



ECtHR- Konstatinov v. The Netherlands

The applicant of Roma origin was denied a residence permit to the Netherlands on the basis of the applicant's husband failing to meet the requirements under domestic immigration rules and because of the applicant's multiple convictions. The Court held the Contracting State had struck a fair balance between the applicant's Article 8 rights and its own interests in regulating its immigration.

Case name (in original language) : Konstatinov v. The Netherlands, Application no. 16351/03

Case status: Decided

Case number: 16351/03

Citation: Konstatinov v. The Netherlands, Application no. 16351/03, European Court of Human Rights

Date of decision: 26/04/2007

State: Netherlands

Court / UN Treaty Body: European Court of Human Rights

Language(s) the decision is available in: English

Applicant's country of birth: Montenegro

Applicant's country of residence: Netherlands

Legal instruments: European Convention on Human Rights (ECHR), European Union law, Other international law

Key aspects: Family reunification, Residence permit, Respect for private and family life, Stateless status and documentation, Statelessness determination

Relevant Legislative Provisions:

s. 21 of The Aliens Act 1965

s. 67 of The Aliens Act 2000

Chapters A3/4.2.2, A5/6.4, AB1 of the Aliens Act Implementation Guidelines

s. 197, s. 310, s. 311, s. 312 of the Criminal Code

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

Facts

The applicant is of Roma origin and was born in Serbia but left at the age of seven with her father following the death of her mother. The applicant resided in The Netherlands and is known to the local authorities under multiple aliases. The applicant was involved in a Roma marriage with Mr. G., whose nationality is unknown, and holds a Dutch permanent residence permit granted in 1988. The applicant applied for a Dutch residence permit to stay with her partner. In 1989, before the outcome of the application, the applicant and Mr. G. had a son (L.G). On 13 February 1990, the Deputy Minister of Justice rejected the applicant's request for a residence permit, on the basis that Mr. G. failed to meet the minimum income requirement under the applicable immigration rules.

Following a brief period of leaving the Netherlands, the applicant returned in 1991 to marry Mr. G. under civil law and filed a subsequent request for a Dutch residence permit, submitting a valid at the time Yugoslav passport. There was no Government response regarding the application for the seven years after its submission.

During these seven years, between 1992 and 1998, the applicant was convicted of robbery and theft on six occasions, crimes carrying various prison sentences.

The Deputy Minister of Justice gave a decision on the application following a complaint by the applicant's lawyer due to the delayed response. The application was rejected based on lacking a valid provision residence visa and not meeting the minimum income requirement under the applicable immigration rules, as he solely relied on benefits.

In addition, the Deputy Minister noted the applicant's convictions, relying on public-order considerations to oppose the granting of a residence permit. The Deputy Minister ordered a five-year exclusion order based on her criminal record in The Netherlands, stating that the Government's interest in protecting public order and

preventing crime, outweighed the applicant's right to family life in the Netherlands granted by Article 8 of the Convention.

The applicant appealed to the Regional Court of The Hague on 10 August 2000 opposing the objection. On 12 July 2001, the Deputy Minister dismissed the objection on grounds relating to Mr. G. not meeting the minimum income requirement and the applicant amassing further convictions until May 2001 for shoplifting. The Deputy Minister also rejected the applicant's stateless status submission based on her possession of a Yugoslav passport. The Deputy Minister also rejected her arguments under Article 8 of the Convention for the same reason.

On 10 October 2002, the Court held that the applicant's exclusion order did not interfere with her family life, as no objective obstacles were evident to prevent the applicant from enjoying her full rights in Yugoslavia. The Court held that the Contracting State was effective in balancing the competing interests of both parties in its justification.

Legal arguments by the applicant

The applicant argued that expulsion from The Netherlands would constitute an unjustified interference with her right to a private and family life, as protected by Article 8 of the Convention.

The applicant claimed that she had lived in The Netherlands for 21 years, with her son and husband. Her son had attended school in the country and all of them spoke Dutch. The applicant also noted that her husband's mother and his six siblings were living in the Netherlands, demonstrating strong ties with the Contracting State.

The applicant claimed that the refusal of her requests for legal residency since 1991 had entitled her husband to reduced benefits, resulting in financial problems that led to his criminal record. It was also raised that Mr. G.'s inability to meet the minimum income requirement of the immigration rules and thus the denial of a residence permit, was due to weight and health issues rendering him unable to work.

The applicant argued that it was uncertain whether she and her son could obtain Yugoslav citizenship. She claimed that relocating to Yugoslavia was unreasonable, considering neither her son nor husband had ever been in the country and did not speak the language. With regards to Mr. G.'s precarious nationality, it was not

certain he would be admitted in any event.

On this basis, the applicant argued expulsion from the Netherlands would result in a breach of her right to family life provided by Article 8 of the Convention.

Legal arguments by the opposing party

The Government argued that the applicant's claim to a right to family life, under Article 8 of the Convention did not amount to a positive obligation of the state. The applicant had never resided in the Netherlands lawfully and her husband had never met the minimum income requirements as provided by the immigration rules. The Government argued that there was no justification for the applicant to exercise her right to family life within the Netherlands.

As the applicant and her son were both citizens of the former State Union of Serbia and Montenegro, no obstacles existed in preventing the applicant from exercising her right to family life outside of the Netherlands. The Government noted that there had been no evidence to imply why the applicant's son could not stay with his paternal evidence until his coming of age.

The Government raised the applicant's most recent criminal conviction, of aggravated theft in 2005, as an example of a threat to the peace and public order of Dutch society, which resulted in the exclusion order. The applicant, aware that this made her ineligible for the residence permit, continued engaging in that type of behaviour.

The Government, therefore, submitted that the denial of the residence permit for the applicant in the Netherlands struck a reasonable balance between the competing interests of protection of public order and the right to the enjoyment of family life.

Decision & Reasoning

The Court reiterated the *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 42, judgment, 1 December 2005, which provides that in regard to Article 8 of the Convention, a balancing exercise must be carried out between the rights of the individual and the community of the country in question. The Court noted that in immigration cases concerning family life, the margin varies, and many factors have to be taken into account. In relevance to the applicant's case, these

factors include the insurmountable obstacles in the way of the family living in the country of origin, whether there are factors such as breaches of immigration law, and considerations of public order weighing in favour of exclusion.

Precarious immigration status

The Court relied on the *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006 judgment. The court noted that where the family life was created at a time when the applicant was aware the immigration status of one of them was precarious, it is likely only to be in exceptional circumstances that the removal of the non-national will constitute a violation of the Convention under Article 8. The Court highlighted that the applicant's relationship with Mr. G. developed, as well as the birth took place while the persons involved were aware of the applicant's precarious immigration status. The applicant and her husband were also aware that it was unlikely for that status to change whilst he did not meet the requirements of the domestic immigration rules for a residence permit.

The Court held the minimum income requirement under the immigration rules to be reasonable and stated that it had not been demonstrated that Mr. G. had ever made any efforts to comply with this requirement. The applicant's claim, being incapable to work, was according to the Court unsubstantiated.

The Court noted the applicant's various criminal convictions further rendered her immigration status precarious, relying on the judgment in *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006 that the Contracting States are entitled to expel an alien convicted of criminal offences.

Insurmountable obstacles for the exercise of the family life

The Court noted the applicant's son coming of age imminently and relied on *Ezzouhdi v. France*, no. 47160/99, § 34, 13 February 2001, to note that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency. The medical history of the applicant's son was not considered to amount as indicative of a further element of dependency.

On the applicant's submission of her stateless status, the Court held the fact that the applicant was holding a valid Yugoslav passport to be enough to dismiss this claim. The Court reiterated that the exclusion order was of a temporary validity, not a permanent exclusion and therefore it could be lifted after a limited number of

years of residency outside of the Netherlands.

The Court, therefore, held, based on the above considerations, that the Netherlands struck a fair balance between the applicant's interests of enjoying the right to family life and its interests in controlling its immigration and in the prevention of crime or disorder.

Decision documents

[Konstatinov%20v.%20The%20Netherlands.pdf](#)

Outcome

The Court held that there was no violation of the applicant's rights granted under Article 8 of the Convention.

Caselaw cited

Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 42, 1 December 2005
Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 39, ECHR 2006
Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006
Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001