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Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life

Sarah van Walsum

Senior Researcher, Migration Law, VU University Amsterdam, The Netherlands

Abstract

Feminist and post-colonial theorists challenge the supposed neutrality of international human rights law which, in their view, should be seen as a product of asymmetrical power relations. On the basis of this premise, it seems unlikely that single and divorced migrant mothers from outside of the EU will be able to mobilize international human rights law to their advantage. And yet, after twenty years of litigation, single and divorced migrant mothers in the Netherlands are now finally able to claim their right to respect for family life and reunite with children left behind in their countries of origin. This chapter seeks to explain how this increase in human rights protection could come about. While some litigants are less powerful than others, they do not always stand alone. Increasing the scope of analyses makes it possible to include case law produced by more powerful actors. Their gains can offer strategic opportunities to those less powerful.

Keywords

admission of children als family migrants; family migration policy; gender and immigration law; respect for family law

1. Introduction

As discussed in the introduction to this volume, the effect of international human rights law upon national immigration policies is subject to debate. On the one hand, there are writers who express a strong belief in the growing impact of international human rights law upon immigration policy. On the other hand are sceptics who point out that international human rights law, like any other form of law, can only be effective to the extent that it is implemented within a concrete national context and given the current political trends human rights of migrants cannot bank on much support.

In a similar vein, feminist lawyers have questioned which role, if any, law can play in serving women's interests, and particularly those of racialised women. Even if the national concept of citizenship has been expanded in the past to include workers, women, and racialised minorities, it has done so as a result of struggle. While the gains of these struggles have undeniably resulted in important forms of formal equality whose significance should not be underestimated, the

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fact is that substantive inequalities persist, even within national communities, and continue to affect the way in which formally acquired rights are interpreted and implemented in practice.[1] By the same token, international human rights law may have its foundational roots in the emancipatory ideals of liberty, equality and solidarity, but in actual practice it has been and continues to be implicated in projects of empire, the unequal power struggles between nations, and accompanying tactics of racialisation, orientalism etc.[2] According to such theories, law – both nationally and internationally based – does not necessarily serve the interests of all individuals equally. Its effectiveness remains dependent on the specific context of power relations in which it is mobilised.

In this article, I will examine a particular episode in the history of Dutch immigration law. I will explore what role, if any, Article 8 of the European Convention of Human Rights (European Convention) – which deals with the right to respect for family life – has played in mitigating restrictive Dutch policies regarding family reunification. I will focus, in particular, upon the situation of single and divorced mothers, originating from outside the EU, who have left their children behind with family when coming to the Netherlands. In the light of the theories quoted above, one would expect that, even if Dutch national law formally includes the protection provided by international human rights law, this particular group will not easily play that game and win.

Before exploring to what extent this assumption has been borne out in practice, I will first give an account of a specific measure of Dutch family migration policy which has been at issue: the requirement that parents wishing to bring over a foreign child are legally obliged to prove an "effective family bond" between them and that child. I shall thereafter highlight the underlying assumptions concerning the divorced and single migrant mothers involved, as expressed through Dutch immigration law courts, and contrast these assumptions with those expressed through concurrent jurisprudence in Dutch family law concerning single and divorced Dutch fathers.

Subsequently, I explore to what extent this discrepancy can help explain why Dutch family reunification policies finally changed to the advantage of divorced and single migrant mothers. Additionally, besides gender struggles in family law, the federalist ambition of the European Union seems also to have played a role in enabling single and divorced migrant mothers to achieve their goal of family reunification.

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1) See for example: Carol Smart, *Feminism and the Power of the Law,* London: Routledge, 1989.

2) See for instance: Keebet von Benda-Beckmann, Western Law and Legal Perceptions in the Third World, in: Jan Berting, Peter R. Baehr, Herman Burgers, Cees Flinterman et al. (eds.), *Human Rights in a Pluralist World. Individuals and Collectivities,* Middelburg: Meckler Corporation in association with the Netherlands Commission for UNESCO and the Roosevelt Study Center, 1990; Andrew Hurrell, Power, principles and prudence: protecting human rights in a deeply divided world, in: Tim Dunne and Nicholaas J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge: Cambridge University Press, 1999.

2. The Effective Family Bond Criterion in Dutch Family Migration Policy

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, provide proof of a legal family bond and convince the Dutch immigration authorities that there has always been an effective family bond between them and the child.[3]

Recently, in 2002 and again in 2006, the relevant criteria have been modified. I shall come back to those changes later. Up until 2002 however, 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 "adopted" into another household than that of the parent(s), residing in the Netherlands. At what point a child could be assumed to have been accepted as part of another household was difficult to determine, and depended to a large extent on the reasons which 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 as part of 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.

How this assumption was played out in practice can be illustrated by comparing two court decisions that both concerned applications for family reunification made by immigrant mothers who had already left their children behind in the care of their own mother before they left for the Netherlands. In the first case, the woman had left her children with her mother after having remarried with a man with children of his own, who refused to take her children into his home. During the day, this woman stayed at her mother's home and looked after her own children, feeding them, taking them to school and, as the Dutch judge later would put it, 'generally doing all that a mother who actually lives with her children would do for them'. In the evenings, she left her children and returned to her new husband's home to look after his needs and those of his children. When her case came before the Dutch immigration court, the judge ruled that she and her children had in fact shared an effective family bond, even though they did not sleep under the same roof, and she won her case.[4]

The second case involved a single mother who left her children with her mother, and moved to a larger city so that she could earn enough money to look after herself and her family. In the city she shared a home with a new partner, but during the weekends returned to her home town to stay with her mother and the

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3) *Vreemdelingencirculaire* paragraph B2/6.4.

4) Rechtbank Den Haag, seated in Haarlem, 2 June 1999, AWB 99/296.

children. In her case, the Dutch judge seriously doubted there had ever been an effective bond between mother and children while she was still in her country of origin. In any event, he was not convinced it was strong enough to justify reunification after her arrival in the Netherlands.[5]

2.1. *Care is Explicitly Rejected as a Criterion in Dutch Family Law*

Strikingly, during the same period that these immigration policies were effective, Dutch feminist lawyers were lobbying – without success – to have visiting rights, custody and the right to shared parental authority explicitly linked to demonstrated day-to-day care. While formal equality between men and women had by then been reached in Dutch family law, substantive inequalities continued to persist within Dutch society. Feminist lawyers were concerned that unless the substantive implications of women's caring responsibilities were somehow accounted for in family law, the legal protection of family life against state interference would benefit fathers more than mothers.[6]

The Dutch legislature, however, ruled that proof of effective care should not be a criterion for entitlement to parental rights.[7] In this, they followed Dutch court decisions which stated that making parental rights dependent on actual involvement in day-to-day care amounts to discrimination.[8] Consequently, divorced or separated fathers are now entitled to parental rights irrespective of the amount of financial support they provide for their children or the extent of their involvement in day-to-day-care. Only under very exceptional circumstances will they be denied visiting rights or the right to shared parental authority.

This legislation reflects a more general trend in Dutch family law, in which the right to respect for family life, as guaranteed by Article 8 of the European Convention, has proven to be a powerful instrument, particularly for unmarried and divorced fathers. By appealing to this fundamental human right, fathers have managed to acquire the right to recognise children born out of wedlock even when the mother has refused permission, as well as the right to share custody and parental authority with a child's mother outside of marriage. Men have even won the right to recognise children born out of an adulterous relationship.[9]

While feminist lawyers have expressed their disappointment over these developments, mainstream human rights lawyers have been positive in their reactions.

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5) Rechtbank Den Haag, seated in Zwolle, 15 January 1997, AWB 96/8085.

6) See for instance: C. van Wamelen, De eerbiediging van een zorgrelatie. De rol van zorg bij echtscheiding, *Nemesis* 1996, nr. 3, pp. 76–82.

7) *Kamerstukken II* 1996/97, 23 714, nr. 11, p. 12. See also: E.J. Nicolai. De juridische positie van de niet-verzorgende ouder na echtscheiding, *NJB* 10/15 (1998) 696.

8) Caroline Forder, *Legal Establishment of the Parent-Child Relationship: Constitutional Principles*, Maastricht: University of Limburg, 1995.

9) Els van Blokland, Het culturele conflict. Afstammingsrecht versus vreemdelingenrecht, *Nemesis* 1998, nr. 4, pp. 85–87.

In their view, fathers and mothers are rightly being treated as mature adults, capable of making their own choices and decisions in the best interests of their children. 'It is undesirable to impose stereotypes upon the parents… Furthermore, a child's needs are not static but dynamic and disparate. In short, a legal response to the concern expressed by [feminist authors like] Brophy and others would necessarily involve an intensified regulation of custody, when what is needed, in the interests of being able to respond to the individual needs of each child, is greater de-regulation.'[10]

Where policing the actual involvement of parents in the care of their children had been rejected in Dutch family law as an unacceptable invasion of the privacy rights of those involved,[11] Dutch immigration law actually required immigration authorities to do just that. As long as the effective family bond criterion was being applied in Dutch immigration law, migrant mothers had to adhere to a specific notion of the 'good mother.' While this idealized figure no longer reflected the realities of child rearing among the white Dutch mainstream, it was used as a standard for reunification with children from developing countries.

2.2. *Family Norms and Ethnically Motivated Modes of Exclusion*

These discrepancies between Dutch family law and Dutch immigration law as they played out at the close of the last century, reflected another, related, mode of distinction that was, by then, being drawn between *autochthonous* Dutch (the white "native" population) and non-Western *allochtonen* (immigrants and their descendents)[12] residing in the Netherlands. The stigma attached to single motherhood had decreased for white, middle class single and divorced women since the 1970s. These single and divorced mothers became a more or less accepted phenomenon[13] and by the turn of the century, those who managed to combine their caring responsibilities with paid employment were even being depicted in the Dutch media as living proof of women's emancipation in the Netherlands.[14]

At the same time, however, there was a growing concern about a specific category of unwed mothers, namely young single mothers among the non-Western *allochtoon* communities. These young women were not lauded as emancipated

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10) Forder, 1995, p. 405.

11) Forder, 1995, p. 406.

12) This term, which includes both foreign immigrants and Dutch nationals of (second generation) foreign origin, can probably best be translated as "of foreign origin". The category of non-western *allochtonen* includes all persons with at least one parent born in Africa or Asia (with the notable exceptions of Japan and Indonesia), Latin America, or Turkey. It is used in contrast with the term *autochtoon*, which generally denotes the "native" (white) population of the Netherlands.

13) Holtrust, Geschiedenis van de afstandsmoeder. Dikke bult, eigen schuld, in Carla van Splunteren (ed.), *Publiek geheim. Deprivatisering van het vrouwenleven*, Amsterdam: Clara Wichmann Instituut, 1995, pp. 56–57.

14) Aleid Truijens, Zonder zappende man gaat 't ook; Moderne alleenstaande moeders zijn niet zielig. Zij zijn trots op hun gezin, en op hun zelfstandigheid, *Volkskrant* (a Dutch daily) 5 March 2003.

but were depicted in the same terms that used to apply to all single mothers in the 1960s: unknowing, irresponsible, and incapable of bringing up their children to become responsible citizens. Consequently, these women and their children were depicted as a threat to the moral cohesion of Dutch society.[15] The assumed increase in the number of single mothers coming to the Netherlands from the Dutch Antilles was, for example, quoted as a reason for trying to limit the migration from those islands.[16]

Since women from the Dutch Antilles possessed Dutch nationality, proposals to exclude them could not be explained in terms of nationalist ideology as expressed through immigration law but must also have stemmed from exclusion related to culture and/or phenotype. As Ann Stoler has made clear, processes of racialisation in the European context have always been complex and unstable, linking physical traits to assumed cultural attributes and *vice versa*.[17] Where ethnicized and/or racialized categories are linked to countries of origin, as with the term "non-western *allochtoon*", the line between nationality and ethnicity/race becomes blurred as well.

When family norms are used to distinguish dominant from sub-dominant groups, distinctions may also be made regarding the measure of responsibility and pedagogical insight to be attributed to the different categories of parents. When care is introduced as a substantive criterion for according certain parental rights, the danger that the dominant group of parents will be privileged above the sub-dominant ones in terms of parental rights becomes very real.

As argued elsewhere,[18] for single and divorced mothers migrating to the Netherlands from third world countries, taking proper care of their children involves enlisting the help of friends and relatives in providing day-to-day care. For many migrant mothers, the refusal to allow family reunification on the grounds that the effective bond with the child they left behind had been broken was incomprehensible and unacceptable. The assumptions, expressed in Dutch immigration law, as to how a true mother should meet her responsibilities, were not compatible with the reality of their lives and the way they experienced their moral obligations as mothers. They could, therefore, not accept that they had been disqualified as mothers in the eyes of the Dutch immigration authorities. Consequently, it is not surprising that many of them fought negative decisions in court and even went as far as the European Court of Human Rights (ECtHR), appealing to Article 8 of

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15) See e.g., the editorial page of a leading Dutch daily, the *NRC*, on 10 September 1999 (p. 9, Amsterdam heeft het!).

16) *Nota migratie Antilliaanse jongeren*, Tweede Kamer 1998–1999, 26 283, Nr. 1, p. 5.

17) Ann Laura Stoler, *Racism and the Education of Desire*, Durham and London: Duke University Press, 1995.

18) Sarah van Walsum, Transnational Mothering, National Immigration Policy, and European Law: The Experience of the Netherlands, in Seyla Benhabib and Judith Resnik (eds.), *Migrations and Mobilities. Citizenship Borders, and Gender*, New York: New York University Press, 2008, pp. 228–251.

the European Convention. This despite the fact that, where first admissions were at issue, this court until very recently proved very reluctant to judge national immigration measures to be in violation of this article.

3. Challenging Dutch Immigration Law before the ECtHR

Although the European Commission had deemed a case concerning the admission of a child to the Netherlands admissible as early as 1984,[19] the ECtHR did not actually pass judgement on such a case until 1996 in the case of *Ahmut v the Netherlands*.[20] This case concerned the admission of nine year old Soufiane Ahmut to the Netherlands in order to join his father.[21] As usual, the Dutch immigration authorities refused admission on the grounds that the effective family bond had been severed. The father lost his case before the Dutch courts and proceeded to Strasbourg where the European Commission judged his case admissible.

The ECtHR, however, took a very reticent position. Considering that the father had made the deliberate choice to leave his children behind and that the father could, in theory, return to Morocco to join his son there and that Soufiane could be looked after in Morocco (his father had, for the time being, placed him in a boarding school), the ECtHR ruled that 'In the circumstances the Netherlands Government cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.'

Significantly, four of the nine judges presiding over the *Ahmut* case explicitly rejected this reasoning in three separate dissenting opinions, the most extensive of which was written by the Dutch judge, Martens. His dissent rested upon the following arguments. He argued that once a state has allowed an immigrant to settle within its territory, that state is, in his view, in principle bound to respect the choices made by that immigrant concerning family life. Accordingly, a Member State should as a rule admit family members 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. Moreover, he 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.'

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19) European Commission, 3 December 1984, *Tapsinan v. Nederland*, App. No. 11026/84.

20) ECtHR, 28 November 1996, App. No. 21702/93, EHRR 24:62.

21) For a detailed case description, see Thomas Spijkerboer, Structural Instability: Strasbourg's Case Law on Children's Family Reunion, *European Journal of Migration and Law* 11(3) (2009) 271–293, this issue.

Following the *Ahmut* case, several more complaints concerning the Dutch 'effective bond criterion' were submitted in Strasbourg. Most of these cases were judged inadmissible on the basis of the same arguments that were put forward in the *Ahmut* decision. On November 7th 2000, however, a case was judged admissible: the case of *Sen v. the Netherlands*.[22]

3.1. *The Sen Case: An Ambiguous Judgment*

This case centred on the admission of a nine-year-old Turkish girl, Sinem Sen.[23] As in *Ahmut* the application was refused on the grounds that the effective family bond between her and her parents had been broken. A significant distinction from the *Ahmut* case, however, was that by the time the Dutch Council of State had turned down Sinem's appeal, two more children had been born to the family, one in November 1990 and the second in December 1994. Both of these younger children lived with Sinem's parents in the Netherlands.

On 21 December 2001 the ECtHR unanimously determined that in the case of Sinem Sen, Article 8 of the European Convention had been violated. Yet despite this unanimity, or perhaps in order to achieve it, the ECtHR took a rather unclear stance regarding its previous jurisprudence as expressed in the *Ahmut* case and in another judgement that had preceded it.[24] In paragraph 36, the ECtHR explicitly referred to its earlier jurisprudence and repeated its previously applied criteria. In paragraph 40 the ECtHR explained that the facts of the *Sen* case diverge from those in *Ahmut* on one essential point, namely that of the presence of two children born and bred in the Netherlands. In the eyes of the ECtHR, this circumstance forms a major obstacle to reunification in Turkey.

In his consenting opinion, Judge Türmen indicates that the presence of the two younger children in the Netherlands was in fact the decisive factor in this case. He expresses his disappointment that the ECtHR was not prepared to take a more principled stance against the Dutch decision which, in his words, 'testifies to a restrictive spirit that is at odds with the meaning of the European Convention and with human rights in general.' In his interpretation, national immigration law had prevailed over human rights law.

Another reading of this judgement is however possible. In the final paragraphs of *Sen*, the ECtHR takes over surprisingly many of Marten's points of criticism regarding its previous judgement in *Ahmut*. Particularly striking is that the ECtHR emphatically states that the initial decision taken by Sinem's parents to leave her behind cannot be taken to be final. Nor does the ECtHR maintain the position that it had previously taken in the *Ahmut* case, that a state will not have violated

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22) *Sen v. the Netherlands*, ECtHR, 7 November 2000, App. No. 31465/96.
23) Again, for a detailed case description, see Thomas Spijkerboer, pp. 271–293, this issue.
24) ECtHR, *Gül v. Switzerland,* 19 February 1996, App. No. 23219/94, EHRR 22:93.

Article 8 of the European Convention as long as the status quo in family relations is maintained. On the contrary, with explicit reference to jurisprudence in the field of family law, the ECtHR 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.[25]

With this explicit reference to legal doctrine which has been developed within family law, the ECtHR brings to the foreground, the diverging family norms which characterise Dutch immigration policies and Dutch family law. In the eyes of the ECtHR, the right to respect for family life applies to all parents and their children in the same way, regardless of nationality. Read this way, the *Sen* Case seems to imply that universalising principles of human rights do in fact prevail over the exclusionary implications of national immigration rules.

3.2. *The Principle of the Margin of Appreciation*

In order to understand why the ECtHR may have taken such an indeterminate stand in the *Sen* Case, it is necessary to take a closer look at the workings of this court. From the start, the ECtHR has been conscious of the fact that it must account for the differences in culture and tradition between the various states over which its jurisdiction prevails. It also takes care not to interfere in the sovereign right of states to make complex choices regarding social and economic issues *via* processes of democratic decision-making.[26] On questions for which there is a clear lack of consensus among the Member States, and on questions that strongly relate to state sovereignty, the ECtHR tends to take a reticent stance.

On the other hand, the European Convention also assumes a minimum standard of human rights and fundamental freedoms, to which the Member States have committed themselves (Article 53). This minimum standard does, however, limit the range of choices that can be made *via* the national democratic decision-making process. The legal term of the "margin of appreciation" refers to the space which the ECtHR can allow member-states in exercising their sovereign rights, without having them violate the minimum standards guaranteed by the European Convention. The flip side to this margin of appreciation is the freedom that the ECtHR has to rule against concrete actions taken by member-states.

In effect, the ECtHR must perform quite a sensitive balancing act between these competing interests. Since the ECtHR does not possess any means of its own with which it can ensure execution of its judgements, it is entirely dependent of the moral weight of its decisions. The ECtHR is only effective to the extent that its judgements are actively given effect within national legal orders. If the ECtHR goes too far in ruling against government actions which, within the

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25) Cf. ECtHR, *Marckx v. Belgium*,13 June 1979, series A vol. 31, EHRR 2:330.

26) L.C.M. Meijers, Rechtsvormende taak van de rechter bij implementatie van Straatsburgse rechtspraak, *NJCM-Bulletin*, 1996 (1) p. 123.

Member State involved, enjoy a high level of political support, then there is considerable risk that the ECtHR's judgement will be ignored or set aside. Should this happen too often, then the authority of the ECtHR would be undermined. On the other hand, should the ECtHR be too timid in its judgements, individuals may become cynical and lose faith in the ECtHR as a defence against violation of human rights. Such a reaction would also be fatal for its authority.[27]

Given the sensitive balance that the ECtHR must seek to maintain, it is not surprising that it generally grants Member States a wide margin of appreciation in immigration law cases. Traditionally, immigration law is considered to lie close to the heart of national sovereignty, something the ECtHR has been careful to acknowledge since it first passed judgment in an immigration law case.[28] Certainly among the states party to the European Convention, immigration continues to be a politically sensitive issue to this day, with the present consensus leaning towards more, rather than less, restrictive measures.[29]

On the other hand, the ECtHR has been anything but timid in championing the right to respect for family life in the context of family and child protection law. In the case of *Kroon v the Netherlands*,[30] for example, the ECtHR set aside the Dutch law of succession so that the child of an adulterous relationship could be recognised by its father. Remarkably, the ECtHR didn't even bother to motivate why, in this case, it was justified in bypassing the Dutch legislature. Although they may have agreed on the substantive issues in this case, some authors – to my mind rightly – have criticised the ECtHR for having shown so little concern for processes of democratic legitimisation.[31]

Yet despite the ECtHR's decidedly radical approach to family law, its jurisprudence in this field has on the whole been enthusiastically received within the Dutch legal order – with the exception of objections raised in the margins by some feminist lawyers. The ECtHR's decisions have been promptly followed by most of the national courts and in the end led to the family law reforms that I described above. The decisions of the ECtHR in fact served to catalyse the transformation of normative changes then taking place within dominant (i.e. white, middle class and male) Dutch society into legal reforms. This explains, to my mind, how the ECtHR could get away with taking such a strong initiative in the field of family law, leaving the Dutch state a narrow margin of appreciation.

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27) J.G.C. Schokkenbroek, De 'margin of appreciation-doctrine' in de jurisprudentie van het EHRM, in A.W. Heringa, e.a. (ed.), *40 jaar EVRM*, Leiden: Stichting NJCM-Boekerij, 1990, pp. 54–57.

28) *Abdulaziz, Balkendali and Cabales v. United Kingdom,* Appl. Nos. 9214/80;9473/81;9474/81, 7 Eur. H.R. Rep. 471, para. 67 (1985).

29) An initially liberal proposal regarding family reunification that was put forward by the European Commission has, for example, been heavily amended in favour of more restrictive policies by the national ministers making up the European Council.

30) ECtHR, *Kroon v. the Netherlands*, 27 October 1994, Series A vol. 297-C, EHRR 19:263.

31) T. Loenen, Het Europees Hof voor de rechten van de mens als toetser of steller van de wet? Enkele beschouwingen naar aanleiding van de zaak *Kroon*, *NJCM-Bulletin* 1996 (1) 75–82.

The difference between the level of protection that the ECtHR was prepared to afford family life in family law and that which it was willing to grant in immigration law did not go unnoticed among legal academics and practitioners.[32] I suspect this discrepancy also helped fuel the doubts of those who wrote dissenting opinions against the *Ahmut* decision. And judging from the explicit references that were made, in *Sen*, to the ECtHR's family law jurisprudence, it must have played a role in that judgement's ambiguous approach towards the initial course set out in *Ahmut*.

3.3. *The Struggle Regarding the Sen Judgment and Its Implications*

However embarrassing the gulf between family and immigration case law may have been, closing the gap was still risky. Given the political static surrounding immigration issues at the time, the Dutch government was not likely to greet an incursion into its sovereign right to control its borders in quite the same cooperative way in which it had taken on the ECtHR's family law jurisprudence.

Preceding the ECtHR's judgement in the *Sen* case, the Dutch government had announced its intention to modify its family reunification policies in the sense that, as long as parent and child had not been separated for longer than five years, the effective family bond between them would be assumed to be still intact. Once they had been separated for more than five years however, family reunification would no longer be possible except in two instances, namely: the child had no one to look after it in the country of origin; or the parent had been unable to trace the child due to a situation of (civil) war in the country of origin.[33]

Under these proposed reforms, Sinem Sen would still not have qualified for admission. In reaction to questions posed in the Dutch parliament concerning the implications of the *Sen* Case for Dutch family reunification policy, the Dutch government replied that the *Sen* Case involved a very particular set of circumstances and was of no general significance for Dutch policy.[34] In court cases, too, the government maintained its position that the *Sen* Case was specific in two respects. Firstly, it involved a family with two children born and bred in the Netherlands. Secondly, this case didn't involve a single or divorced parent who had come to the Netherlands, remarried, and subsequently arranged the immigration of their child, but a married couple who had come to the Netherlands to settle there as an already established family.[35]

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[32] J. van der Velde, Positieve verplichtingen, *EVRM R&C*, 33rd revision, March 2002, pp. 1–21.

[33] This policy change was implemented in 2002: Tussentijds Bericht Vreemdelingencirculaire (TBV 2002/4) *Stcrt*. 58:15 (2002).

[34] Letter, dated 8 July 2002, from the Dutch Minister of Foreign Affairs addressed to the Chairman of the Permanent Committee on Foreign Affairs of the Dutch Parliament (Second Chamber), concering the *Sen* case (DJZ/IR-211/02).

[35] See the arguments presented by the Dutch State in: Rechtbank Den Haag, seated in Zwolle, 22 May 2002, AWB 01/67498.

Although the Dutch regional courts regularly applied *Sen* in a way that favoured single and divorced migrant mothers,[36] the import of that judgment remained subject to debate. Some claimed that *Sen* illustrated the ECtHR's criticism of the Dutch effective family bond criterion. Others argued that *Sen* was the exception that proved the rule expressed in the earlier case law: that this point of policy fits comfortably within the Dutch government's margin of appreciation. Notably, the Dutch Council of State (*Raad van State*), the highest Dutch court in administrative appeals, continued to show more concern for immigrant mothers' moral standing as parents than for their and their children's fundamental right to enjoy each other's company.

Consider the following case in which this adjudicative body upheld the State's refusal to admit a child to join her parents, who had been admitted as refugees. In this particular case, admission had been refused because the parents had not met the set income requirements, not because of their separation from the child, as this had not yet exceeded the newly set five year limit. For the Dutch Council of State however, the fact that the mother had chosen to leave the child behind when she set out to join her husband formed an important argument for concluding that denying the child admission on the grounds of the parents' insufficient income would not be in violation of Article 8 of the European Convention. Although this case actually involved refugees, meaning that reunification in the country of origin was even less of an option than in the *Sen* Case, the onus of the continued separation was placed on the parents and not on the Dutch State.[37]

This focus on a mother's responsibility for the separation from her child was also evident in another case, in which the Dutch Council of State ruled that a child *should* be admitted, even though he had been separated from his mother for longer than five years. It was considered significant that the mother had not left the child behind of her own free will but as a minor had been forced to leave the child by her father and hence was considered not responsible for the separation. Therefore, according to the Dutch Council of State, the refusal to admit the child was unjustified.[38] Again, the central issue was not whether or not mother and child were in a position to realise their fundamental right to enjoy each other's company, but to what extent the mother's behaviour as a parent had been reprehensible.

This approach initially seemed to find support in the ECtHR's jurisprudence following *Sen.* Although many complaints concerning the Dutch effective family bond criterion were brought before the ECtHR, none was declared admissible.[39] One case in particular was striking in its resemblance to the *Sen* Case. This case

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[36] Rechtbank Den Haag, seated in Zwolle, May 22nd 2002, AWB 01/67498; Rechtbank Den Haag, seated in Zwolle, 23 May 2002, published in *Jurisprudentiebulletin* 9(19) nr. 536; Rechtbank Den Haag, seated in Arnhem, 8 Oktober 2002, AWB 02/26237.

[37] ARRvS 25 September 2003, *JV* 2003/528.

[38] ARRvS 26 May 2003, *JV* 2003/295.

[39] *I.M. v the Netherlands,* App. No. 41226/98, Eur. Ct. H.R., (2003); *Ebrahim & Ebrahim v. the Nether-*

involved a woman, I.M., originating from the Cape Verde Islands.[40] A single mother, she left her nearly two year old daughter S. behind with family when she migrated to the Netherlands in 1986. There she set up house with a Dutchman, with whom she had a second child – a boy. As in the *Sen* Case, it took six years before the mother – who by then had separated from her Dutch partner – applied to have the older child admitted. By then, S. was nearly as old as Sinem when she first applied for admittance. Again, the application was refused on the grounds that the family bond had been broken. Like Sinem Sen, S. was also twelve years old when she finally lost her appeal in last instance before the Dutch court. And like Sinem Sen, S. went on to the ECtHR– only now without success.

Admittedly, there was a significant difference with the *Sen* Case, namely that in this particular case the mother, I.M., had made an important procedural error. In the course of her daughter's administrative appeal and during the proceedings before the Dutch court, she had neglected to mention the fact that she had a Dutch son, born and bred in the Netherlands, who maintained regular contact with his Dutch father. The ECtHR therefore ruled that it could not take this fact into consideration. This was crucial, since this child's presence in the Netherlands was an important argument against the possibility of reunification in the Cape Verde Islands.

Having said that, a procedural flaw cannot in itself account for the marked difference in tone between this judgement and that concerning the *Sen* Case. As indicated above, Sinem Sen's and S.'s stories run parallel in terms of how old they were at crucial moments in their stories. Yet surprisingly, while in Sinem Sen's case the ECtHR focussed on the child's age at the moment that she first applied for admission – eight years – and her urgent need at that age to become integrated into her parents' family, in S.'s case the ECtHR focused on the child's age at the moment that the Dutch court decided in last instance – twelve years – at which point 'she was presumably not as much in need of care as a young child.' And while the ECtHR was not judgemental about the fact that Mrs. Sen had left her child behind at the age of three, and actually chastised the Dutch government for drawing any pedagogical conclusions from this fact, it was clearly disapproving of I.M.'s behaviour:

> When the applicant left the Cape Verde Islands in November 1986 to settle, marry and start a new family in the Netherlands, she decided voluntarily to leave S. who was 20 months old at the time and completely dependent on others. She went along with her new husband's wishes to the effect that S. should not come to the Netherlands to form part of their new family unit [it is interesting to note here that in the case of Sinem Sen, too, the father's initial objections to family reunification formed an important cause for the six year delay] … Altogether, it was only after six and a half years that the applicant took steps to take up the care and daily responsibility for her daughter.

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lands, App. No. 59186/00, Eur. Ct. H.R. (2003); *Chandra v. the Netherlands*, App. No. 53102/99, Eur. Ct. H.R. 13 (2003).

40) ECtHR, *I.M. v. the Netherlands*, 25 March 2003, App. No. 41226/98.

The implicit message is clear. I.M. had been a bad mother to her daughter, and did not deserve to be reunited with her. Given the considerable similarity between these two cases, I suspect that the ECtHR's disapproval of I.M.'s behaviour – so different from its assessment of Mr. and Mrs. Sen's actions – had something to do with the fact that she had come to the Netherlands as a single mother.

It is a tribute to the undaunted spirit of single and divorced migrant mothers that they persisted in appealing to the *Sen* Case despite the lack of follow-up that it had received from the part of the Dutch government, the Dutch Council of State and – as appeared, at least – the ECtHR itself. In the end, however, this perseverance was rewarded. On 19 October 2004, a second complaint against the Dutch effective family bond criterion was declared admissible by the ECtHR in the case of *Tuquabo-Tekle v. the Netherlands*. Judgment was granted in favour of the plaintiff on 1 December 2005.[41] This case concerned a daughter who had been left behind for six years before her mother initiated admission procedures, and again the family involved included two children born and bred in the Netherlands. There were significant differences with *Sen*, however. In this case, the mother, a widow, had traveled to Europe as a single parent and subsequently remarried.[42] But the ECtHR made no distinction on this point, and explicitly referred back to the position taken in *Sen*, namely that "parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion".[43]

4. The Intersection between EU Law on the Freedom of Movement and European Human Rights Law

On 25 September 2006, the former Dutch Minister for Immigration and Integration, Rita Verdonk, sent a letter to Parliament regarding the effective family bond criterion in Dutch immigration law.[44] She announced that no distinction would be made any more between the term "effective family bond" as applied in immigration law and the term "family life" as applied in family law on the basis of Article 8 of the European Convention. What this in fact meant was that, for purposes of family reunification, all children legally related to a parent and all children sharing a biological bond with a parent would be forthwith assumed to share an effective family bond with that parent. Only in the event the child was living on its own and supporting itself or if he/she had established a family of

41) *Tuquabo-Tekle v. the Netherlands*, App. No. 60665/00, Eur. Ct. H.R. 1 (2005).
42) For more case details, see Spijkerboer's contribution, pp. 273–293, this issue.
43) *Ibid.*, para. 45.
44) *Kamerstukken II* 2006–2007, 19 637, nr. 1089. The policy change announced in this letter was made effective retroactively, valid as of 8 September 2006.

their own, would the authorities still be allowed to conclude that the effective family bond had been broken.

In her letter, the Minister explicitly referred to the judgment of the ECtHR in the *Tuquabo-Tekle* case. However, this judgement alone cannot explain the policy change. For one thing, more than ten months separated the Court's judgement and the Minister's letter. In the intervening period, the effective family bond criterion had been the subject of a number of court cases in the Netherlands. The question being put before the Dutch administrative courts was not only whether the effective family bond criterion had been applied in accordance with Article 8 of the European Convention, but also whether or not a European Directive on Family Reunification, which had become effective as of 3 October, 2005, allowed for the application of such a criterion.[45]

During the negotiations preceding the adoption of this European Directive, the Dutch government had tried to find support for its position that the effective family bond criterion should be included in the Directive. This proposal was rejected. In fact, it appeared that the Netherlands was the only Member State of the European Union to apply such a criterion in its family reunification policies. Nevertheless, the Dutch Minister for Immigration and Integration saw no reason to modify or eliminate the effective family bond criterion when implementing the European Directive on Family Reunification in Dutch Immigration Law. Her reasoning was that Article 16 of the European Directive on Family Reunification allowed the Member States to refuse family reunification in the event that the sponsor and his/her family member(s) did not live or no longer lived "in a real marital or family relationship." In her eyes, the effective family bond criterion, as applied in Dutch immigration law, could serve to determine the existence of a real marital or family relationship. This position was challenged before the Dutch regional courts, and subsequently, before the Dutch Council of State.

The complaints which came before the Dutch Council of State were declared unfounded on formal grounds,[46] leaving the question as to their substantive merits unresolved. It would be only a question of time, however, before the Dutch Council of State would have to decide on the substantive issue. Since this would require interpreting EU law, ultimately the Dutch Council of State would have to submit prejudicial questions to the European Court of Justice (ECJ) in Luxemburg.

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45) Council Directive 2003/86/EC, 2003 *OJ* (L 251) 12–18.

46) The complaints concerned decisions that were taken before the Directive had become effective and/or that involved parents with dual citizenship, who fell outside of the scope of the Directive. See Comment, C.A. Groenendijk, Afdeling Bestuursrecht van de Raad van State [ABRvS] [Dutch Council of State], 29 March 2006, 200510214/1, *Jurisprudentie Vreemdelingenrecht* (*JV*) 2006/172.

Since the European Directive on Family Reunification had only just been implemented, there was little case law on which to rely.[47] Nevertheless, there was good reason to suspect that the ECJ would grant the Dutch state a narrow margin of interpretation in deciding on this issue. Although the European Union is not (yet) party to the European Convention, the articles of the Convention are accepted as guiding principles of EU law. In particular, Article 8 of the Convention is referred to explicitly in the preamble to the European Directive on Family Reunification. Existing jurisprudence of the ECJ in Luxembourg strongly suggests that the ECJ takes a more activist stance in applying Article 8 than the ECtHR in Strasburg is inclined to do. In particular, this is evident in the position that the ECJ has taken regarding the significance of Article 8 of the European Convention for EU citizens who have exercised their freedom of movement within the EU and who have family members from outside of the EU.[48] In any event, the Dutch regional courts were not convinced that the Dutch effective family bond criterion was in accordance with the European Directive on Family Reunification and it is interesting to note that once the Directive had been implemented, the Dutch State no longer appealed judgements to this effect.[49]

Many factors can explain the difference in approach between the two European courts, and it would go well beyond the scope of this chapter to explore them all. But one or these should at least be mentioned, namely: the fact that the EU as an institution has an interest in promoting the free movement of persons within the EU – including those with family members originating from outside. Moreover, as the EU strives to promote integration on a political and normative plane, as well as on the level of economics, the concepts of EU citizenship – with the accompanying right to settle in each of the Member States – and of universalistic human rights – promoted as a shared normative heritage – have gained significance.[50] In determining the degree of freedom to be left to the Member States, the ECJ has to take this project of integration into account. If for no other reason, the role that it plays in adjudicating conflicts regarding the right to respect for family life in conjunction with the freedom to move among and reside within the nations of the European Union, will differ from that played by the ECtHR in weighing an individual's right to respect for family life against a Member State's right to control immigration.

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47) The only judgment until now is Case C-540–03, *European Parliament v. European Counsel*, E.C.R. 2006.

48) Case C-60/00, *Carpenter v. Sec'y of State for the Home Dep't,* 11 July, 2002. The ECJ's position that freedom of movement must include full enjoyment of family life was most recently confirmed in: Case C-127/08, *Metock and others v. Ireland*, ECJ 25 July 2008.

49) See the comment that Marcel Reurs wrote following ABRvS 12 July 2006, *RV* 2006/28.

50) C.f. Judith Resnik who has posited that the jurisprudence of federal courts regarding fundamental rights can serve to legitimate a federalist project, while the rights being protected can help to invest that project with a shared federal identity; Judith Resnik, Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction, *Yale Journal of Law and Feminism* 14:393 (2002) 395–418.

5. Conclusion: Immigrant Mothers, Agency and European Law

What this story about the effective family bond criterion in Dutch immigration law reveals is that law, and hence also universalistic principles as expressed through European human rights law, is not monolithic, but fragmented and fraught with contradictions and logical flaws. In serving conflicting interests, it can also facilitate surprising coalitions. It is, after all, nothing more and nothing less than the result of dynamic processes of human interaction. The question that I have addressed in this chapter is to what extent single and divorced migrant mothers have been able to take an active part in these processes in order to mobilize international human rights law so as to increase the scope of their agency in realizing one of the most vital aspects of their identity as mature adults: that of a parent responsible for the welfare and future of her child.

As it happens, this story has a happy ending for the mothers involved. But that happy end was not self-evident. There is nothing inevitable or irreversible about the workings of the European Convention. The effectiveness of this, or any other expression of human rights law, remains dependent of the concrete power relations in which it is mobilized. In fact, in the context of the gendered conflicts surrounding parent-child relations in the Netherlands and of the specific identity politics being played out here and in the rest of the EU, single and divorced migrant mothers of "non-western" origin have many cards stacked against them. None the less, they have persisted over a period of decades in demanding their right, as mothers, to raise and care for their children in their legal place of residence.

To understand the role that the European Convention has played in this struggle, it is important to realize that, to the degree that single and divorced migrant mothers have been able to claim this right, this has been thanks to gains already made by more mainstream actors: single and divorced Dutch fathers claiming parental rights on the one hand, and EU citizens claiming rights linked to the project of European integration on the other.