document and request a Surinamese residence permit after their arrival. This category is defined to include, *inter alios*, the following:

- persons born in Suriname who now have a nationality other than Surinamese;
- persons born outside Suriname to parents one or both of whom was, or were, born in Suriname, those persons having or having had legally recognised family ties (*familierechtelijke betrekkingen*) with said parent or parents, and who now have a nationality other than Surinamese;
- the spouse and minor children who actually belong to the family of one of the above.

65. In addition, a multiple-entry tourist visa valid for three years is available for aliens of Surinamese origin (provided that they have not been refused entry into Suriname during the preceding five years).

66. Certain foreign nationals, including Netherlands nationals, may purchase a single-entry "tourist card" which in the case of aliens of Surinamese origin (as defined in paragraph 63 above) is valid for up to six months (ninety days in all other cases). Documents to be submitted are a passport valid for six months or more on arrival, a return ticket and (if applicable) proof of Surinamese origin.

D. Surinamese Act on Persons of Surinamese Origin, 2013

67. On 20 December 2013, the National Assembly of Suriname adopted the Act on Persons of Surinamese Origin (*Wet Personen van Surinaamse Afkomst*), also known as the Diaspora Act. This Act was published in no. 8 of the 2014 Official Gazette (*Staatsblad*) of Suriname on 21 January 2014 and entered into force three months after publication. This Act defines a "person of Surinamese origin" as someone who does not hold Surinamese nationality but who is born in Suriname or who has at least one parent or two grandparents hailing from Suriname. Under section 9 of this Act, a person holding the status of "person of Surinamese origin" as defined in this Act has the right to enter Suriname freely and to settle and work there, and

the visa requirements that apply to foreign nationals in these areas are waived for a "person of Surinamese origin".

E. Official language of Suriname

68. Dutch is the sole official language of Suriname and thus used by government and administration. It is taught in public education. It is also widely spoken in addition to the traditional languages of particular ethnic groups.

III. RELEVANT EUROPEAN AND INTERNATIONAL LAW

A. Relevant European Union law

69. The applicable rules for family reunification under European Union ("EU") law differ depending on the status of the person receiving the alien for family reunification purposes. There are three main categories:

1. Family reunification of a third country national (TCN) legally residing in an EU Member State who wishes a member of his/her family, also a TCN to join him/her.
   This situation is covered by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
2. Family reunification of a citizen of an EU Member State who has exercised his/her freedom of movement within the EU by settling in another EU Member State than the EU Member State of which he/she is a national.
   This situation falls within the scope of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
3. Family reunification in an EU Member State of a "static" national of that State living there (i.e. a citizen of the EU who has always lived in the EU Member State of which he/she is a national and who has not moved across the border to another EU Member State).
   This category falls, in principle, within the remit of Member States and outside the scope of Directives 2003/86 and 2004/38, unless a refusal to admit the TCN would deprive the "static" EU citizen concerned of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen (see paragraphs 71-72 below).

70. Article 20 of the Treaty on the Functioning of the European Union (TFEU) reads as follows:

"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

71. On 8 March 2011 the Court of Justice of the European Union gave its ruling in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, which concerned the right of two Columbian nationals, Mr Ruiz Zambrano and his wife, to reside in Belgium on account of the Belgian nationality of their two minor children who had acquired such nationality due to the fact that they were born in Belgium during a period when their parents had been granted humanitarian protection allowing them to reside in Belgium. However, the parents then lost their protective status in Belgium. In this case, the Court of Justice held as follows:

"Article 20 [of the TFEU] is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

72. In its judgment of 15 November 2011 in Case 256/11, *Dereci and Others v. Bundesministerium für Inneres*, the Court of Justice examined, *inter alia*, the question whether Article 20 of the TFEU was to be interpreted as prohibiting a Member State from refusing to grant a right of residence to a national of a non-member country who wished to live with their spouse and minor children, who were European Union citizens resident in Austria and nationals of that Member State, whilst the spouse and children had never exercised their EU right to free movement and were not maintained by the national of a non-member country. It held as follows:

"64 ... the Court has held that Article 20 [of the TFEU] precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit would have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case."

B. The International Convention on the Rights of the Child

73. The relevant provisions of the United Nations Convention on the Rights of the Child ("CRC"), signed in New York on 20 November 1989, read as follows:

Preamble

"The States Parties to the present Convention, ...

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ...

Have agreed as follows: ...

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6 ...

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall ... have the right from birth... to know and be cared for by his or her parents...

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ...

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. ...

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right ..."

74. In its General Comment No. 7 (2005) on Implementing child rights in early childhood, the Committee on the Rights of the Child – the body of independent experts that monitors implementation of the CRC by its State Parties – wished to encourage recognition by States Parties that young children are holders of all rights enshrined in the said Convention and that early childhood is a critical period for the realisation of these rights. The best interests of the child are examined, in particular, in section 13, which provides as follows:

"13. Best interests of the child. Article 3 [of the CRC] sets out the principle that the best interests of the child are a primary consideration in all actions concerning children. By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities. The principle of best interests appears repeatedly within the Convention (including in articles 9, 18, 20 and 21, which are most relevant to early childhood). The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children's rights:

(a) Best interests of individual children. All decision-making concerning a child's care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children.

States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; ..."

75. For a fuller discussion, see *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 49-55, ECHR 2010).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

76. The applicant complained that to deny her residence in the Netherlands was contrary to her right to respect for family life as guaranteed by Article 8 of the Convention. This provision reads 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 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."

A. The parties' submissions

1. The applicant

77. The applicant claimed that the refusal to exempt her from the obligation to hold a provisional residence visa and the refusal to admit her to the Netherlands breached her right under Article 8 of the Convention. Her intention had been from the outset to settle in the Netherlands with her partner, later her husband, and this had at all relevant times been known to the Netherlands immigration authorities. The applicant submitted that the Court should place emphasis on the question as to whether a fair balance had been struck between the competing interests involved. She considered that in her case no fair balance had been struck for the following reasons.

78. In the first place, the applicant and her family, i.e. her husband and their three children, had lived together as a family in the Netherlands for the past sixteen years. They had lived in the same family home since 1999. All her children had been born in the Netherlands and both her husband and her children were Netherlands nationals. The applicant, herself, was a former Netherlands national prior to the independence of Suriname.

79. To refuse the applicant a Netherlands residence permit would inevitably result in the family becoming separated. Her husband was gainfully employed in the Netherlands and he was the sole financial provider for the family. His income was required to support the family and to pay for debts incurred because the applicant was never permitted to work in the Netherlands and thus to contribute to the family income. The distance between the Netherlands and Suriname was obviously too far for her husband to commute and he did not have a job in Suriname.

80. The applicant further submitted that, whilst she had never been granted a residence permit, she had in fact been lawfully present during a large part of her time in the Netherlands in that she had been allowed to remain whilst awaiting the outcome of the proceedings on her requests for a

residence permit which, moreover, had been unnecessarily protracted. She argued that the years that had passed since her first lawful admission into the Netherlands must be taken into consideration. Even during periods when she was eligible for removal, no practical steps had been taken by the authorities to ensure her effective removal. During this time her family life had been established and developed. She also pointed out that she had never lied about her identity and, unlike the situation of the applicants in the cases of *Nunez v. Norway*, (no. 55597/09, 28 June 2011); *Arvelo Aponte v. the Netherlands*, (no. 28770/05, 3 November 2011); and *Antwi and Others v. Norway*, (no. 26940/10, 14 February 2012), she had no criminal record.

81. The applicant considered that it was in the best interests of her children that she be permitted to reside in the Netherlands. She was their primary carer and they needed their mother to be with them. Her husband was working shift work, at times, and this prevented him from returning home every day. The children depended on her emotionally and psychologically and it was in their best interests to have her stay with them and a separation would have adverse effect on their development. She relied upon an expert report that was supplied to the Court in support of her claim that the children had already been adversely affected by the separation that they had endured during their mother's placement in aliens' detention. To grant the applicant a residence permit would give the children the stability, certainty and a sense of security they needed.

82. The applicant contended that it was also in the best interests of her children – who were rooted in the Netherlands – to preserve their family unit in the Netherlands. Leaving the Netherlands with their mother to move to Suriname would have a negative impact upon them. The children were settled in schools and had their friends there. They were all doing very well at school. They had no friends in Suriname and they were not used to Surinamese schools.

83. The applicant also argued that it would be contrary to the rights of her children under Article 20 of the TFEU if they would be compelled to leave the Netherlands and the European Union as a result of the applicant being refused residence in the Netherlands. Article 20 of this Treaty, as interpreted by the Court of Justice of the European Union in its *Ruiz Zambrano* judgment (see paragraph 71 above), entitled her to remain in the European Union on the strength of the Netherlands nationality of her dependent children. The applicant's children could not be held responsible for choices made by their parents.

84. The applicant thus concluded that, in the circumstances of her case, the general interests of the Netherlands State did not outweigh the rights of the applicant and her family under Article 8 and that insufficient weight had been given to the best interests of her children. The outcome reached by the Netherlands authorities was not in line with Article 3 of the United Nations

Convention on the Rights of the Child nor was it proportionate for the purposes of Article 8 of the Convention.

2. The Government

85. The Government accepted that the applicant had family life in the Netherlands within the meaning of Article 8 of the Convention. Since she was still in the process of seeking a first admission for residence purposes, the pertinent question was whether the Netherlands authorities were under a positive obligation to allow her to reside in the Netherlands for the purpose of enabling her to enjoy family life with her husband and children there. This was the essential question in the case, and not the requirement to hold a provisional residence visa when applying for a residence permit.

86. As to whether a fair balance had been struck, the Government pointed out that, in view of the Court's case-law under Article 8 of the Convention relating to family life formed during an unlawful stay, it was only in the most exceptional circumstances that the removal of the non-national family member would be contrary to Article 8.

87. Noting that the applicant and Mr W. already had a relationship when they were living in Suriname, the Government observed that – before travelling to the Netherlands – the applicant had never applied for a (provisional residence) visa for the purpose of visiting or living with Mr W., even though she had been in a relationship with him since 1987. The applicant seemed to have made this decision deliberately with a view to settling in the Netherlands and thus presenting the Netherlands authorities with a *fait accompli*. When she travelled to the Netherlands on a 45-day tourist visa for the purpose of visiting a relative, she knew that her visa could not serve as a basis for a residence permit.

88. The Government pointed out that only after almost six months of illegal residence in the Netherlands did the applicant submit her first request for a residence permit. That request was not examined because she had failed to cooperate with the authorities. Despite being notified on two occasions, she had not appeared in person before the immigration authorities and had failed to submit the requisite documents. None of the applicant's subsequent requests for a residence permit – all of which were determined within a reasonable time – had been made for the purpose of reunification with Mr W., whereas she now complained of having been denied a residence permit enabling her to exercise her family life.

89. The Government further submitted that the applicant had been given notice that she was obliged to leave the Netherlands on several occasions during the periods in which she was not permitted to stay to await the outcome of her domestic proceedings. However, she had failed to comply. The applicant had no grounds whatsoever for believing, and had not been given any reason to believe, that she would be issued with a residence permit.

90. The Government considered that there were no "highly exceptional circumstances" in the applicant's case. There were no objective impediments or insurmountable obstacles for the applicant to exercise her family life in Suriname. Both she and her husband were born and raised there and had lived in Suriname for most of their lives. They were both adults and capable of building a life in Suriname where they still had relatives. Furthermore, Dutch was the official language of Suriname in government and administration and it had not been demonstrated that her husband would not be permitted to settle in Suriname. The applicant's decision to further her family life in the Netherlands and to have children there, even though she and her husband knew that she was not lawfully residing there, was her own choice. On that account, the applicant was responsible for the consequences of that decision.

91. As regards the weight to be given to the best interests of the children, the Government considered that the birth of a child, even if the child held the nationality of the host country, did not, in itself, give its parent(s) the right of residence. Admittedly, it was, in principle, important for children to grow up in the vicinity of both parents. However, in the case at hand there was no question of the family being separated as there were no objective insurmountable obstacles to exercising the right to family life elsewhere.

92. According to the Government, the applicant's children – now 13, 8 and 3 years old, respectively – were still relatively young and adaptable. It could be expected that they would adjust to the culture of Suriname where Dutch was spoken. Any other conclusion would mean that emigration would almost always be contrary to the general interest of any child who had become integrated in the country where it was born and being raised. The Government argued that it could not be inferred from the Court's case-law that the general interest of children could be the sole decisive factor. There was no evidence of specific circumstances, such as a guardianship arrangement, special education or health issues requiring that the applicant's children be regarded as being "bound" to the Netherlands. The Government lastly submitted that the applicant had no direct or derived residence rights under EU law and that her situation bore no resemblance to that of the *Ruiz Zambrano* case (see paragraph 71 above) invoked by her.

93. The Government concluded that a careful review of the facts of the case had been carried out in order to determine whether the applicant should be granted residence in the Netherlands on the basis of Article 8. Only after this had been found not to be the case, did the Netherlands authorities conclude that the applicant was not exempted from the obligation to hold a provisional residence visa. The applicant had deliberately used her entry visa for purposes other than a brief family visit and should not be entitled to remain in the Netherlands merely because of her wish to live there and her filing of repeated residence requests.

3. Third parties

(a) Defence for Children

94. Defence for Children ("DFC") emphasised – referring to the general principles contained in the United Nations Convention on the Rights of the Child ("CRC") which has been ratified by all Member States of the Council of Europe – that this Convention prescribed that the best interests of the child were to be a primary consideration in all decisions relating to children.

95. DFC argued that the general "best interests of the child" principle should, in cases about family reunification, be interpreted and explained with reference to the rights in the CRC regarding the relationship between children and their parents. It considered that, in order to determine the best interests of a specific child, it was of essential importance to take into consideration his or her personal development. DFC further enumerated elements which, according to the Committee on the Rights of the Child, a monitoring body of independent experts overseeing the implementation of the CRC, must be taken into account when assessing and determining the best interests of the child in each individual case.

96. DFC further considered that in the Court's recent case-law on Article 8 of the Convention the "best interests of the child" principle had become more firmly established as a crucial factor in examining situations concerning children. It lastly submitted that the Netherlands immigration authorities fell short of their obligation under the CRC and Article 8 to make the best interests of the child a primary consideration in their decisions.

(b) The Immigrant Council of Ireland – Independent Law Centre

97. The Immigrant Council of Ireland ("ICI") submitted that the protection of the EU Directive 2004/38/EC only operates in respect of EU nationals who have exercised their right of free movement under EU rules. It confirmed that there exists no codified EU secondary legislation expressly regulating the residence rights of third country national (TCN) family members of "static" EU citizens.

98. However, referring to various rulings of the Court of Justice of the European Union, the ICI submitted that because the decision to grant or withhold residence rights to TCNs could have a significant impact on the continued enjoyment by EU citizens of their right under Articles 20 and 21 of the TFEU to reside in the territory of the EU, it was those Treaty provisions which brought such situations within the scope of EU law. Relying on the *Ruiz Zambrano* ruling (see paragraph 71 above), it argued that Article 20 grounded a right of residence for a TCN who was a family member of a "static" EU citizen where the consequence of a refusal of

residence would mean that the EU citizen involved would have to leave the territory of the EU. Since the only way in which that eventuality could be avoided was by the family relocating to another EU Member State, States were – according to the ICI – under an EU law duty to ascertain whether or not it was reasonable to expect them to do so.

99. The ICI further described the "effective legal protection" which EU law required. It advocated for coherence on European family reunification principles, arguing that the Court should ensure that the level of human rights protection under the Convention was at least equal to the level of protection afforded by EU law without preventing the Court from giving a more extensive human rights protection than was guaranteed under EU law.

B. The Court's assessment

1. General considerations

100. The present case concerns essentially a refusal to allow the applicant to reside in the Netherlands on the basis of her family life in the Netherlands. It has not been disputed that there is family life within the meaning of Article 8 of the Convention between the applicant and her husband and their three children. As to the question of compliance with this provision, the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country (see, for instance, *Nunez*, cited above, § 66). The corollary of a State's right to control immigration is the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence.

101. The Court notes the applicant's clear failure to comply with the obligation to obtain a provisional residence visa from abroad before seeking permanent residence rights in the Netherlands. It reiterates that, in principle, Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory (see, as a recent authority, *Djokaba Lambi Longa v. the Netherlands* (dec.), no. 33917/12, § 81, 9 October 2012).

102. Although the applicant has been in the Netherlands since March 1997, she has – apart from the initial period when she held a tourist visa valid for 45 days – never held a residence permit issued to her by the Netherlands authorities. Her stay in the Netherlands therefore cannot be equated with a lawful stay where the authorities have granted an alien

permission to settle in their country (see *Useinov v. the Netherlands* (dec.), no. 61292/00, 11 April 2006). However, the Court notes that until 22 June 2001 she was under a civil obligation, pursuant to section 6:83 of Book 1 of the Civil Code, to live with her husband (see paragraph 61 above).

103. Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; *Benamar v. the Netherlands* (dec.), no. 43786/04, 5 April 2005; *Priya v. Denmark* (dec.) no. 13594/03, 6 July 2006; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 43, ECHR 2006-I; *Darren Omoregie and Others v. Norway*, no. 265/07, § 64, 31 July 2008; and *B.V. v. Sweden* (dec.), no. 57442/11, 13 November 2012).

104. The instant case may be distinguished from cases concerning "settled migrants" as this notion has been used in the Court's case-law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8. In such cases, the Court will examine whether the interference is justified under the second paragraph of Article 8. In this connection, it will have regard to the various criteria which it has identified in its case-law in order to determine whether a fair balance has been struck between the grounds underlying the authorities' decision to withdraw the right of residence and the Article 8 rights of the individual concerned (see, for instance, *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX; *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII; *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008; *Savasci v. Germany* (dec.), no. 45971/08, 19 March 2013; and *Udeh v. Switzerland*, no. 12020/09, 16 April 2013).

105. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual

residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (see *Ahmut v. the Netherlands*, 28 November 1996, § 63, *Reports of Judgments and Decisions* 1996-VI). As regards this issue, the Court will have regard to the following principles as stated most recently in the case of *Butt v. Norway* (no. 47017/09, § 78 with further references, 4 December 2012).

2. Relevant principles

106. While 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.

107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be 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 the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Butt v. Norway*, cited above, § 78).

108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-

established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *M. v. the United Kingdom* (dec.), no. 25087/06, 24 June 2008; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, § 39; *Arvelo Aponte v. the Netherlands*, cited above, §§ 57-58; and *Butt v. Norway*, cited above, § 78).

109. Where children are involved, their best interests must be taken into account (see *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005; *mutatis mutandis*, *Popov v. France*, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; *Neulinger and Shuruk v. Switzerland*, cited above, § 135; and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see *Neulinger and Shuruk v. Switzerland*, cited above, § 135, and *X v. Latvia*, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.

3. Relevance of EU law

110. As to the applicant's reliance on the *Ruiz Zambrano* judgment of the Court of Justice of the EU (see paragraph 71 above), the Court emphasises that, under the terms of Article 19 and Article 32 § 1 of the Convention, it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 54 with further references, 20 September 2011).

111. In the *Dereci* case (see paragraph 72 above), the Court of Justice of the EU, whilst finding no obligation under EU law to admit the third country national, also held that this finding was without prejudice to the question whether, on the basis of the right to respect for family life, a right

of residence could not be refused but that this question had to be considered in the framework of the provisions on the protection of fundamental rights.

112. It is precisely in that latter framework that the Court will now examine the applicant's case, namely – and as noted above – the alleged failure of the Netherlands authorities to protect the applicant's fundamental right to respect for family life as guaranteed by Article 8 of the Convention.

4. Application of the above general considerations and relevant principles to the present case

113. The Court reiterates that the applicant's presence in the Netherlands has been irregular since she outstayed the 45-day tourist visa granted to her in 1997. It is true that at that time admission to the Netherlands was governed by the Aliens Act 1965 but the applicant's situation – in view of the reason why her request for a residence permit of 20 October 1997 was not processed (see paragraph 14 above) – is governed by the Aliens Act 2000. Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware – well before she commenced her family life in the Netherlands – of the precariousness of her residence status.

114. Where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited

the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see *Neulinger and Shuruk v. Switzerland*, cited above, § 135, and *X v. Latvia*, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see *Tuquabo-Tekle and Others v. the Netherlands*, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23

(under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

125. The applicant claimed 30,000 euros (EUR) in compensation for pecuniary damage due to loss of benefits under various social security

schemes to which her family would have been entitled as from 2008 had her request for a residence permit filed on 28 September 2007 been granted.

126. The applicant further claimed EUR 8,640 in compensation for non-pecuniary damage for having been unlawfully held in aliens' detention for removal purposes in 2010.

127. She lastly claimed EUR 1,714 in compensation for non-pecuniary damage for the trauma, anxiety and upset she and her family, in particular the children, suffered for an extended number of years.

128. The Government contested the applicant's claim for pecuniary damage, submitting that there was no causal link between any violation found and the social security benefits referred to.

129. The Government also contested the applicant's claim for compensation for non-pecuniary damage based on the days she had spent in aliens' detention, pointing out that her complaints about this detention had been declared inadmissible by the Court on 4 December 2012.

130. As to the remainder of the applicant's claim for compensation for non-pecuniary damage, the Government considers that the granting of a residence permit constituted sufficient satisfaction.

131. Since Article 8 does not, as such, guarantee a right to social security benefits, the Court considers that there is no causal link between the violation found and the applicant's claim for pecuniary damage based on the finding of a violation of the applicant's right to respect for her family life. Noting that the applicant's complaints relating to her placement in aliens' detention were rejected in the Court's decision on admissibility of 4 December 2012 (see paragraph 4 above), this part of the applicant's claim for non-pecuniary damages must be dismissed.

132. As to the remainder of the applicant's claim for compensation for non-pecuniary damage, the Court considers that the applicant must have suffered moral damage that cannot be sufficiently compensated by the mere finding of a violation of Article 8. It awards the applicant the sum claimed, namely EUR 1,714, in respect of non-pecuniary damage.

B. Costs and expenses

133. The applicant claimed EUR 564.50 for hotel expenses incurred for attending the hearing before the Grand Chamber. She did not submit a claim for travel costs for attending the hearing. Nor did she submit a claim for legal expenses.

134. The Government did not express an opinion on the matter.

135. According to the Court's established case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. Having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum

claimed in full. It therefore awards the applicant EUR 564.50 under this head.

C. Default interest

136. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by fourteen votes to three, that there has been a violation of Article 8 of the Convention;

2. *Holds*, by fourteen votes to three,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 1,714 (one thousand seven hundred and fourteen euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 564.50 (five hundred and sixty four euros and fifty cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 October 2014.

Lawrence Early Jurisconsult	Dean Spielmann President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Villiger, Mahoney and Silvis is annexed to this judgment.

D.S.
T.L.E.

JOINT DISSENTING OPINION OF JUDGES VILLIGER, MAHONEY AND SILVIS

1. Understanding the judgment in the present case in the context of the Court's case-law is not an easy task, since the exceptional character of the particular circumstances seems to override most of the previously followed jurisprudential principles. We were unable to follow the majority in finding that the domestic authorities failed to live up to a positive obligation by not granting the applicant residence in the Netherlands upon any of her repetitive requests. These requests for residence were lodged on various grounds, and filed from Dutch territory during an illegal overstay after expiration of a short-term tourist visa. From one point of view – that of the present dissenters – the Court can be seen to be acting as a first-instance immigration court, in disregard of the principle of subsidiarity; although, in all fairness, the rejoinder to that criticism is presumably that the Court has merely taken the approach of granting paramount importance to the best interests of the children. Is the Court striking the right balance, while the respondent State had failed to do so? Who is to perform such a balancing exercise going into the factual, detailed merits of the applicant's individual circumstances? Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court should require strong reasons to substitute its own view for that of the domestic courts (see *Von Hannover v. Germany (No. 2)*, nos. 40660/08 and 60641/08, § 107).

2. In summary, the facts are as follows. The applicant, a Surinamese woman, was allowed to enter the Netherlands only once for a limited period of 45 days for the declared purpose of a tourist visit to an aunt in 1997. After expiration of her visa she overstayed illegally in the Netherlands. The applicant then repeatedly requested legal residence and all of these requests were ultimately refused, while one such request is still pending. In the meantime, the applicant had started building a family life in the Netherlands despite having no legitimate expectation of being granted permanent legal residence in the country, a factor that was at all times perfectly well known to herself and her partner. Her partner/husband is of Surinamese origin and holds Dutch nationality. Both of them have lived most of their lives in Suriname, and indeed they cohabited there before coming to the Netherlands. The applicant and her husband have three children, all holding Dutch nationality by virtue of their father's nationality. The applicant, her husband and her children have led a continuous family life together in the Netherlands in the period under consideration. The children have never visited Suriname. The official language of Suriname is Dutch.

3. At the outset it is important to observe that the subject-matter of the Court's judgment is not interference in family life by the State. Rather, the judgment goes to the issue of the Contracting States' positive obligations regarding family life in the sphere of immigration. If this judgment is to be taken as establishing principled guidelines, it (a) expands the positive obligations incumbent on the State under the Convention in the interface of immigration and family law, (b) thus shrinks the margin of appreciation in relation to family life created during illegal overstay, (c) virtually disregards the attitude of the applicant as a relevant matter of consideration, (d) upgrades the obligation to take into account the best interests of the children. However, it must be observed that most of these seemingly fundamental jurisprudential developments are not reflected in the applicable general principles as hitherto formulated by the Court in its case-law and reiterated in the current judgment. They appear only under the surface in the application of these principles to the facts of the case. Perhaps this judgment by the Grand Chamber is not to be taken as establishing principled guidelines? Such ambiguity would be a worrying signal for the future performance of the Court's advisory role under Protocol No. 16.

4. The underlying question of principle is whether foreign nationals have a claim, on the basis of Article 8 of the Convention, to obtain from a Contracting State permission to enter and/or reside on the latter's territory in order to join or remain with their relatives who have legal residence there. In the Court's longstanding case-law this question is answered mainly in the negative. True, the Court does acknowledge that Article 8 is capable of being applicable under its family-life head, but it has concluded most of the time that the immigration treatment accorded to these persons was not such as to violate this provision, regard being had to their situation and the general interest of the community. The overriding consideration highlighted in this case-law is that they are foreign nationals, that is to say members of a category in respect of whom the States enjoy, under international law, as is stressed in all the relevant decisions, a virtually absolute right of control over entry into their territory and discretionary power in the matter of admission and residence. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country (see, for instance, *Nunez v. Norway*, no. 55597/09, § 66, 28 June 2011); and it does not prevent the Contracting States from enacting into law and enforcing a strict, even very strict, immigration policy. In concrete terms, the Court has taken the stance that a Contracting State is not obliged under the Convention to accept foreign nationals and permit them to settle except in cases where family life could not be lived elsewhere than on its soil. In the great majority of cases, it has pointed out that such family life could flourish in another country.

5. Thus, having chosen not to apply for a provisional residence visa from Suriname prior to travelling to the Netherlands, the applicant had no right whatsoever to expect to obtain any right of residence by confronting the Netherlands authorities with her presence in the country as a *fait accompli* (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). However, taking into account the particulars of the case, the Court considers that granting residence to the applicant on the territory of the Netherlands is the only appropriate way to respect her family life and that, by not taking such a decision to grant residence, the national authorities have failed to meet the positive obligation which Article 8 placed on them.

6. Two other cases spring to mind in which the Court may seem to have taken a somewhat similar position; both concerned the Netherlands (*Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00; and *Şen c. les Pays Bas*, no. 31465/96 – the last mentioned decision not being available in English and not being cited by the Court in the present judgment). Both of these cases concerned the reunification of families by admitting a child to the territory of the host State (the Netherlands) where the parent or parents had legal residence. The integration of the children concerned into the family unit was regarded as necessary for their development in view of their young age (nine years in *Şen* and fifteen years in *Tuquabo-Tekle and Others*). It should be observed that neither of these two cases concerned family-formation during an illegal overstay in the host State, but that, on the contrary, in both instances the request to have the children enter the State was filed before they had entered the State, in compliance with the applicable immigration law – quite unlike the situation in the present case. In both of these previous cases, where the children themselves were applicants, the Court concluded that the Netherlands had a positive obligation to allow the children to reunify with their parent(s) lawfully on Dutch territory.

7. In the present case the original complaint of the applicant was that the respondent State had not allowed her to file a request for residence from its territory. It is noteworthy that the Court has not changed its position on the legitimacy of the immigration condition contested by the applicant. It reiterates in paragraph 101 that, in principle, Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. This matter is not further addressed in the

judgment because the Court, after having reformulated the complaint *proprio motu* (in paragraph 76 - the original complaint being set out in paragraph 77), decides on the merits that in the particular circumstances of the case denial of residence violates the obligation to respect family life. The particular circumstances taken into consideration by the Court are that the husband and children all hold Dutch nationality; that the children have always lived in the Netherlands; that the applicant's husband provides for the family by working full-time in a job that includes shift work, with the consequence that he is absent from the home on some evenings; and that, as a result, the applicant is the primary care-taker of the children. What is remarkable is that the Court performs a balancing exercise of its own as regards the factual, detailed merits of the individual circumstances affecting the applicant, although it cannot be said that the domestic authorities did not themselves have full and careful regard to the relevant principles, considerations and aspects as developed in the Court's case-law (see paragraph 34).

8. After years of legal battle the respondent State is reproached by the Court for having "tolerated" her presence as long as it did (paragraph 116), having allowed her the opportunity to raise a family. The Court equates the absence of a forced removal with tolerance of her presence. While this precarious situation continued for such a lengthy period of time, during which, according to the Court, for a large part it was open to the authorities to remove her, the applicant was enabled to establish and develop strong family, social and cultural ties in the Netherlands. The Court's reasoning can hardly be understood as applying the principle that family-creation without having stable grounds for residence is at the risk of those who do so in a situation that is known to them to be precarious. The margin of appreciation, which was wide in such circumstances, has undergone a hot wash in this case.

9. Where parents make personal choices, the State's positive obligations under Article 8 are generally spoken of as being of secondary importance and almost the same goes for facing consequences of deliberate acts. Thus, imprisonment of fathers sentenced for having committed a crime rarely raises issues under Article 8 of the Convention, even though their children are liable to suffer from it. The same goes for divorce. The present case, of course, is not at all about a committed crime or a divorce; nor is it about an eventual rupture of family life caused by the State. It is about a family wishing to establish a particular place of residence. What would be the perspective in cases of chosen emigration from the Netherlands in contrast with this case of refused residence? Many parents seek economic or other opportunities abroad; and nowadays Suriname is a notably popular destination. Even though children of such emigrants might prefer to stay

where they reside, they would be obliged to follow their parents. In such cases of chosen emigration the State has generally speaking no positive obligation to intervene. It is commonly understood that respect for family life implies that the best interests of the children are then considered to be best served by accepting the consequences of the (lawful) choices made by their parents, unless fundamental rights of the children (such as those protected by Article 3) would thereby be violated. Shifting the responsibility for consequences of choices made by parents to the State is, in our view, in principle not conducive to the furtherance of the best interests of the children with regard to family life. There would also be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves (see *Butt v. Norway*, no. 47017/09, § 79).

10. On our analysis of the facts, the balancing exercise between the interests of the applicant and her family, on the one hand, and the general interest of the community, on the other, was performed by the national authorities, including the independent and impartial domestic courts, in a full and careful manner, in conformity with the well-established principles of the Court's case-law. The majority holds a different view. The approach adopted by the Court in the present case in effect involves giving to those prospective immigrants who enter or remain in the country illegally and who do not properly and honestly comply with the prescribed conditions for seeking residence a special premium, in terms of Convention protection, over those who do respect the applicable immigration law by remaining in their country of origin and conscientiously complying with the procedures laid down for seeking residence. The result is liable to be to encourage illegal entry or over-staying and refusal to comply with the prescribed immigration procedures and judicially sanctioned orders to leave the country. The right answer in hard cases is the one that fulfils the obligation of the community to treat its members in a civilised but also coherent and principled manner. In replacing the domestic balancing exercise by a strong reliance on the exceptional character of the particular circumstances, the Court is drifting away from the subsidiary role assigned to it by the Convention, perhaps being guided more by what is humane, rather than by what is right.