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

FORMER SECTION II

CASE OF RODRIGUES DA SILVA AND HOOGKAMER v. THE NETHERLANDS

(Application no. 50435/99)

JUDGMENT

STRASBOURG

31 January 2006

FINAL

03/07/2006

In the case of Rodrigues da Silva and Hoogkamer v. the Netherlands,

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

Jean-Paul Costa, *President*,
András Baka,
Corneliu Bîrsan,
Karel Jungwiert,
Volodymyr Butkevych,
Wilhelmina Thomassen,
Antonella Mularoni, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 14 September 2004 and on 5 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 50435/99) 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 Brazilian national, Ms Solange Rodrigues da Silva, and her daughter, Ms Rachael Hoogkamer, who is a Netherlands national ("the applicants"), on 9 July 1999. Rachael Hoogkamer was represented by her father, Mr Daniël Hoogkamer, who exercises parental authority (*ouderlijk gezag*) over her.

2. The applicants, who had been granted legal aid, were represented by Ms G. van Atten, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agents, Mr R.A.A. Böcker and Ms J. Schukking, of the Ministry of Foreign Affairs.

3. The applicants alleged that the Government's refusal to allow the first applicant to reside in the Netherlands breached their right to respect for their family life as guaranteed by Article 8 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 14 September 2004, the Chamber declared the application admissible.

6. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties were

given the opportunity to reply in writing to each other's observations. Neither party availed itself of this opportunity.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant was born in 1972 and lives in Amsterdam. The second applicant was born in 1996 and lives in Amsterdam and Uithoorn.

9. The first applicant came to the Netherlands in June 1994, leaving her two sons from a previous relationship, Jean (born in 1990) and Carlos (born in 1992), with her parents. In the Netherlands she lived with her partner Mr Hoogkamer, who was in paid employment at that time. The first applicant submitted that they had looked into applying for a residence permit allowing her to reside in the Netherlands with her partner, but that, owing to the unavailability of documents concerning Mr Hoogkamer's income, such an application had never actually been made.

10. In April 1995 the first applicant's son Carlos joined his mother and Mr Hoogkamer. Her other son Jean remained in Brazil with his grandparents.

11. On 3 February 1996 Rachael, the second applicant, was born to the first applicant and Mr Hoogkamer. The first applicant was invested *ipso jure* with parental authority (*ouderlijk gezag*) over Rachael. Rachael was recognised (*erkenning*) by Mr Hoogkamer on 28 March 1996, as a result of which she obtained Dutch nationality.

12. The first applicant and Mr Hoogkamer split up in January 1997. Rachael stayed with her father, who subsequently applied to the Amsterdam District Court (*kantonrechter*) seeking to be awarded parental authority over Rachael. The District Court granted the application on 20 February 1997. The first applicant subsequently appealed to the Amsterdam Regional Court (*arrondissementsrechtbank*) against that decision. The Regional Court requested the Child Care and Protection Board (*Raad voor de Kinderbescherming*) to examine which attribution of parental authority would be in Rachael's best interests.

13. On 12 August 1997 the first applicant applied for a residence permit which would allow her to reside in the Netherlands, either – depending on the outcome of the proceedings concerning parental authority – with her

daughter Rachael, or in order to have access to her. She also made an application on behalf of her son Carlos.

14. The Child Care and Protection Board found, in its report of 26 August 1997, that parental authority should remain with Mr Hoogkamer. In view of the likelihood of the first applicant having to return to Brazil, awarding her parental authority over Rachael could lead to a break-off in contact between Rachael and her father and also between Rachael and her paternal grandparents, who were very important to her. It was felt that this would be a traumatic experience for Rachael, who had her roots in the Netherlands and whose bonding with all the persons concerned had taken place in that country.

15. In a decision of 26 November 1997, the Amsterdam Regional Court nevertheless quashed the decision of the District Court and awarded the first applicant parental authority over Rachael. Mr Hoogkamer lodged an appeal on points of law with the Supreme Court (*Hoge Raad*).

16. On 12 January 1998 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the first applicant's application for a residence permit. The first applicant lodged an objection (*bezwaar*) against this decision. At the hearing on this objection before an official committee (*ambtelijke commissie*) on 27 May 1998, it was stated on behalf of the first applicant that she worked (illegally, as she was not in possession of a residence permit allowing her to do so) from Monday to Thursday and that on those days Rachael stayed either with her father or with her grandparents. Rachael stayed with her mother on the remaining days of the week.

17. On 12 June 1998 the Deputy Minister of Justice dismissed the objection, holding that, even if account was taken of Rachael's right to reside in the Netherlands and to be brought up and educated there, the interests of the economic well-being of the country outweighed the interests of the first applicant. Although the first applicant did not claim welfare benefits, she did not pay taxes or social security contributions either, and there were sufficient numbers of nationals of European Union member States or aliens residing lawfully in the Netherlands available to fill the post she was occupying. The general interest also prevailed over Mr Hoogkamer's interest in being able to lead his family life with Rachael in the Netherlands. In this context it was noted that, at the time Mr Hoogkamer started his relationship with the first applicant, the latter had not been entitled to reside in the Netherlands. He had thus accepted that family life with Rachael might have to be enjoyed elsewhere or in a different manner. It was further noted that Mr Hoogkamer did not make a substantial financial contribution to Rachael's care and upbringing since he only took care of those expenses on the days Rachael stayed with him and, as he was in receipt of welfare benefits, those costs were borne by public funds.

18. The first applicant lodged an appeal against this decision with the Regional Court of The Hague, sitting in Haarlem.

19. On 30 October 1998 the Supreme Court quashed the Amsterdam Regional Court's decision of 26 November 1997 in the proceedings concerning parental authority and referred the case to the Amsterdam Court of Appeal (*gerechtshof*).

20. The Regional Court of The Hague, sitting in Haarlem, dismissed the appeal against the refusal to grant the first applicant a residence permit. In its decision of 12 February 1999, the Regional Court held that Article 8 of the Convention did not oblige national authorities to ensure that Rachael's parents would not have to choose between leaving Rachael with her father in the Netherlands or letting her go to Brazil with her mother. Both these options were considered to be feasible. According to the Regional Court, the fact that Rachael would have to be without either her father or her mother was, strictly speaking, the result of the parents' choice to conceive a child at a time when the first applicant was not allowed to reside in the Netherlands. No further appeal lay against this decision.

21. On 28 June 1999 a hearing took place before the Amsterdam Court of Appeal in the proceedings concerning parental authority, during which an officer of the Child Care and Protection Board told the court that the Board's report of 26 August 1997 remained pertinent and that it was in Rachael's best interests for the status quo – with Mr Hoogkamer having parental authority over her – to be maintained. In its decision of 15 July 1999 the Amsterdam Court of Appeal upheld the decision of the Amsterdam District Court of 20 February 1997 awarding parental authority over Rachael to Mr Hoogkamer. The Court of Appeal accepted that Mr Hoogkamer, supported by Rachael's grandparents, was sufficiently capable of providing Rachael with the necessary upbringing and care, and that he was indeed doing so in practice. It was of the opinion that the submissions made by the first applicant in support of her argument that Rachael's interests would be better served if parental authority were awarded to her – even if this meant Rachael living in Brazil without contact with her father and grandparents – were of insufficient weight compared to the possibilities the father had to offer and was offering. The first applicant lodged an appeal on points of law against this decision, which was dismissed by the Supreme Court on 27 October 2000.

22. Despite having received a letter dated 8 July 1999 from the local police informing her that she had to leave the Netherlands within two weeks, the first applicant remains in the Netherlands. She works from Monday to Friday. Rachael stays with her at the weekend and with her paternal grandparents during the week. This arrangement is confirmed in a letter dated 20 March 2002 written by Rachael's grandparents to the applicants' legal representative:

> "The access arrangement we have concluded with [the first applicant], the mother of our granddaughter Rachael Hoogkamer, is fully satisfactory for all parties. According to the arrangement, Rachael stays with us during the week. On Friday evening we take her to her mother and collect her again late on Sunday afternoon. No disagreement whatsoever has arisen on this point in the past years. We further confirm that the weekend visits of our granddaughter to her mother pass off in a very pleasant fashion and that she enjoys telling us about them. In other words, the close contact with her mother has a beneficial effect on our granddaughter."

23. In January 2002 the first applicant applied for a residence permit allowing her to reside in the Netherlands with her new Dutch partner. In this application the first applicant indicated that Rachael was being brought up partly by her grandparents and partly by her new family. The application was rejected on 18 April 2002 as the first applicant was not in possession of the required temporary residence permit (*machtiging tot voorlopig verblijf*). The first applicant did not challenge this decision.

24. The second son of the first applicant, Jean, has been living with his mother in the Netherlands since February 2002.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. Parental authority comprises the duty and the right of a parent to care for and bring up his or her child (Article 247 § 1 of the Civil Code (*Burgerlijk Wetboek*)). The parent invested with parental authority is the child's statutory representative (*wettelijk vertegenwoordiger*) and administers the child's possessions (Article 245 § 4 of the Civil Code).

26. At the material time, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1965 (*Vreemdelingenwet 1965*). On 1 April 2001 a new Aliens Act came into force, but this has no bearing on the present case.

27. The government pursues a restrictive immigration policy due to the population and employment situation in the Netherlands. Aliens are eligible for admission only on the basis of obligations arising out of international agreements, or if their presence serves an essential national interest, or on compelling humanitarian grounds.

28. The admission policy for family reunion purposes was laid down in the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire 1994*). These provided that the spouse, the partner, a minor child born of the marriage or relationship and actually belonging to the family unit (*gezin*), and a minor child born outside the marriage but actually belonging to the family unit could be eligible for family reunion if certain conditions (relating to public order, accommodation and livelihood) were met. In the context of family reunion with other family members (so-called extended family reunion), such other members actually belonging to the family unit might also be eligible if they would otherwise suffer disproportionate hardship.

29. The phrase "actually belonging to the family unit" (*feitelijk behoren tot het gezin*) used in Netherlands law only partly overlaps with the term "family life" in Article 8 of the Convention. The alien in question must belong to the family unit with which he or she intends to live in the Netherlands in order to qualify for admission. If it is concluded that the requirement of "actually belonging to the family unit" has not been met, an independent investigation is then carried out to ascertain whether the concept of family life within the meaning of Article 8 of the Convention applies and, if so, whether this provision obliges the State to allow the person concerned to live in the Netherlands, having regard to the specific circumstances of the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. The parties' submissions

1. The applicants

30. The applicants complained that the refusal to grant the first applicant a residence permit constituted a breach of their right to respect for their family life. They relied on Article 8 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... 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."

31. The applicants argued that if paramount importance was attached to the fact that the first applicant was not lawfully resident in the Netherlands, the balancing exercise which had to be carried out by the domestic authorities was reduced to unacceptable proportions. Rachael – who was an independent party to the present proceedings – had her own, individual, interests which also required consideration: it could not and should not be held against her that she had been conceived while her mother was not lawfully resident.

32. In the view of the applicants, the present case could be compared with that of *Şen v. the Netherlands* (no. 31465/96, 21 December 2001), which concerned a young girl who, like the first applicant, had not previously been lawfully resident in the Netherlands. In that case the Court had considered that the parents' strong ties with the Netherlands constituted an essential element to be taken into account in the balancing exercise. Rachael also had very strong ties with the Netherlands. In addition, just as in *Şen*, there existed a major obstacle in the instant case to family life being developed in Brazil. Since the first applicant was not entrusted with parental authority over Rachael, she did not have the power to make decisions relating to her daughter's place of residence – and Rachael's father had always maintained that he would not give permission for Rachael to leave for Brazil. If the first applicant were forced to leave Rachael behind in the Netherlands, the latter would be without the close proximity and care of her mother – elements of essential importance to a young girl. The applicants emphasised that an annual visit to the Netherlands by the mother would not even come close to securing Rachael's interests.

33. Finally, it was the applicants' distinct impression, obtained in the course of the proceedings concerning parental authority, that it was precisely in order to avoid a situation whereby the Netherlands national Rachael would accompany her mother when the latter left for Brazil that parental authority had been awarded to her father, despite the fact that he did not, and still does not, play a significant role in her care and upbringing. There was no other identifiable reason why the father, who was not the parent looking after Rachael, should have been entrusted with parental authority rather than the mother, who was.

2. The Government

34. The Government stressed that the family life relied on by the applicants had developed while the first applicant was living in the Netherlands illegally. In their opinion, this constituted a decisive difference compared with the situation in *Berrehab v. the Netherlands* (21 June 1988, Series A no. 138), since that case related to a refusal to allow continued residence, whereas in the present case the first applicant had not previously resided lawfully in the Netherlands. This was mainly the result of the first applicant's own actions, or lack thereof: neither she nor her partner Mr Hoogkamer had made any serious effort to legalise her residence on the basis of the fact that from June 1994 to January 1997 they had been in a lasting relationship with each other, which would have made lawful residence in the Netherlands possible.

35. The Government further submitted that Rachael's father had long since ceased to play a prominent part in her daily care and upbringing. This being so, the parents might have agreed that Rachael would be cared for by the first applicant and would accompany her to Brazil. Since Rachael had

only been three years old at the time of the contested decision, she did not have such deep roots in the Netherlands that she would have been unable to adapt to life in Brazil, especially as her half-brothers, along with her mother, might be assumed to provide her with a familiar and supportive environment there. Even if Rachael were to live with her grandparents in the Netherlands, the first applicant would be able to maintain family ties to some extent, since she had the right to visit the Netherlands for short periods. In this context the Government pointed to the fact that even now the first applicant was not living with Rachael all of the time.

36. The Government concluded that Rachael having to forsake family life with either her father or her mother did not give rise to a positive obligation on their part to admit the first applicant, since this state of affairs had come about as a direct result of Rachael's parents' deliberate decision to enter into a relationship and develop family life with each other and the daughter born of their relationship, even though the mother had no right to reside in the Netherlands.

B. The Court's assessment

37. The Court observes at the outset that there can be no doubt that there is family life within the meaning of Article 8 of the Convention between the first applicant and her daughter Rachael, the second applicant: Rachael was born from a genuine relationship, in which her parents cohabited as if they were married.

38. Next, it observes that the present case concerns the refusal of the domestic authorities to allow the first applicant to reside in the Netherlands; although she has been living in that country since 1994, her stay there has at no time been lawful. Therefore, the impugned decision did not constitute interference with the applicants' exercise of the right to respect for their family life on account of the withdrawal of a residence status entitling the first applicant to remain in the Netherlands. Rather, the question to be examined in the present case is whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory. For this reason the Court agrees with the parties that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see *Ahmut v. the Netherlands*, 28 November 1996, § 63, *Reports of Judgments and Decisions* 1996-VI).

39. The Court reiterates that 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. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family

reunion in 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 (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports* 1996-I). 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 to 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 (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). 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 from the outset be precarious. 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 *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).

40. Turning to the circumstances of the present case, the Court notes that the first applicant moved from her native Brazil to the Netherlands in 1994 at the age of 22. Even though she has now been living in the latter country for a considerable time, she must still have links with Brazil, where she presumably grew up and underwent her schooling.

41. However, if the first applicant were to return to Brazil she would have to leave her daughter Rachael behind in the Netherlands. The Court observes in this connection that at the time the final decision on her application for a residence permit was taken on 12 February 1999, the first applicant no longer had parental authority over Rachael, the Supreme Court having quashed the decision of the Amsterdam Regional Court which had awarded her such authority (see paragraphs 19 and 20 above). It was Rachael's father, Mr Hoogkamer, to whom parental authority was subsequently, and finally, attributed. In its assessment of this issue, the Amsterdam Court of Appeal had regard to a report which had been drawn up by the Child Care and Protection Board in August 1997 – prior to the final decision in the residence proceedings – according to which it would be traumatic for Rachael if she had to leave the Netherlands in view, *inter alia*, of the strong bond she had with her paternal grandparents (see paragraph 14 above). Parental authority having been awarded to Mr Hoogkamer, the first applicant is thus simply not able to take Rachael with her without his permission which, as has not been disputed by the Government, will not be forthcoming.

In these circumstances, the Court considers that the Government's claim that the first applicant and Mr Hoogkamer might have agreed that Rachael would move to Brazil with her mother is untenable, bearing in mind that it was the Dutch courts, following the advice of the Dutch child welfare authorities, who concluded that it was in Rachael's best interests to stay in the Netherlands.

42. The Court further notes that, from a very young age, Rachael has been raised jointly by the first applicant and her paternal grandparents, with her father playing a less prominent role. She spends three to four days a week with her mother (see paragraphs 16 and 22 above), and, as confirmed by her grandparents (see paragraph 22 above), has very close ties with her. The refusal of a residence permit and the expulsion of the first applicant to Brazil would in effect break those ties as it would be impossible for them to maintain regular contact. This would be all the more serious given that Rachael was only three years old at the time of the final decision and needed to remain in contact with her mother (see *Berrehab*, cited above, § 29).

43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see *Berrehab*, cited above, § 29, and *Cılız v. the Netherlands*, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any 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). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, *Solomon*, cited above).

44. In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed,

by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.

The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicants submitted no claims in respect of pecuniary damage, but sought compensation for non-pecuniary damage relating to the stress and fear they had suffered as a result of the uncertainty surrounding the first applicant's residence status in the Netherlands. They claimed 10,000 euros (EUR) under this head.

47. The Government argued, firstly, that the applicants had not submitted any documents attesting to their suffering from the psychological condition of stress. Secondly, they were of the view that any uncertainty the applicants experienced as a consequence of their considered decision to remain in the Netherlands illegally was a circumstance that could not be imputed to the State.

48. The Court considers that the present judgment constitutes in itself sufficient just satisfaction with regard to the non-pecuniary damage alleged (see *Mehemi v. France*, 26 September 1997, § 41, *Reports* 1997-VI).

B. Costs and expenses

49. The applicants claimed a total of EUR 145.30 for the costs and expenses the first applicant had incurred in the domestic court proceedings relating to her application for a residence permit: EUR 50 for court fees, and EUR 95.30 for the mandatory personal contribution (*eigen bijdrage*) she had to pay her lawyer.

50. The Government submitted that they had no observations to make in relation to this claim.

51. The Court finds the claim reasonable, and consequently allows it in full.

C. Default interest

52. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

3. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 145.30 (one hundred and forty-five euros thirty cents) in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé	Jean-Paul Costa
Registrar	President