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Comment on the Sen case. How wide is the margin of appreciation regarding the admission of children for purposes of family reunification?

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Comment on the *Sen* case. How wide is the margin of appreciation regarding the admission of children for purposes of family reunification?

ECHR, December 21st 2001 (*Sen vs. the Netherlands*), nr. 31465/96
(Judges: Palm, Thomassen, Gaukur Jörundsson, Türmen, Bîrsan, Casadevall, Maruste)

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Introduction

While public debates over immigration and immigration law are traditionally dominated by discussions over asylum and labour migration, family migration - at least in the Netherlands - accounts for fifty percent or more of all legal admissions. Decisions concerning the admission of family members inevitably touch on fundamental questions regarding the definition and value of family bonds.

Since *Abdulaziz*¹ we know that the sovereign right of a nation state to determine who may or may not be granted entry to its territory is bounded by the obligations that that same State has accepted in joining the European Convention on Human Rights (the European Convention), including the obligation to respect family life. But where exactly do the boundaries lie? While many European countries are making a political swing to the right, placing restrictive immigration measures high on the agenda, and while the European Commission is cautiously herding the EU member States towards a minimal consensus on the harmonisation of family reunification policies, the European Court on Human Rights (European Court) has recently brought out an important decision regarding the admission of children in the case of *Sen vs. the Netherlands*. Depending on how one interprets this decision, it could mean a significant shift from earlier decisions that the European Court has taken on this issue.

In the rest of this comment I shall first give a short explanation of the Dutch policy measures that are at issue in *Sen*. Then, after having discussed a previous decision of the European Court concerning these same policies - namely in the *Ahmut*² case - I shall go on to describe the facts regarding *Sen* and the European Court's final judgement which is, to say the least, ambiguous. In an attempt to gain better insight into this decision, I shall relate it to yet another decision regarding the right to respect for family life in the context of immigration law, namely *Ciliz*.³ By doing so, I shall try to determine what, in the eyes of the European Court, must be seen as the core obligations, inherent to the respect for family life, that place limits upon the sovereign right of member states to control the entry of foreigners to their territories.

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¹ *Abdulaziz, Cabales and Balkandali vs. the United Kingdom*, ECHR May 28th 1985, Series A, nr. 94.

² *Ahmut vs. the Netherlands* ECHR November 28th 1996, Reports 1996-VI.

³ *Ciliz vs. the Netherlands* ECHR July 11th 2000, nr. 29192/95.

Dutch policies regarding the entry of children for purposes of family reunification

Parents residing in the Netherlands who wish to have their foreign children join them there, must meet certain requirements. They must produce a certified birth certificate of the child, meet specified income requirements and provide proof of a legal family bond with the child. A legal family bond in itself however is not sufficient. In order to qualify for admittance, the child must also have maintained an effective family bond with the parent(s) involved.⁴

Recently, the relevant criteria have been modified.⁵ But at the time of the *Sen* case, the existence of an effective family bond was determined as follows. Such a bond was assumed to exist as long as the child had not been definitively taken up in another household than that of the parent(s) residing in the Netherlands. At what point a child could be assumed to have been taken up in another household was difficult to determine, and depended to a large extent on the reasons that the parent(s) gave to justify the term of separation. The longer the period of separation, the more easily it was assumed that the child had been taken up in another household. However, even if this was the case, the effective bond between the parent(s) and the child could still remain intact if the parent could prove that he or she had always supported the child and had maintained effective custody over the child. In practice these matters were often difficult to prove, and certainly when the separation had lasted longer than a year or two, the effective family bond was usually assumed to have been broken.

For many parents it is difficult to accept that their child should be refused entry on such grounds. Certainly in most third world countries, it is not uncommon to leave young children in the care of close friends or relatives during lengthy periods - for instance because both parents must work in order to be able to support their child, or to facilitate access to schools or medical facilities, or to spread the burden of supporting a large family.⁶ From a parent's perspective, the decision to leave a child behind with family when embarking on the risky adventure of emigration makes perfect sense. Immigrant parents residing in the Netherlands cannot comprehend how a decision, that they have taken in their capacity as parents and in the best interest of their child, can be viewed as proof that the effective family bond between them and their child has been severed. Decisions to refuse entry to a child have therefore been frequently submitted for administrative revision and, when these decisions have been upheld, the parents involve have often appealed before the Dutch administrative court.

Although Dutch court decisions on this issue have varied, in many cases the original refusal to grant entry has been upheld.⁷ A number of parents, therefore, have pushed on to Strasbourg. Already in 1984 a case was judged admissible by the European Commission on Human Rights.⁸ It wasn't until 1996 however, in the *Ahmut* case, that the European

⁴ *Vreemdelingencirculaire* paragraph B2/6.4.

⁵ *Tussentijds bericht vreemdelingencirculaire* 2002/4. According to the new criteria, parents and children are assumed to still enjoy an effective family bond up until five years after the moment of separation. After this five year period, the effective bond is assumed to have been severed, and admission will be denied, unless exceptional circumstances apply.

⁶ S. van Walsum. *De schaduw van de grens. Het Nederlandse vreemdelingenrecht en de sociale zekerheid van Javaanse Surinamers*. Gouda Quint, 2000.

⁷ See: S. van Walsum. De feitelijke gezinsband onder de loep genomen (II), in: *Migrantenrecht* 2000 nr. 1.

⁸ *Tapsinan vs. the Netherlands*, EC December 3rd 1984, nr. 11026/84.

Court actually passed judgement on a case involving the Dutch policy criterion of an "effective family bond".

The *Ahmut* case

This case involved a Moroccan man, Mr. Ahmut, who had come to the Netherlands in 1986, leaving his former wife, whom he had divorced, and five children behind. Early in 1987 his former wife died as the result of an automobile accident. By that time, Mr. Ahmut's eldest son had already left the home. Two other sons came to the Netherlands on a student visa. A daughter, Souad, and Souffiane, the youngest son, were entrusted to the care of their paternal grandmother. In 1990 Mr. Ahmut, who by then had acquired the Dutch nationality, had Souad and Souffiane come to the Netherlands on a tourist visa. His mother, who by then was eighty years old, was no longer capable of looking after the children. Mr. Ahmut therefore applied to have them admitted to the Netherlands.

The Dutch immigration authorities refused admission on the grounds that the effective family bond between Mr. Ahmut and the children had been severed. Mr. Ahmut requested a revision and subsequently appealed the negative decision before the Dutch administrative court. In the meantime he sent the children back to Morocco. Souad, who was nearly eighteen, went to stay with family. Souffiane, ten years old at the time, was placed in a boarding school. On November 28th 1996 the European Court voted five to four that the Dutch authorities' refusal to grant Souffiane admission had not been in violation of article 8 of the European Convention.

In reaching this conclusion, the Court referred to its previous decision in the case of *Gül vs. Switzerland*,⁹ which also involved the admission of a young child, and in which the European Court had determined 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 both contexts regard must be had to the fair balance that has to be struck between the competing interest of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation...”

Previous to the *Gül* case the European Court had already determined in the case of *Kroon vs. the Netherlands*¹⁰ that the distinction between negative and positive obligations under article 8 of the European Convention did not lend themselves to precise definition. In that particular case, which involved family law, the European Court had left the Dutch State a very slim margin of appreciation indeed, disqualifying Dutch paternity laws in the interests of the individual child and parents involved. In the *Gül* case however the European Court claimed a more modest role for itself. Deciding that the Swiss State’s decision to refuse the *Gül* child entry did not amount to interference in family life, the European Court allowed for a wide margin of appreciation, determining that the disputed decision was not beyond the bounds of reason.

⁹ ECHR February 19th 1996, nr. 00023218/94.

¹⁰ ECHR October 27th 1994, Series A nr. 297.

In the *Ahmut* case, the European Court similarly allowed for a wide margin of appreciation. Following a line of reasoning that had first been expounded in the *Abdulaziz* case, the European Court considered that article 8 of the European Convention does not guarantee a right to choose the most suitable place to develop family life (para. 71). Since Souffiane had spent most of his life in Morocco and was being cared for there in a boarding school, the European Court did not consider it unreasonable to expect him to remain in Morocco (para. 70 and 72). The European Court further took into consideration that the fact of the applicants' living apart had been the result of the father's original decision to settle in the Netherlands rather than remain in Morocco (para. 70.) Finally, the European Court considered that there was no obstacle preventing Mr. Ahmut, who had retained his Moroccan nationality alongside his newly acquired Dutch nationality, from returning to Morocco to intensify his contact with Souffiane. "In these circumstances the Netherlands Government cannot be said to have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other."

Dissenting opinions

Four of the nine judges explicitly rejected this reasoning in three different dissenting opinions. All of these dissenting opinions expressed the concern that, in cases where immigration law was at issue, the European Court was providing too little protection to the right to respect for family life. One of the dissenting judges, the Dutch judge Martens, had also previously protested against the European Court's decision regarding *Gül*. His objections to both decisions were similar and rested on the following arguments. In general, Martens argued that where the issue of family reunification arises in a case of "immigrants who already had a family which they left behind", the reasoning followed in *Abdulaziz* - which had after all pertained to couples who were *establishing* a family, not reuniting one - should not apply. Where the reunification, and not just the establishment of a family is at issue, one should, according to Martens, assume that the State of settlement is in principle bound to respect the choices made by immigrants who have achieved settled status there. Accordingly, one should as a rule admit members of the family left behind. In Marten's view this is particularly the case where reunification with young children is at stake.

Regarding the specific merits of the *Ahmut* case, Martens argued that the Dutch government should have taken Mr. Ahmut's settled status and his recently acquired Dutch nationality into account. Finally, Martens dismissed the fact that Souffiane could be properly looked after in Morocco as insignificant: "... whether or not Souffiane might possibly be brought up by his grandmother, his uncles, his brothers or sister, is all, in principle, immaterial as long as Souffiane's father is ready, willing and able to do so."

Following the *Ahmut* case, several more complaints concerning the Dutch "effective family bond criterion" were submitted to the European Court. Most of these cases were judged inadmissible on the basis of the same arguments that were put forward in the *Ahmut* decision.¹¹ Significantly however, in two cases, namely *Lahnifi*¹² and *Adnane*,¹³

¹¹ *Kwakyenti and Dufie vs the Netherlands*, nr. 31519/96; *P.R. vs the Netherlands*, nr. 39391/98; *Knel and Veira vs the Netherlands*, 39003/97; *J.M. vs the Netherlands*, nr. 38047/97; *Mensah vs the Netherlands*, nr. 47042/99.

the European Court followed a different line of reasoning. It distinguished between family reunification and the establishment of a new family unit; it took into consideration that the parents involved had become settled in their country of residence and stipulated that it could be unreasonable to place parents before the choice of having to renounce their acquired status in their country of residence or the company of their foreign child. Although both of these cases were judged non-admissible, the reasoning followed clearly lay closer to the line propagated by Judge Martens than to that followed by the European Court in *Ahmut*.

On November 7th 2000 the *Sen* case was judged admissible. This decision however was only motivated by the standard consideration that the case raised complex issues in the sphere of article 8 of the European Convention. It remained therefore to be seen to what extent the European Court would indeed depart from the line it had previously set out in *Gül* and subsequently *Ahmut*.

The *Sen* case

The facts of the case

On October 26th 1992, Mr. and Mrs. Sen, both of Turkish nationality and legally resident in the Netherlands, requested to have their nine year old daughter Sinem admitted to the Netherlands. Mr. Sen had first come to the Netherlands as a boy of twelve and had lived there ever since. In 1982 he had returned briefly to Turkey in order to get married. After the marriage, he had returned to the Netherlands, leaving his new wife behind. In 1986 his wife left Turkey to join him in the Netherlands, leaving their three year old daughter Sinem in the care of her sister and brother-in-law.

Sinem was refused admittance by the Dutch immigration authorities on the grounds that the effective bond between her and her parents has been definitively broken. Sinem had been separated from her parents for six years. During that period, her parents had visited her on only three occasions. The fact that Sinem's aunt suffered from depression and that her grandmother too was too ill to look after her, provided insufficient grounds for making an exception to the rules. There were enough relatives in Turkey who could take care of her should the need arise. The Dutch administrative court that finally ruled in this case, determined in its decision of December 14th 1995 that the Dutch government had not infringed upon the rights protected by article 8 of the European Convention. Nor was there a positive obligation on the part of the Dutch State to admit Sinem to the Netherlands to be reunited with her parents there.

By the time the Dutch administrative court had decided in Sinem's case, two more children had been born: the first on November 14th 1990; the second on December 21st 1994. Both lived with their parents in the Netherlands.

An ambiguous decision

¹² ECHR February 13th 2001, nr. 39329/98.

¹³ ECHR November 6th 2001, nr. 50568/99.

As mentioned above, Sinem Sen's case was declared admissible by the European Court on November 27th 2000. December 21st 2001, the European Court decided unanimously that article 8 of the European Convention had been violated - but on what grounds? Despite its unanimity, or perhaps in order to achieve it, the European Court is rather ambiguous in its reasoning. In para. 36, the Court explicitly refers to *Gül* and *Ahmut*, implying that it is continuing in the same vein as in those two previous decisions. However in para. 37 the Court follows Martens' approach in pointing out that cases regarding family reunification should not be seen in the same light as cases concerning the establishment of a family unit. But then in para. 38 and 39 the European Court once again refers to *Ahmut*, pointing out that there are many parallels between that case and this one.

The European Court goes on to say in para. 40 that the facts of these two cases do differ on one significant point. In the *Sen* case the family unit includes two children who have been born and bred in the country of settlement and who have no bonds worth mentioning with their parents' country of origin. These circumstances are considered to have formed serious obstacles to transferring family life to Turkey. Thus Sinem's coming to the Netherlands was the most appropriate option for realizing family reunification, particularly considering that, at her young age, there was an urgent need to have her integrated into the family unit of her parents who were both willing and able to look after her.

The European Court suggests, then, that it has stayed true to the line set out in *Ahmut*, but that the exceptional circumstances of this case have brought it to a different conclusion. Yet by lending considerable weight to Sinem's young age at the time of the request for admission, the European Court at the same time takes over yet another one of Martens' objections to *Ahmut*. Moreover the European Court determines, further on in the same paragraph, that the fact that Sinem's parents had initially decided to leave her behind should not have been held against them. Such a decision could not, according to the European Court, be seen as an irrevocable choice by the parents to remain separated from their child. The European Court then goes on to conclude in para. 41 that, in offering the parents no other choice than to abandon their acquired position in the Netherlands or renounce the company of their daughter, the defending State has failed to reach a fair balance. Whether or not Sinem could be cared for by relatives in Turkey was, in the light of these circumstances, of no relevance. Here two arguments that had played a decisive role in *Ahmut* - namely the conscious decision of a parent to leave a child behind and the fact that there were still relatives in the country of origin - are actually dismissed out of hand!

In his consenting opinion, Judge Türmen indicates that the presence of the two youngest children was in fact the deciding factor that had made the European Court decide in Sinem's favour. He strongly expressed his disappointment that the European Court hadn't taken a firmer stand against the disputed decision which he described as "witness to a restrictive spirit that is incompatible with the very meaning of the Convention and the concept of human rights."

Although I don't doubt that the presence of the two children born and bred in the Netherlands may well have won over the more reticent members of the chamber, making it possible to arrive at a unanimous vote, I do seriously question Türmen's conclusion that *Sen* does not indicate any significant departure from the line set in in *Gül* and *Ahmut*.

For if this was the case, how to explain that virtually all of Marten's points of criticism regarding *Gül* and *Ahmut* have been integrated into the European Court's decision on *Sen*? Or that two arguments that played a decisive role in *Ahmut* were now deemed irrelevant?

In fact, when one examines the facts of the *Sen* case more closely, it's actually quite unlikely that the situation of the two children who had been born and bred in the Netherlands could, in itself, explain why the European Court should now decide differently than in *Ahmut*. At the time the Dutch administration decided to uphold the decision to refuse Sinem Sen entry, there was only one child in the Netherlands, and he was only two and a half years old. His younger brother was at that point no more than a glint in his parents' eyes - not a particularly formidable obstacle to a return to Turkey. Admittedly, by the time the European Court reached its decision eight and a half years later, these two children were respectively eleven and seven years old, and firmly entrenched in Dutch society. By then however their sister Sinem had turned eighteen - hardly the tender age at which there is a "pressing need" to be integrated into the family unit of her parents.

This isn't to say that the birth of these children in the Netherlands is of no significance. But the European Court's reasoning only becomes logically consistent when this circumstance is viewed as one of the indicators of the firm degree of settlement of the parents in the Netherlands, and not as the only obstacle preventing reunification in Turkey.

Core obligations as a limit to the margin of appreciation

I also have a more fundamental reason to disagree with Türmen's assessment of the significance of the *Sen* decision. Of particular importance, to my mind, is that the European Court takes an explicit stand in this decision on what, in effect, family life entails. By doing so it sketches the contours of the core obligations that must be met by a State, regardless of how broad its margin of appreciation may be where immigration policies are concerned.

Other than in *Ahmut*, these core obligations in *Sen* reach further than maintaining the status quo. Repeatedly the European Court points out that family life is dynamic and that the obligations of a State involve allowing for or even facilitating the normal development of family ties.¹⁴ Thus in para. 32 the European Court poses the question whether or not the Dutch State had a positive obligation to admit Sinem so that she and her parents could maintain *and develop* family life together within its territory. In para. 40 the European Court points out that there was a pressing need, given Sinem's young age, to *enable her integration* within the family unit of her parents and that her admission was the most appropriate option towards *developing* family life (my emphases).

Similarly in an earlier case involving immigration law, namely *Ciliz*, the European Court also ruled that the Dutch authorities had not "acted in a manner which has enabled family ties *to be developed*" (again, my emphases), resulting in a breach of article 8 of the European Convention. Significantly, in this *Ciliz* case, the European Court referred to *Ahmut* in para. 61 in determining the margin of appreciation to be allowed to the

¹⁴C.f. ECHR June 13 1979, *Marckx vs Belgium*, Series A vol. 31.

defending State. This is striking considering that in *Ciliz* continued residence, implying a negative obligation, was at stake and not - as in *Ahmut* - a first entry, which would imply a positive obligation. In fact the European Commission in its decision on the admissibility of the *Ciliz* case had examined all the interests involved quite extensively, in the same spirit as that the European Court had previously done in the *Berrehab*¹⁵ case which had also involved continued residence. In its decision on *Ciliz* however the European Court chose to limit itself to a more marginal examination, close to the spirit of *Gül* and *Ahmut*, and focussed only on formal points of procedure.

However, the broad margin of appreciation that the European Court was prepared to grant the defending State in *Ciliz* did find its limits in the core obligation, implied by article 8 of the European Convention, to allow for and even facilitate the *normal development* of family life between parent(s) and child. Also significant, to my mind, is that both in *Ciliz* and *Sen*, the European Court refers to its jurisprudence on family law and on the forced placement of children.¹⁶ An important principle that emerges from both of these lines of jurisprudence is that the essence of family life is that parents and children can enjoy each others' company - a principle that is also referred to by Martens in his dissenting opinions following *Gül*, and by Türmen in his consenting opinion following *Sen*.

Conclusion

Judge Türmen's assessment that the European Court will not depart from the line set out in *Ahmut* is probably accurate up to a point, namely that the European Court will remain reluctant to impinge upon a member State's sovereign right to regulate immigration. A wide margin of appreciation will continue to apply. However, by confirming the dynamic interpretation of family life as already given in *Ciliz*, the European Court has indicated that, not only with regards to continued residence but with regards to a first entry as well, this margin of appreciation finds its limits in the core obligations implied by article 8 of the European Convention. These obligations require that a State allow for and even facilitate the development of normal family ties between settled members within the defending State's community and their foreign family members.¹⁷ This is particularly the case where family life between parents and young children is at stake.

¹⁵ ECHR June 21st 1988, *Berrehab vs the Netherlands*, Series A no. 138.

¹⁶ In *Ciliz* the ECHR refers to: *Keegan vs Ireland*, May 26th 1994, Series A no. 290; *W. vs. the United Kingdom*, July 8th 1987, Series A no. 121 and to *McMichael vs. the United Kingdom*, February 24th 1995, Series A no. 307-B. In *Sen* the ECHR refers to *Johansen vs. Norway*, August 7th 1996, Reports 1996-III, p. 1001-1004 and *X., Y. and Z. vs. the United Kingdom*, April 22nd 1997, Reports 1997-II, p. 632.

¹⁷ In this respect the case of *Boultif vs. Switzerland* (ECHR August 2nd 2001, nr. 54273/00) is also relevant