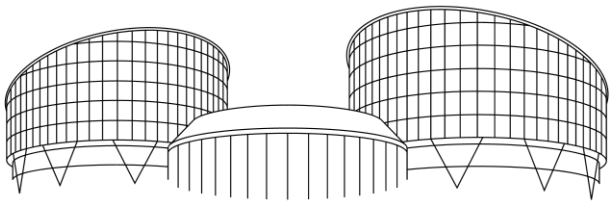

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF ARVELO APONTE v. THE NETHERLANDS

*(Application no. 28770/05)*

JUDGMENT

STRASBOURG

3 November 2011

**FINAL**

04/06/2012

*This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.*

**In the case of** Arvelo Aponte v. the Netherlands**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 4 October 2011,

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

## PROCEDURE

1. The case originated in an application (no. 28770/05) 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 Venezuelan national, Ms Diana Begilia Arvelo Aponte ("the applicant"), on 4 August 2005.

2. The applicant was represented by Mr S.J. van der Woude, a lawyer practising in Amsterdam. The Dutch Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and their Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicant alleged a violation of her right to respect for her family life as guaranteed by Article 8 of the Convention due to the refusal of the Netherlands Government to grant her a residence permit, based primarily on an old conviction of a narcotics offence committed in Germany. She further complained of the lack of an effective domestic remedy within the meaning of Article 13 of the Convention in respect of her complaint under Article 8.

4. On 9 September 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (former Article 29 § 3).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 in Caracas (Venezuela) and currently lives in Amsterdam.

6. On 17 March 1996 the applicant flew from Venezuela to Frankfurt. At the airport, German officials discovered 691.6 grams of cocaine on one of the applicant's travelling companions, on the basis of which the applicant and her companions were arrested. On 21 October 1996 the Frankfurt am Main Regional Court (*Landesgericht*) convicted the applicant of participation in the deliberate importation of 691.6 grams of cocaine and sentenced her to two years and six months imprisonment. The applicant did not appeal the judgment. She was granted early release on 25 August 1997 and, on the same day, was expelled from Germany to Venezuela. The German authorities did not impose an exclusion order on the applicant.

7. In 2000 the applicant travelled as a tourist to the Netherlands where she met and started a relationship with a Netherlands national, Mr T. On 27 October 2000, a request for advice on her eligibility for a provisional residence visa (*machtiging tot voorlopig verblijf*) for the purpose of stay with Dutch partner was filed on behalf of the applicant. Such a visa entitles the holder to enter the Netherlands in order to apply for a residence permit for a stay exceeding three months. An application for a provisional residence visa is in principle assessed on the basis of the same criteria as a residence permit. On 9 April 2001, a positive advice was issued.

8. The applicant subsequently returned to Caracas where she applied for a provisional residence visa at the Netherlands mission. According to the applicant, the question whether she had ever been convicted of a criminal offence was not raised in the procedure on her request for a provisional residence visa and, being unaware that this would be relevant, she had not volunteered this information either.

9. Following the transmission of a positive advice of the Netherlands Aliens Police Service (*Dienst Vreemdelingenpolitie*) to the Netherlands mission in Caracas, in which the latter were requested to inform the applicant that, in order to quality for a residence permit, she would be required to sign a formal statement to the effect that she had never been the subject of criminal proceedings and/or a criminal conviction (*antecedentenverklaring*; hereinafter "declaration on criminal antecedents"), the applicant was provided on 27 April 2001 with a provisional residence visa by the Netherlands Minister of Foreign Affairs. According to the applicant, the information about the declaration on criminal antecedents was not given to her when she received the provisional residence visa at the Netherlands mission in Caracas.

10. On 2 May 2001 the applicant returned to the Netherlands where, to date, she has been cohabiting with Mr T.

11. On 11 May 2001 the applicant filed a request for a temporary regular residence permit (*verblijfsvergunning regulier voor bepaalde tijd*) for the purpose of stay with her Netherlands partner Mr T. When she was confronted with the prescribed declaration on criminal antecedents, she refused to sign it and her conviction in Germany came to light.

12. On 15 August 2001, the applicant was informed of the Minister's intention (*voornemen*) to declare her an undesirable alien entailing the imposition of an exclusion order (*ongewenstverklaring*). The applicant was given the opportunity to react to this intention in the course of an interview conducted by the Aliens' Police (*vreemdelingenpolitie*) on 28 August 2001.

13. On 16 October 2001, the prosecution department at the Amsterdam Regional Court (*arrondissementsparket*) was requested to consider whether the facts of which the applicant had been convicted in Germany constituted a criminal offence under Dutch law and whether the sentence imposed was comparable to the sentence that would be imposed by a Netherlands judge if the offence had been committed in the Netherlands. In its reply of 6 March 2002, the prosecution department stated that participation in the deliberate importation of cocaine constituted a serious criminal offence (*misdrijf*) under Dutch law, attracting a prison sentence of up to 12 years'. It further stated that the applicant, if she were convicted in the Netherlands, would probably be sentenced to 15 to 24 months' imprisonment on the understanding that a judicial examination and determination of sentence obviously depended on the specific circumstances of each individual case.

14. By decision of 21 March 2002, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's request for a residence permit. The Deputy Minister further declared the applicant an undesirable alien entailing the imposition of a ten-year exclusion order, as it had appeared that the applicant had been convicted on 22 October 1996 by the Frankfurt am Main Regional Court of participation in the deliberate importation of cocaine for which she had been sentenced to two years and six months' imprisonment. Having noted the contents of the letter of 6 March 2002 of the prosecution department at the Amsterdam Regional Court, the Deputy Minister found that the judgment of the Frankfurt am Main Regional Court did not substantially differ from the judgment that would have been passed by a Netherlands court. While acknowledging that the exclusion order constituted an interference with the applicant's right to respect for her family life, the Minister considered that this was justified in the interests of public safety (*openbare orde*) and the prevention of crime, and that the general interests of the State thus outweighed those of the applicant.

15. On 14 May 2002, the applicant lodged an objection (*bezwaar*) against the decision. She argued that, as she had been granted a provisional

residence visa, she had a legitimate expectation that she would be granted a residence permit as well. She further argued that a Dutch court would have passed a much more lenient sentence than the German court had done and that forcing her to leave would constitute an unjustified interference with her right to respect for family life now that she had been legally residing in the Netherlands since 2 May 2001.

16. As a decision to impose an exclusion order is immediately enforceable and an appeal against such a decision does not enjoy automatic suspensive effect, the applicant applied on 4 June 2002 to the Regional Court (*rechtbank*) of The Hague for a provisional measure (*voorlopige voorziening*) in order to stay her expulsion pending the objection proceedings.

17. The applicant and her partner married in Amsterdam on 7 February 2003. On 11 April 2004 a son was born of this marriage. The applicant had decided that, in view of her age, it would be unwise to wait too long before conceiving a child, despite her uncertain residence status.

18. In the meantime, on 31 March 2004, the applicant was heard on her objection lodged on 14 May 2002 before an official board of enquiry (*ambtelijke commissie*). This board also put questions to her husband who attended the hearing, who stated *inter alia* that he had a reasonable command of Spanish but that he did not wish to settle in Venezuela given the bad economic situation there. The applicant stated *inter alia* that she was in contact with her mother and two brothers who were living in Venezuela.

19. On 7 June 2004 the Minister for Immigration and Integration (*Minister van Vreemdelingenzaken en Integratie*; the successor to the Deputy Minister of Justice) dismissed the applicant's objection on the grounds that the applicant could not claim a legitimate expectation to be granted a residence permit on the basis of the provisional residence visa and that a Dutch court would have imposed a sentence approaching the sentence handed down by the German court. Furthermore, the Minister held that the interference with the applicant's family life was justified in order to protect public safety (*openbare orde*) and to prevent crime in view of the applicant's drug-related conviction, and that there were no objective obstacles standing in the way of the applicant's husband and child following her to Venezuela.

20. On 8 July 2004, the Regional Court of The Hague sitting in Amsterdam – unaware of the fact that the applicant's objection had been determined on 7 June 2004 – granted the provisional measure that she had requested on 4 June 2002. As its requests of 3 February 2004 and 25 March 2004 to the Minister for information about the state of affairs in the objection proceedings had remained unanswered, it concluded that apparently the Minister did not attach great weight to the applicant's speedy removal from the Netherlands and therefore granted the provisional measure.

21. By 9 June 2004 the applicant had already filed an appeal with the Regional Court of The Hague against the dismissal of her objection, raising largely the same grounds and elaborating her claim that she was unlikely to have been sentenced to more than six months' imprisonment had she been tried by a Dutch court. She based this assertion on a document containing indicative guidelines for the determination of sentences for drug couriers, in use by judges in the Netherlands. A sentence of less than six months in the applicant's case would have meant, according to the regulations in force, that she would have been eligible for a residence permit.

22. On 20 August 2004, after a hearing held on 13 August 2004, the Regional Court of The Hague sitting in Amsterdam denied the applicant's appeal. The court agreed with the Minister that there was no question of a legitimate expectation. It further found that, based on the advice of the public prosecution department, the Minister had correctly estimated the length of the sentence that a Dutch court would have handed down. As regards Article 8 of the Convention, the court held that the interference with the applicant's family life was justified in order to protect public safety and to prevent crime and that there were no objective obstacles to the applicant and her family continuing their family life in Venezuela. In this context it considered that the conviction concerned a narcotics offence, that – although eight years had elapsed since this conviction whereas the applicant had not reoffended since – this did not affect the serious nature of this offence and that – unlike the situation in the case of *Boultif v. Switzerland*, (no. 54273/00, ECHR 2001-IX) – the applicant had never held a residence permit. It further took into account that the applicant's marriage and the birth of her child were posterior to the decision to impose an exclusion order and found that there were no objective obstacles for the applicant and her family to continue their family life in Venezuela. It therefore concluded that the public interest outweighed the personal interests of the applicant and her family.

23. On 14 September 2004 the applicant appealed the judgment of the Regional Court to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*; "the Division") on largely the same grounds. The applicant also argued that the Regional Court had merely carried out a marginal assessment (*marginale toetsing*) by examining the reasonableness of the decision of the Minister to deny the applicant's claim under Article 8 of the Convention, whereas the matter should have been considered on the merits as well. The applicant further claimed that the Regional Court had misinterpreted the principle of objective obstacles to the family starting anew in Venezuela.

24. The applicant also petitioned the President of the Administrative Jurisdiction Division for a provisional measure on 15 September 2004. The President denied the request as there were no grounds on which to assume that the impugned decision would be overturned on appeal.

25. On 15 February 2005 the Administrative Jurisdiction Division rejected the further appeal, holding:

> "What has been raised in the grievances does not provide grounds for quashing the impugned ruling (*kan niet tot vernietiging van de aangevallen uitspraak leiden*). Having regard to article 91 § 2 of the Aliens Act 2000, no further reasoning is called for, since the arguments submitted do not raise questions which require determination in the interest of legal uniformity, legal development or legal protection in the general sense."

No further appeal lay against this ruling.

26. The applicant currently still resides in the Netherlands and has never reoffended.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Until 1 April 2001, the admission, residence and expulsion of aliens 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.

28. 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.

29. According to the transitional rules, set out in article 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 set for the substantive provisions of the aliens' law, the substantive provisions under the Aliens Act 2000 took effect immediately.

30. 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 international agreements, or if their presence serves an essential Dutch interest, or for compelling reasons of a humanitarian reason (article 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.

31. As a rule, anyone wishing to apply for a residence permit in the Netherlands must first apply from his or her country of origin to the Netherlands Minister of Foreign Affairs for a provisional residence visa.

Only once such a visa has been issued abroad may the holder travel to the Netherlands and apply for a residence permit for the Netherlands. An application for a provisional residence visa is in principle assessed on the basis of the same criteria as a residence permit.

32. The admission policy for family formation (*gezinsvorming*) and family reunion (*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.

33. Pursuant to article 3.20 of the Aliens Decree 2000, a residence permit for the purposes of family reunion or family formation can be refused if the alien constitutes a threat to public order or national security. In this respect, article 3.77 § 1(c) of the Aliens Decree 2000 reads in its relevant part that a threat to public order exists when:

> "c. the alien has been convicted of a criminal offence and sentenced to either a non-suspended prison sentence or custodial measure, a community service order or non-suspended financial penalty, or if, in relation to a criminal offence, the alien has accepted an out-of-court settlement or if a punishment order has been issued against him by a public prosecutor."

Article 3.77 § 2 of the Aliens Decree 2000 provides that, in applying Article 3.77 § 1(c), also violations of public order committed outside of the Netherlands are taken into account, provided that they constitute a serious criminal offence (*misdrijf*) under Dutch law.

34. A past criminal conviction is not permanently held against the person concerned. Like the delays that apply to a request to lift an exclusion order, a past conviction is no longer held against a petitioner for a residence permit once a period of ten (for drugs or violent offences) or five (for other offences) years has elapsed, provided that the petitioner has not reoffended.

35. Article 67 of the Aliens Act 2000 provides that a foreign national may be declared an undesirable alien, entailing the imposition of an exclusion order, on the ground, *inter alia*, that he or she has been convicted of a serious offence carrying a prison sentence of three years or more, or poses a danger to public order. An exclusion order entails a ban on residing in or visiting the Netherlands. An exclusion order is immediately enforceable and the person on whom it is imposed is informed at the time of notification of this decision that he or she is obliged to leave the Netherlands immediately, that is within 24 hours.

36. An exclusion order can be challenged in administrative law appeal proceedings under the terms of the General Administrative Law Act. Such appeal proceedings do not have automatic suspensive effect.

37. Article 91 § 2 of the Aliens Act 2000 provides as follows:

> "If the Administrative Jurisdiction Division of the Council of State finds that a complaint raised does not provide grounds for overturning [the impugned ruling], it may, in giving reasons for its decision, limit itself to that finding."

38. Article 197 of the Criminal Code (*Wetboek van Strafrecht*) provides that an alien who stays in the Netherlands while he or she knows that an exclusion order has been imposed on him or her commits a criminal offence punishable by up to six months' imprisonment or a fine of up to 4,500 euros.

39. An exclusion order may be revoked, upon request, if the alien concerned has been residing outside the Netherlands for an uninterrupted period of ten years (article 68 of the Aliens Act 2000). Such revocation entitles the alien to seek readmission to Netherlands territory subject to the conditions that are applicable to every alien.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant complained of an unjustified interference with her right to respect for her family life as guaranteed by Article 8 of the Convention due to the refusal of the Netherlands Government to grant her a residence permit, based primarily on an old conviction of a narcotics offence committed in Germany. In so far as relevant, Article 8 of the Convention 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. Admissibility

41. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The applicant's submissions*

42. The applicant submitted that the refusal to grant her a residence permit and to impose an exclusion order constituted a disproportionate interference with her right to respect for family life. In the applicant's view, she was entitled to expect that she would be granted a residence permit for the purpose of starting a family with her Dutch partner since her request for a provisional residence visa, which was assessed on the same criteria as a residence permit, had been granted. Emphasising that the actual point of requiring aliens to apply for a provisional residence visa in their country of origin is for the assessment of that alien's eligibility for a residence permit to take place in his/her home country rather than on Dutch soil, the applicant argued that in such a system it stands to reason that – once a provisional residence visa has been granted – a residence permit can only be denied in "exceptional circumstances", as indeed provided for in Chapter B1 1.1.8 of the Aliens Act Implementation Guidelines 2000. Such situations usually involve a subsequent intervening change in circumstances such as loss of employment, the end of the relationship, new crimes committed etc.

43. The applicant argued that, although the immigration rules allow the denial of a residence permit on the grounds that the alien petitioner constitutes a threat to public order, there was no reason for holding that she posed such a threat as her conviction was an old one, predating her request for a provisional residence visa. It could thus not be said that this conviction amounted to an "exceptional circumstance" within the meaning of the Aliens Act Implementation Guidelines 2000. The applicant pointed out that she had not sought to conceal her past conviction vis-à-vis the Netherlands authorities; she had simply answered the questions put to her when she applied for a provisional residence visa and no question had been put to her about any criminal prosecutions or sentences. Furthermore, the idea that a five-year old conviction would stand in the way of a residence permit had never crossed her mind. So when the provisional residence visa was granted, she had been very happy as she then knew that she would be granted a residence permit.

44. The applicant further submitted that, under the immigration rules as in force at the material time, a prison sentence of less than six months could not result in a decision to impose an exclusion order. Relying on sentencing guidelines for drug couriers ("*oriëntatiepunten straftoemeting drugskoeriers"*), used by the Haarlem Regional Court as of 1 May 2003 and according to which a judge at this court – competent to try drug couriers found at Schiphol airport – would have imposed 240 hours' community service plus 4-6 months' imprisonment for the offences of which she had been found guilty, the applicant argued that the estimate of sentence given

by the public prosecution department in the domestic proceedings was much too high which had resulted in the imposition of an exclusion order with far-reaching consequences for her family life in the Netherlands.

45. Furthermore, the Netherlands immigration policy at issue came down to an automatic exclusion of alien convicts instead of ensuring an assessment of the actual real danger posed to public order by the alien concerned. Underlining that she had never reoffended whereas she had been living in the Netherlands since 2001, the applicant maintained that the only reason why the Netherlands authorities denied her the possibility to enjoy her family life in the Netherlands was a sentence imposed 14 years ago.

46. As regards continuing her family life in Venezuela, the applicant claimed that her husband hardly spoke Spanish and that he could never reasonably hope to get a decent job in Venezuela; a poor country afflicted by unemployment, violence and crime. She further explained that her husband would never consent to move to Venezuela and that for this reason she had not left the Netherlands. In this connection she further pointed out that the Netherlands authorities had never taken any action aimed at her removal from the Netherlands.

47. The applicant therefore concluded that, in refusing her request for a residence permit and imposing the exclusion order, no fair balance had been struck.

*2. The Government's submissions*

48. The Government submitted that the applicant was not entitled to expect that she would be granted a residence permit. Admittedly, she was given a provisional residence visa – erroneously, as it subsequently transpired – but that did not alter the fact that a residence permit could still be refused, for example, if the applicant was considered to pose a threat to public order. Given her criminal record, the applicant ought to have realised that refusal was a real possibility in her situation. The Government emphasised that the offence of which the applicant had been convicted in Germany, i.e. participation in the deliberate importation of cocaine, was a serious offence under Dutch law carrying a prison sentence of up to 12 years' and constituted a very serious violation of public order transcending national boundaries. It related to the smuggling of a drug that has a destructive impact on human health and is a root cause of social dislocation and related problems affecting the fabric of society.

49. As regards the estimate of the sentence made by the public prosecution department in the applicant's case, the Government submitted that the guidelines referred to by the applicant applied only as of 1 May 2003, i.e. a considerable time after the applicant's conviction in Germany and after 21 March 2002 when her request for a residence permit was rejected and the exclusion order imposed. The guidelines did apply when the applicant's objection was determined on 7 June 2004. Furthermore,

these sentencing guidelines only related to a very specific group of drug couriers, namely the so-called "body packers" ("*bolletjesslikkers*") arrested at Schiphol airport. The guidelines were drawn up as part of an attempt to deal with the exponential increase as from the end of 2001 in cocaine smuggling by couriers via Schiphol airport, creating capacity problems in various parts of the criminal justice system. The Government further submitted that in any event, under the policy on initial permission for residence, the severity of the sentence played no role in the application of the public order criterion. It was sufficient that the offence of which a petitioner had been convicted was a serious one (*misdrijf*) under Dutch law and that the comparable sentence in the Netherlands would be a term of unsuspended imprisonment or detention order, an alternative sanction or a fine. Therefore, even assuming that in the applicant's case the lightest prison sentence under the sentencing guidelines, i.e. five months, was applicable, her application for a residence permit would still have been refused.

50. The Government accepted that the fact that the applicant's conviction occurred some time ago and that she had not been convicted again since her release in 1997 constituted mitigating circumstances. However, in the Government's opinion, these carried insufficient weight to offset the gravity of her offence. In assessing the threat the applicant posed to Dutch society, the nature of the offence committed by her should take precedence over the estimated risk that she may or may not reoffend.

51. As regards the length and nature of the applicant's stay in the Netherlands, the Government emphasised that the applicant had never held a residence permit. Referring to the Court's decision in the case of *Useinov v. the Netherlands* (no. 61292/00, 11 April 2006), the Government contended that, although the applicant was allowed to stay in the Netherlands pending the outcome of her request for a residence permit, this could not be equated with lawful stay where the authorities had explicitly granted an alien permission to settle in their country. A stay in the host country in these circumstances remained uncertain and it did not follow from the fact that such permission enables the alien concerned to establish or intensify family life that the alien was entitled to expect that his/her residence will be tolerated.

### *3. The Court's assessment*

52. The Court notes at the outset that it is not in dispute that the applicant's relationship with Mr T. and their minor child constitutes "family life" for the purposes of Article 8 and that the refusal to grant her a residence permit and her exclusion from the Netherlands affected that family life.

53. The Court reiterates at the outset that 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 the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. The Court does not find it necessary to determine whether in the present case the impugned refusal to grant the applicant a residence permit and to impose an exclusion order on her constitute an interference with her right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation. In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation (see, *inter alia*, *Konstatinov v. the Netherlands*, no. 16351/03, § 46, 26 April 2007; *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 42, 1 December 2005; *Gül v. Switzerland*, 1 February 1996, § 63, *Reports of Judgments and Decisions* 1996-I; and *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 41, Series A no. 172).

54. The Court further reiterates that, where immigration is concerned, Article 8 does not impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see *Dadouch v. Malta*, no. 38816/07, § 49 with further references, ECHR 2010-... (extracts)). 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 (see, *inter alia*, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, §§ 67-68, Series A no. 94; *Gül*, cited above, § 38; *Ahmut v. the Netherlands*, 28 November 1996, § 63, *Reports* 1996-VI; and *Priya v. Denmark* (dec.), no. 13594/036 July 2006).

55. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them 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. Another important consideration will also be 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 be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in

the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39 with further references, ECHR 2006-I).

56. Turning to the facts of the case, the Court notes that the applicant had resided – with the exception of the time she was imprisoned in Germany – all her life in Venezuela when she arrived as a tourist in 2000 in the Netherlands where she met and started a relationship with Mr T. She was subsequently granted permission – in the form of a provisional residence visa – to enter the Netherlands and apply for a residence permit for the purpose of family formation with Mr T. It appears that, in the procedure on her request for a provisional residence visa, it was erroneously not brought to the applicant's explicit attention that, if she were to file a subsequent request for a residence permit, she would be questioned about any possible criminal antecedents. Her request for a residence permit was actually rejected and a ten-year exclusion order was imposed on her after it had appeared – in the context of her request for a residence permit filed in 2001 – that in 1996 she had been sentenced to imprisonment for a narcotics offence in Germany. It also appears that she had not been convicted of any crime since 1996.

57. The Courts considers that the fact that a significant period of good conduct elapses between the date on which a person has served his or her sentence imposed for a criminal offence and the date on which immigration is sought by the person concerned necessarily has a certain impact on the assessment of the risk which that person poses to society. As regards the severity of the offence at issue, the Court reiterates that, in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness towards those who actively contribute to the spread of this scourge (see, for instance, *Dalia v. France*, 19 February 1998, § 54, *Reports* 1998-I; and *Baghli v. France*, no. 34374/97, § 48, ECHR 1999-VIII).

58. The Court notes that the applicant's offence was quite serious as it involved the participation in the importation of a not negligible quantity of cocaine, which resulted in a prison sentence of two years and six months (see § 6 above). The severity of this offence must therefore weigh heavily in the balance. In so far as the applicant raises arguments based on sentencing guidelines used in the Netherlands by the Haarlem Regional Court in relation to the decision to impose an exclusion order on her, the Court does not find it necessary to determine these arguments as these guidelines did not exist at the time when the offences of which the applicant was convicted in Germany were committed.

59. The Court also notes that the family life at issue was developed further during a period when the applicant and Mr T. were aware that the applicant's immigration status was precarious. The applicant must be

considered as having become aware as early as 15 August 2001 – thus well before her marriage to Mr T. and the birth of their child – that there was a serious possibility that an exclusion order would be imposed on her. Although she has continued to reside in the Netherlands, she did not do so on the basis of a residence permit issued to her by the Dutch authorities. Moreover, the applicant's presence in the Netherlands – as from the date on which she was notified of the decision to impose an exclusion order on her – constituted a criminal offence, even if no criminal proceedings for that offence have been taken against her. It therefore appears that her presence in the Netherlands as from that date was tolerated while she awaited the outcome of the administrative appeal proceedings taken by her. This cannot, however, be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country (see *Useinov*, cited above; and *Narenji Haghighi v. the Netherlands* (dec.), no. 38165/07, 14 April 2009). Accordingly, the total length of her stay in the Netherlands cannot be given the weight attributed to it by the applicant.

60. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant has been born and raised in Venezuela where she has resided for most of her life and where she has relatives who could help the applicant and her family to resettle there. Further noting that her husband stated on 31 March 2004, when heard before the official board of enquiry, that he had a reasonable command of Spanish and also noting that their child is of a young and adaptable age, the Court finds that it may reasonably be assumed that they can make the transition to Venezuelan culture and society, although the Court appreciates that this transition might entail a certain degree of social and economic hardship.

61. Having regard to all the above considerations, the Court concludes that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the competing interests. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention.

62. Accordingly, there has been no violation of Article 8 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

63. The applicant complained of a lack of an effective remedy in relation to her complaint under Article 8 since the Administrative Jurisdiction Division dismissed her further appeal without any reasoning on the merits. She relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

64. The applicant submitted that in her further appeal to the Administrative Jurisdiction Division, the highest competent domestic tribunal in the matter, she raised six elaborate complaints which were dismissed by the Division without giving any reasons. In her opinion, it cannot be said that this part of the legal system constituted an effective legal remedy for the purposes of Article 13 of the Convention.

65. The Government disagreed, pointing out that the fact that the Administrative Jurisdiction Division, in application of article 91 § 2 of the Aliens Act 2000, rejects an appeal on summary grounds does not mean – as suggested by the applicant – that it had not assessed that appeal on its merits.

66. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

67. The Court further notes that the applicant seeks to complain of a lack of sufficient reasoning in the final decision given in her case. The Court considers that this complaint does not, as such, raise an issue under Article 13 in that the expression "effective remedy" used in Article 13 cannot be interpreted as entailing an obligation to give a detailed answer to every argument raised, but simply an accessible remedy before an authority competent to examine the merits of a complaint.

68. Therefore, even assuming that the applicant had an arguable claim for the purposes of Article 13 (see *Gökçe and Demirel v. Turkey*, no. 51839/99, § 69, 22 June 2006), the fact that the Administrative Jurisdiction Division examined but rejected the applicant's further appeal on summary grounds whilst upholding the impugned ruling does not of itself warrant the conclusion that the applicant was denied an effective remedy under Article 13 of the Convention.

69. It follows that there has been no violation of Article 13 of the Convention.

## FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by four votes to three that there has been no violation of Article 8 of the Convention;

3. *Holds* by four votes to three that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 3 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Marialena Tsirli | Josep Casadevall |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Ziemele, Tsotsoria and Pardalos is annexed to this judgment.

J.C.M.
M.T.

# JOINT DISSENTING OPINION OF JUDGES ZIEMELE, TSOTSORIA AND PARDALOS

1. We cannot agree with the Chamber's conclusions in the present case.

2. The Chamber reiterates that Article 8 of the Convention does not impose a general obligation on a State to grant entry into the country and authorise family reunion in its territory. "Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligation 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" (see paragraph 54). The Chamber also reiterates the balancing exercise that the national authorities are required to carry out:

> "Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them 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. Another important consideration will also be 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 be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39 with further references, ECHR 2006 I)." (see paragraph 55)

3. We note that the applicant learnt of the requirement to sign a formal statement to the effect that she had never been the subject of a criminal conviction only after her return to the Netherlands on the basis of the provisional residence visa. The latter was issued in view of a positive recommendation from the Aliens Police Service. Only once she was in the Netherlands, when filing a request for a temporary regular residence permit, did she discover that requirement, which she obviously could not comply with and which explains her refusal to sign the declaration. In our view, it was an honest move on the part of the applicant. Moreover, under the national law "an application for a provisional residence visa is in principle assessed on the basis of the same criteria as a residence permit" (see paragraph 31). Since August 2001 the applicant's immigration status has been examined by various authorities. It is in fact this examination of the various factors by the authorities that is of interest for the purposes of Article 8 and not the outcome *per se*.

4. We note that the Deputy Minister of Justice declared the applicant an undesirable alien because in 1996 she had participated in the deliberate importation of cocaine. The Deputy Minister considered that the

interference with the applicant's right to respect for her family life was justified in the interests of public safety. At that stage, no analysis was made of her behaviour since the conviction, the time that had elapsed since the offence was committed, other factors indicating that it was a genuine couple, and so on. Later on the Minister for Immigration also primarily emphasised the conviction factor, adding that the family would have no obvious problems in following the applicant to Venezuela. Only the Regional Court noted that eight years had elapsed since the conviction, that the marriage and the birth of the child had taken place after the exclusion order was imposed and that the family could move to Venezuela, and drew a distinction with the case of *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, in which the applicant had been granted a residence permit and was subject to expulsion. We agree that the factors established in the *Boultif* case, as long as it is recognised that Article 8 also applies to illegal aliens, all have to be taken into account and balanced against each other. The problem that we have in this case – again as long as it is accepted that Article 8 applies – has to do with the manner in which the Netherlands authorities assessed and weighed up all the factors. It may well be that they would have arrived at the same conclusion and it may well be that the public-order consideration was particularly strong in this case. But the State is required, under Article 8, to have due regard to the other factors. For example, it could very well be the case that the main reason for the applicant giving birth to the child in 2004 was her age. The authorities should have considered that possibility and should not have assumed that this was a deliberate act undertaken on account of the applicant's difficult immigration situation. In other words, from the facts, as presented in the case, it is difficult to see to what extent the authorities had regard to the personality of the applicant and her true family situation, which should have been balanced against the public-order considerations.

5. In many ways the majority does more justice to the balancing exercise in its reasoning than the national authorities did (see paragraphs 56–60). We cannot agree with the majority, however, when they stress the fact that the applicant's presence in the Netherlands constituted a criminal offence. This was a situation which emerged by virtue of the legislation and, we should say, a certain inconsistency between the administrative-law avenue for challenging an exclusion order of no suspensive effect and the position under criminal law regarding the stay of aliens following an exclusion order (see paragraphs 36-38). The alleged criminal offence of the applicant (see paragraph 59) was not of her doing for as long as, at least theoretically, there were remedies by which she could challenge the exclusion order.

6. There has therefore in our view been a violation of the procedural aspect of Article 8 and a violation of Article 13.