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

THIRD SECTION

CASE OF A.W.Q. AND D.H. v. THE NETHERLANDS

(Application no. 25077/06)

JUDGMENT

STRASBOURG

12 January 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A.W.Q. and D.H. v. the Netherlands,

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

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*
Having deliberated in private on 15 December 2015,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25077/06) 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 two Afghan nationals, Mr A.W.Q. ("the first applicant") and Ms D.H. ("the second applicant"), on 15 June 2006. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr P. Hillen, a lawyer practising in Nijmegen. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicants initially complained that if expelled from the Netherlands to Afghanistan they would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. In their submissions of 25 November 2013, the second applicant – also on behalf of the applicants' four children – further complained that their removal would entail a violation of their rights under Article 2 of the Convention.

4. On 12 February 2009 the President of the Third Section decided to apply Rule 39 of the Rules of Court in the applicants' case, indicating to the Government that they should not be expelled to Afghanistan pending the proceedings before the Court.

5. On 19 February 2009 the application was communicated to the Government. The Government submitted written observations on 18 September 2009 and the applicants submitted observations in reply on 30 November 2009. On 1 October 2013, the parties were requested to submit additional written observations on the admissibility and merits. The Government submitted these on 4 November 2013 and the applicant on 25 November 2013.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are a married couple and were born in 1956 and 1966 respectively. They have been in the Netherlands since 1999.

A. Proceedings before the introduction of the application

7. The applicants and their three children (two daughters, A and B, born in, respectively, 1992 and 1993, and a son C, born in 1997) entered the Netherlands on 17 December 1999 and, on 26 December 1999, applied for asylum, fearing persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Convention") and/or treatment in breach of Article 3 of the Convention from the mujahideen and/or the Taliban in Afghanistan on account of the first applicant's professional activities during the former communist regime.

8. The first applicant submitted that he had become a member of the communist People's Democratic Party of Afghanistan ("PDPA") in 1978 and that, as a conscript, he had served in a battalion in Kabul from 1978 to January 1981. Feeling a moral obligation to serve his country, he had subsequently decided to join the army for a professional military career.

9. From March to December 1981 he had taken a preparatory course for university studies in the Soviet Union, which had mainly consisted of Russian language lessons. He had subsequently been sent by the Director of Political Affairs of the General Staff of the Ministry of Defence to the Minsk Higher Combined Arms Military Political School in Belarus, where he had studied between 1982 and 1986. On 5 July 1986 he had graduated with a Master's degree in pedagogic and social sciences.

10. Holding the rank of captain, the applicant had been assigned to Division 5, which was responsible for controlling the border between Afghanistan and Iran. From September 1986 to December 1989 the first applicant had worked in that area in the political affairs division of the border security unit. He had been responsible for cultural matters, including propaganda, combating illiteracy amongst soldiers, and the creation of patriotic awareness amongst them. He had further been given the task of persuading deserters who had been caught to do their military service in the Afghan army. The first applicant stated that he had apprehended about 300 such deserters between 1986 and 1989, and that he had only failed in respect of fifteen of them to persuade them to do their military service. These fifteen individuals had been handed over to the Military Public Prosecutor. In 1988 he had been promoted to the rank of senior captain.

11. In 1990 he had been appointed first secretary or deputy scientific officer of the Army Museum in Kabul, which fell under the responsibility of the propaganda division of the Ministry of Defence. He had been responsible for collecting weapons for the museum. He had later been promoted to deputy director of the museum and, holding the rank of major, had worked in that function until 1992.

12. The first applicant's problems had started after the mujahideen had taken power in 1992. Mujahideen had come to the army museum to take exhibits which they thought were valuable as weaponry or otherwise. When they recognised the first applicant as an army officer who had worked for the former regime, the mujahideen had incarcerated him – together with three other officers and a soldier – in the basement of the museum. He had been released after a week. The mujahideen had wanted him to cooperate with them by helping them to take arms and ammunition out of the museum. He had refused all such requests, which had led to aggressive behaviour towards him on the part of the mujahideen. The first applicant had repeatedly reported this attitude to these mujahideen's superiors in the Ministry of Defence, namely two generals with whom the first applicant had collaborated during the former communist regime. These two generals had both remained in their position at the Ministry of Defence and were working with the *Hezb-e-Harakat-e-Islami* of Ahmad Shah Massoud. After the museum had been placed under the control of a mujahideen commander, the first applicant had resigned in March 1994 and taken the keys of the museum to the Ministry of Defence, to be given to one of the two generals.

13. The second applicant – who had also applied for asylum on behalf of the applicants' children – had worked as a guide in the same army museum in Kabul when the city was captured in 1992 by the mujahideen. Under pressure from the mujahideen and in the footsteps of her husband, she had also resigned from her job in 1994.

14. Shortly after the first applicant had resigned from his post in the museum, the applicants received a written death threat in the courtyard of their house: the house was destroyed a few days later. After a brief stay with the second applicant's father in another neighbourhood of Kabul, the applicants moved in March 1994 to Kunduz, which was under the control of followers of Ahmad Shah Massoud, who – like the applicants – was of Tajik origin. In Kunduz, the applicants lived off the income generated by land owned by the first applicant's family, and the first applicant, admittedly not out of any financial necessity, opened a small shop in order to have something to do.

15. In April or May 1998 – after the Taliban had seized power in Kunduz on 26 June 1997 – two of the first applicant's cousins appeared at the applicants' house together with eight to ten Taliban. According to the first applicant, he had been betrayed by these two relatives. They had informed the Taliban of his position under the former communist regime and his whereabouts. The Taliban conducted a search for weapons in the applicants' house. Although they found none, the Taliban arrested the first applicant and his brother. They were separated shortly after their arrest.

16. During his detention by the Taliban, for the first two weeks in a basement on a military base in Kunduz and subsequently in the Kunduz prison, the first applicant had been interrogated, ill-treated and forced to perform hard labour. As it happened sometimes that in the evening hours two or three detainees were taken away from the cell they shared with the applicant and others and were never seen again, the first applicant feared for his life during his detention.

17. On a date he could not remember, the first applicant was taken before a tribunal composed of four mullahs, who interrogated him whilst he was being ill-treated. He was subsequently forced to place his fingerprint on documents, most of which were written in Arabic.

18. During his subsequent transport in a convoy consisting of five cars from Kunduz to a prison in Kabul, the first applicant had managed to escape when the convoy had come under armed attack, he believed by followers of Ahmad Shah Massoud. The first applicant had then fled to Mazar-i-Sharif, where he had been joined by his family on 7 November 1999. On 12 November 1999 the applicants and their children had left Afghanistan.

19. The first applicant was interviewed by Dutch immigration officials about his flight and the motives for it on three occasions; the second applicant on two occasions. On 8 January 2004 they were informed of the intention (*voornemen*) of the Minister for Immigration and Integration (*Minister voor Vreemdelingzaken en Integratie*) to refuse them asylum. Having noted the first applicant's asylum account, an official general report (*ambtsbericht*), drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs on "Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD" ("*Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD*")[1], and two different person-specific official reports *(individuele ambts-berichten*), DPC/AM 635082 and DPC/AM 696035, both drawn up by the Ministry of Foreign Affairs on 15 December 2000, the Minister decided to refuse the first applicant asylum and to hold Article 1F of the 1951 Geneva Convention relating to the Status of Refugees ("the 1951 Refugee Convention") against him. On 4 February 2004, a lawyer acting on behalf of the applicants submitted written comments (*zienswijze*) on this intention.

20. After interviewing both applicants once more, the Minister rejected their asylum applications, in separate decisions taken on 17 February 2004. The elaborately argued notices of intention of 8 January 2004 were added to the decisions and formed part of them.

21. The Minister found, *inter alia,* that the first applicant constituted a danger to public order (*openbare orde*), as serious reasons had been found for believing that he had committed crimes referred to in Article 1F of the 1951 Refugee Convention, thus excluding him from international protection under the 1951 Convention . Although the Minister attached credence to the first applicant's statements in terms of his positions and career within the Afghan army, the applicant's description of his tasks was deemed to be inaccurate. His statements relating to certain of the tasks he said he had performed (namely his stated activities relating to what was called the PDPA's national reconciliation policy, amnesty, reconstruction and demilitarisation) were found to be highly implausible.

22. On the basis of the two person-specific official reports of 15 December 2000, the Minister found that, at the relevant time, the political affairs divisions of the Afghan army consisted solely of highly loyal and skilled professional soldiers, that people working for these divisions regularly provided the security service KhAD/WAD with person-specific and general information ("*Khadimat-e Atal'at-e Dowlati / Wezarat-e Amniyat-e Dowlati*"; the KhAD was set up in 1980 and transformed in 1986 into a ministry called "WAD", which remained in existence until the communist regime fell in 1992. Although the WAD was the successor of the KhAD, the security service continued to be commonly referred to as KhAD); those working for the political affairs divisions had relatively easy access to the PDPA leadership, and one of their tasks had been to remove anti-government soldiers from the army, if need be with the help of the KhAD. They were thus inextricably connected to the frequent arrests, torture, disappearances and/or executions of disloyal members of the army by the KhAD.

23. The Minister emphasised the widely known cruel character of the KhAD, its lawless methods, the grave crimes it had committed such as torture and other human rights violations, and the "climate of terror" which it had spread throughout the whole of Afghan society, including the army. The Minister underlined the vague definition of "enemy of the communist regime" used by the KhAD, how it found those enemies through an extensive network of spies, and how all of this led to widespread and often random arrests of suspects. The Minister relied in this regard on the general official report of 29 February 2000.

24. Having established, on the basis of elaborate argumentation based on various international documents, that those involved in KhAD and the political affairs divisions of the Afghan army were likely to fall within the scope of Article 1F of the Refugee Convention, the Minister proceeded to an analysis of the first applicant's individual responsibility under that Convention on the basis of the prescribed test known as the "personal and knowing participation test".

25. On this point, the Minister found that, in view of the contents of the aforementioned official reports of the Ministry of Foreign Affairs, the first applicant had known or should have known about the criminal character of the KhAD, given his position in one of the political affairs divisions of the army and the contacts he had maintained professionally. The Minister further found that the first applicant had directly facilitated the crimes committed by KhAD by performing his tasks in the Afghan army, *inter alia* the attributed task of arresting and persuading deserters trying to flee across the border to continue military service, failure of which led to the handing over of these deserters to the office of the Military Public Prosecutor.

26. As regards Article 3 of the Convention, the Minister noted that, during an additional interview on his asylum motives held on 1 July 2003, the first applicant had been explicitly invited to submit specific evidence that he would be exposed to a risk of treatment contrary to Article 3 in Afghanistan. The Minister found that the first applicant had not furnished sufficient specific grounds to establish that he would run a real risk of treatment contrary to this provision if returned to Afghanistan. Thus, he had failed to indicate which specific persons or groups would be looking for him, and had only stated in generally phrased terms that he feared persecution by the mujahideen. In respect of the first applicant's alleged fear of returning to Afghanistan as a (former) member of the PDPA, the Minister held that the first applicant was in a position not dissimilar to that of many other Afghan nationals. Furthermore, the Minister, with reference to the most recent general official report on Afghanistan issued by the Ministry of Foreign Affairs on 12 November 2003, held that the sole fact that an asylum seeker had been a member of the PDPA did not in itself suffice to render Article 3 applicable in the eventuality of an expulsion.

27. Separate appeals by the applicants were rejected in two distinct judgments handed down on 4 August 2005 by the Regional Court (*rechtbank*) of The Hague, sitting in Assen.

28. As regards the first applicant, the Regional Court accepted the Minister's decision to hold Article 1F of the 1951 Refugee Convention against the first applicant. It also rejected the first applicant's arguments based on Article 3 of the Convention. It agreed with the Minister that the first applicant's fear that he would be subjected to treatment in breach of this provision was based on assumptions, and that he had not submitted any specific evidence of the identity of the person(s) or group(s), or for what reasons, he expected to encounter problems if he were returned to Afghanistan, whereas – according to an official country assessment report on Afghanistan issued by the Ministry of Foreign Affairs on 12 November 2003 – mere membership of the PDPA and active participation in its regime was in itself not enough to raise an issue under Article 3 of the Convention in the event of expulsion of the alien in question. It further rejected, for lack of substantiation, the first applicant's claim that the International Security Assistance Force (ISAF) in Afghanistan would be unable to provide him with sustained protection.

29. Further separate appeals by the applicants were rejected on summary reasoning on 19 December 2005, in two distinct rulings given by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*). It found that the further appeals did not provide grounds for quashing the impugned rulings (*kan niet tot vernietiging van de aangevallen uitspraak leiden*). Having regard to section 91 § 2 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), no further reasoning was called for, as the arguments submitted did not raise any questions requiring a determination in the interest of legal unity, legal development or legal protection in the general sense. No further appeal lay against these rulings.

30. On 2 February 2006, the applicants' fourth child, a daughter named Mina, was born in the Netherlands.

B. Events and proceedings after the introduction of the application

31. On 29 August 2006, the applicants applied for a regular, non-asylum-related, residence permit. This request was rejected on 6 January 2007. The applicant's objection *(bezwaar*) was dismissed on 4 December 2007 by the Deputy Minister of Justice (*Staatssecretaris van Justitie*). The applicants initially lodged an appeal with the Regional Court of The Hague, but withdrew this appeal on 15 July 2008.

32. In the meantime, on 19 February 2008, the second applicant had submitted a fresh asylum claim for herself and on behalf of the three youngest children. The applicants' eldest daughter had made her own asylum claim. Pursuant to section 4:6 of the General Administrative Law Act (*Algemene wet bestuursrecht*), a repeat claim – like the one submitted by the second applicant – must be based on newly emerged facts and/or altered circumstances ("*nova*") warranting a reconsideration of the initial refusal. The asylum claim submitted by the second applicant and her eldest daughter was based on the claim that they had become westernised. The oldest daughter further claimed that she feared being forced into marriage.

33. On 17 September 2010, after an initial negative decision had been quashed on appeal, the Minister of Justice allowed the asylum claim submitted by the second applicant and the three youngest children. The eldest daughter was also granted asylum.

34. More than a year earlier, namely on 12 February 2009 and at the applicants' request, the President of the Chamber had decided to indicate to the Government of the Netherlands that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to remove the applicants to Afghanistan for the duration of the proceedings before the Court (Rule 39 of the Rules of Court). At the same time, the President had decided under Rule 54 § 2 (b) that the Government should be invited to submit written observations on the admissibility and merits of the case.

35. Also, on 27 February 2009 the first applicant had submitted a fresh asylum claim, based on the alleged deterioration in the general security situation in Afghanistan and an increased individual risk of treatment prohibited by Article 3, namely the fact that he was an ex-communist, that he was an atheist and thus belonged to a religious minority, and the fact that he had lived abroad for a long period. He also claimed that, due to his work, he was well known in Afghanistan and was prominent in Afghan circles in the Netherlands. On 19 February 2010, the first applicant was informed of the intention of the Deputy Minister of Justice to reject this request. The first applicant submitted written comments (*zienswijze*) on this intention on 6 April 2010.

36. This request was rejected on 22 October 2010 by the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*). An appeal by the first applicant against this decision was rejected on 31 October 2011 by the Regional Court of The Hague sitting in 's-Hertogenbosch. It found that the first applicant had not shown evidence that the general security situation in Afghanistan had deteriorated since the determination of his first asylum request, or that the further elements relied on by him did not constitute "*nova*" warranting a reconsideration of the decision taken on his initial asylum request. In so far as the first applicant relied on Article 8 of the Convention, the Regional Court held that asylum proceedings offered no scope for such arguments, which should be raised in proceedings on a request for a non-asylum-based residence permit, and that it was open for the first applicant to apply for a residence permit based on his family life within the meaning of Article 8. A further appeal by the applicant was dismissed by the Administrative Jurisdiction Division on 31 October 2012. No further appeal lay against this ruling.

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. The relevant domestic policy, law and practice in respect of asylum seekers from Afghanistan against whom Article 1F of the 1951 Refugee Convention is being held have recently been summarised in *A.A.Q. v. the Netherlands* ((dec.), no. 42331/05, §§ 37-52, 30 June 2015).

III. RELEVANT INTERNATIONAL LAW AND INTERNATIONAL MATERIALS

38. Article 1F of the 1951 Refugee Convention reads:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

39. On 4 September 2003 the United Nations High Commissioner for Refugees ("UNHCR") issued its "*Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*". They superseded "*The Exclusion Clauses: Guidelines on their Application*" (UNHCR, 1 December 1996) and the "*Note on the Exclusion Clauses*" (UNHCR, 30 May 1997) and intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

40. These 2003 guidelines state, *inter alia*, that where the main asylum applicant is excluded from refugee status, his/her dependants will need to establish their own grounds for refugee status. If the latter are recognised as refugees, the excluded individual is not able to rely on the right to family unity in order to secure protection or assistance as a refugee (paragraph 29).

41. In July 2003, the UNHCR issued its "*Update of the Situation in Afghanistan and International Protection Considerations*". This paper stated, in respect of persons associated or perceived to have been associated with the former communist regime, that:

> "Some of the former military officials, members of the police force and Khad (security service) of the communist regime also continue to be generally at risk, not only from the authorities but even more so from the population (families of victims), given their identification with human rights abuses during the communist regime. When reviewing the cases of military, police and security service officials as well as high-ranking government officials of particular ministries, it is imperative to carefully assess the applicability of exclusion clauses of Article 1 F of the 1951 Geneva Convention. To some extent, many of these previous Afghan officials were involved, directly or indirectly, in serious and widespread human rights violations."

42. In May 2008, the UNHCR issued its "*Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992*" in the context of the need to assess the eligibility for international protection for Afghan asylum-seekers who were members of KhAD/WAD. It provides information on the origins of the KhAD/WAD, its structure and staffing, linkages between these services and the Afghan military and militias, the distinction between operational and support services, and rotation and promotion policies within the KhAD/WAD. The Note did not express any views on the question of whether or not persons who had worked for the KhAD/WAD should be regarded as being eligible for international protection.

43. In July 2009, the UNHCR issued Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the July 2009 UNHCR Guidelines") and set out the categories of Afghans considered to be particularly at risk in Afghanistan in view of the security, political and human rights situation in the country at that time. Those Guidelines stated, *inter alia*, the following:

> "Significant numbers of the former People's Democratic Party of Afghanistan (PDPA) – subsequently renamed Watan (Homeland) – members and former security officials, including the Intelligence Service (KhAD/WAD), are working in the Government. ...
>
> Former PDPA high-ranking members without factional protection from Islamic political parties, tribes or persons in a position of influence, who may be exposed to a risk of persecution, include the following: ...
>
> • former security officials of the communist regime, including KhAD members, also continue to be at risk, in particular from the population – e.g. families of victims of KhAD ill-treatment – given their actual or perceived involvement in human rights abuses during the communist regime.
>
> Former PDPA high-ranking members, or those associated with the commission of human rights violations during the former Communist regime, may also be at risk of persecution by mujaheddin leaders, and armed anti-Government groups. ...
>
> When reviewing the cases of military, police and security services officials, and those of high-ranking Government officials during the Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah regimes, it is important to carefully assess the applicability of the exclusion clauses in Article 1F of the 1951 Convention. ...
>
> For individual cases of military officers of the Ministries of Defense and Interior and security services, it is relevant to assess their involvement in operations in which civilians have been subject to arrest, disappearances, torture, inhuman and degrading treatment and punishment, persecution and extrajudicial executions, ..."

44. On 17 December 2010, the UNHCR issued updated Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the December 2010 UNHCR Guidelines"). Those Guidelines read, *inter alia*:

> "These Guidelines supersede and replace the July 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan. They are issued against a backdrop of a worsening security situation in certain parts of Afghanistan and sustained conflict-related human rights violations as well as contain information on the particular profiles for which international protection needs may arise in the current context in Afghanistan. ...
>
> UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF); (ii) humanitarian workers and human rights activists; (iii) journalists and other media professionals; (iv) civilians suspected of supporting armed anti-Government groups; (v) members of minority religious groups and persons perceived as contravening Shari'a law; (vi) women with specific profiles; (vii) children with specific profiles; (viii) victims of trafficking; (ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals; (x) members of (minority) ethnic groups; and (xi) persons at risk of becoming victims of blood feuds. ...

> In light of the serious human rights violations and transgressions of international humanitarian law during Afghanistan's long history of armed conflicts, exclusion considerations under Article 1F of the 1951 Convention may arise in individual claims by Afghan asylum-seekers. Careful consideration needs to be given in particular to the following profiles: (i) members of the security forces, including KHAD/WAD agents and high-ranking officials of the communist regimes; (ii) members and commanders of armed groups and militia forces during the communist regimes; (iii) members and commanders of the Taliban, Hezb-e-Islami Hikmatyar and other armed anti-Government groups; (iv) organized crime groups; (v) members of Afghan security forces, including the NDS; and (vi) pro-Government paramilitary groups and militias. ..."

45. The December 2010 UNHCR Guidelines further state:

> "Members of the Security Forces, including KhAD/WAD agents and high-ranking officials of the Communist regimes, members of military, police and security services, as well as high-ranking Government officials during the Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah regimes, were involved in operations subjecting civilians to arrest, disappearances, torture, inhuman and degrading treatment and punishment, and extrajudicial executions. ...
>
> In this context, careful consideration needs to be given to cases of former members of Khadamate Ettelaate Dowlati (KhAD), the State Information Service. Although the functions of KhAD/WAD evolved over time, culminating in the coordination and undertaking of military operations following the withdrawal of Soviet troops in 1989, it also included non-operational (support) directorates at central, provincial and district levels. Information available to UNHCR does not link the support directorates to human rights violations in the same manner as the operational units. Thus, mere membership to the KhAD/WAD would not automatically lead to exclusion. The individual exclusion assessment needs to take into consideration the individual's role, rank and functions within the organization."

46. Members of the armed forces during the former communist regime were not included in the potential risk profiles set out in the December 2010 UNHCR Guidelines.

47. The most recent update of the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan was released on 6 August 2013 ("the August 2013 UNHCR Guidelines") and replaced the December 2010 UNHCR Guidelines. As in the latter guidelines, the August 2013 UNHCR Guidelines do not include members of the armed forces during the former communist regime in the thirteen cited potential risk profiles, but again state that, as regards Article 1F of the 1951 Refugee Convention, careful consideration needs to be given in particular to, *inter alia*, former members of the armed forces and the intelligence/security apparatus, including KhAD/WAD agents, as well as former officials of the Communist regimes.

48. The "Country of Origin Information Report: Afghanistan – Insurgent strategies – intimidation and targeted violence against Afghans", published in December 2012 by the European Asylum Support Office ("EASO") of the European Union, deals with strategies used by the Taliban and other insurgent groups in Afghanistan to intimidate the local population. It points out that the ongoing conflict in Afghanistan is largely defined by historical underlying mechanisms: local rivalries, power play and tribal feuds. It further notes regional differences in this campaign of intimidation and targeted violence, which vary for the range of targeted profiles studied in the report, which include government officials and employees; Afghan National Security Forces, government supporters, collaborators and contractors, Afghans working for international military forces; Afghans working for international organisations, companies and non-governmental organisations, civilians accused by the Taliban of spying, journalists, media and human rights activists, educational staff or students, medical staff, construction workers, truck drivers, and those judged as violating the Taliban's moral code (for instance, prohibitions on shaving,

women working outdoors, selling music and sweets, or girls' education). This report does not mention persons having worked for the former communist armed forces of Afghanistan or intelligence service as a targeted profile.

49. The relevant part of the 2015 UNHCR country operations profile on Afghanistan reads:

> "It is anticipated that the newly-formed national unity Government will demonstrate commitment to creating an enabling environment for sustainable returns. The withdrawal of international security forces, as well as a complex economic transition are, however, likely to affect peace, security and development in Afghanistan. Humanitarian needs are not expected to diminish in 2015. Support and assistance from the international community will be essential to ensure a transition towards more stable development.
>
> The Solutions Strategy for Afghan Refugees (SSAR) remains the main policy framework for sustainable reintegration of those returning to Afghanistan. The National Steering Committee established in 2014 aims to facilitate the implementation and monitoring of the SSAR's initiatives.
>
> Many returnees have migrated to towns and cities, contributing to the country's rapid urbanization. As rising poverty and unemployment in urban centres prevent them from reintegrating into society, many will need basic assistance. ...
>
> Insurgency continues to spread from southern Afghanistan to large areas of the north and centre and is likely to remain a threat to stability in 2015. While violence may displace more people, insecurity is likely to continue restricting humanitarian access. Economic insecurity and the Government's limited capacity to provide basic services are also challenges. ...
>
> Since 2002, more than 5.8 million Afghan refugees have returned home, 4.7 million of whom were assisted by UNHCR. Representing 20 per cent of Afghanistan's population, returnees remain a key population of concern to UNHCR. Refugee returns have dwindled during the past five years and owing to insecurity and a difficult socio-economic situation, only around 10,000 refugees returned during the first seven months of 2014.
>
> In June 2014, following military operations in North Waziristan Agency, Pakistan, more than 13,000 families (some 100,000 people) crossed into Khost and Paktika provinces in south-eastern Afghanistan. Many of them settled within host communities, however approximately 3,300 families reside in Gulan camp, Khost province. A substantial number could remain in Afghanistan, despite expectations that an early return may be possible.
>
> By mid-2014, 683,000 people were internally displaced by the conflict affecting 30 of the 34 Afghan provinces. More than half of Afghanistan's internally displaced people (IDPs) live in urban areas."

50. In January 2015 the EASO released its "Country of Origin Information Report: Afghanistan - Security Situation". It reads, *inter alia*,:

> "The general security situation in Afghanistan is mainly determined by the following four factors: The main factor is the conflict between the Afghan National Security Forces, supported by the International Military Forces, and Anti-Government Elements, or insurgents. This conflict is often described as an "insurgency". The other factors are: criminality, warlordism and tribal tensions. These factors are often inter-linked and hard to distinguish.
>
> Several sources consider the situation in Afghanistan to be a non-international armed conflict. On 12 November 2014, the World Security Risk Index from the website Global Intake gave Afghanistan the second highest score (48), after Syria (59). Other conflict areas with high scores include: South Sudan (46); Iraq (45); Central African Republic (44); Somalia (41); Ukraine (38). ....

The Taliban are insurgent groups that acknowledge the leadership of Mullah Mohammad Omar and the Taliban Leadership Council in Quetta, Pakistan. The Taliban leadership ruled Afghanistan between 1996 and 2001 and regrouped after it was ousted from power. The different groups have varying operational autonomy, but there is a governing system under the Leadership Council with several regional and local layers. They have a Military Council and a command structure with, at the lowest level, front commanders overseeing a group of fighters. The governing structure and military command is defined in the Taliban's Lahya or Code of Conduct.

On 8 May 2014, the Taliban leadership announced that its spring offensive, called "Khaibar", would be launched on 12 May and would target "senior government officials, members of parliament, security officials, attorneys and judges that prosecute mujahideen, and gatherings of foreign invading forces, their diplomatic centres and convoys".

... the Taliban's core heartland is located in the south and their influence is strongest in the regions of the south-east and east, where they can count on support from affiliated networks. In terms of the Taliban's territorial control, there are only a limited number of districts under their full control, with most district administrative centres remaining under government control. However, outside these centres, there are varying degrees of Taliban control. They have exerted uninterrupted control over large swathes of territory, reaching from southern Herat and eastern Farah, through parts of Ghor (Pasaband), northern Helmand (Baghran and other districts), Uruzgan and northern Kandahar to the western half of Zabul (Dehchopan, Khak-e Afghan) and southern Ghazni.

The Haqqani network is an insurgent network in the south-east of Afghanistan, with its origins in the 1970s mujahideen groups. Its leader, Jalaluddin Haqqani, has attacked Afghan government officials since 1971. It is believed he fled to Pakistan in late 2001, where currently the network has its most important base in North Waziristan. Due to his age, he handed over the practical leadership to his son, Serajuddin Haqqani. Although the network has maintained an autonomous position, structure and its own modus operandi, it is considered part of the Taliban. It is known for various high-profile attacks on targets in Kabul city.

Hezb-e Islami Afghanistan (HIA) is an insurgent group led by Gulbuddin Hekmatyar. The group has the withdrawal of foreign troops as a goal, has conducted high-profile attacks in the capital, but has been more open to negotiation with the Afghan government than the Taliban. The latter criticise HIA for this and on occasions there has been fighting between both insurgent groups in different areas. On other occasions they have cooperated. HIA's strongholds are located in the east and south-east of Afghanistan, in the areas surrounding Kabul, in Baghlan and Kunduz. The group's major field commander is Kashmir Khan, who is active in eastern Afghanistan."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

51. The applicants initially complained that their removal to Afghanistan would violate their rights under Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

On 25 November 2013, the second applicant – also on behalf of the applicants' four children – further complained that their removal to Afghanistan would be contrary to Article 2 of the Convention, the relevant part of which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

52. The Government contested that argument.

A. Admissibility

53. The Court finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3, and will proceed on this basis (see *J.H. v. the United Kingdom*, no. 48839/09, § 37, 20 December 2011).

1. The second applicant and the applicants' children

54. In so far as the application relates to the second applicant and the applicants' four children, the Court notes that they were all granted asylum in the Netherlands on 17 September 2010, and thus no longer risk removal to Afghanistan. Reiterating the relevant principles as set out recently in *M.E. v. Sweden* ((striking out) [GC], no. 71398/12, §§ 32-35, 8 April 2015), the Court finds that, in respect of this part of the application, the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court has found no special circumstances relating to respect for human rights as defined in the Convention and its Protocols which require it to continue the examination of the application.

55. Accordingly, given that this part of the application has been brought by the second applicant and the applicants' four children, it is appropriate to strike it out of the list of cases.

2. The first applicant

56. The Court notes that the application as brought by the first applicant is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

57. The first applicant argued that his expulsion to Afghanistan would expose him to a real risk of ill-treatment within the meaning of Article 3 because of his membership of the PDPA, his four years' study in Belarus, his relatively high military rank during the communist regime, the fact that he was well known through the publication of some of his speeches, and his involvement in the fight against the production of poppies. In addition, he claimed a risk of ill-treatment because his eldest daughter had played a supporting role in a Dutch film produced in 2010 and containing images showing the first applicant – about a former member of the Netherlands parliament and prominent critic of political Islam.

58. In addition, the fact that he was a committed atheist who would be unable to comply with Islamic obligations such as five ritual prayers daily, was a risk-enhancing factor. The first applicant also claimed a risk of ill-treatment in Afghanistan, as he would be forcibly returned not only after having spent a long time abroad but also without his

wife and children, which would inevitably lead to the conclusion in Afghanistan that he had not been granted a Netherlands residence permit because Article 1F had been held against him for being linked to war crimes.

59. Referring to the August 2013 UNHCR Guidelines, according to which individuals perceived as contravening the Taliban's interpretation of Islamic principles, norms and values, or perceived as acting in violation of the Taliban's rules of morality, were at risk of acts of violence from the Taliban, and according to which wealthy business people were exposed to a risk of kidnapping for ransom by criminal gangs, the first applicant argued that his individual circumstances taken together must be regarded as amounting to an increased risk profile for the purposes of Article 3 in the event of his removal to Afghanistan.

60. The Government argued that the first applicant, as regards his individual situation, had not demonstrated that the current Afghan authorities or victims or their relatives were holding him responsible for human rights violations committed under the communist regime. The Government further submitted that the first applicant had failed to substantiate his claim that he was known by the general Afghan population as a former high-ranking officer of the Afghan army and thus associated with human rights violations committed between 1978 and 1992, or that he would have become well known following the publication of his speeches and due to his active participation in the campaign against poppy production in Afghanistan.

61. In this context, the Government pointed out that, according to the applicants' own accounts, they had lived in Kabul between 1992, when the communist regime fell, and March 1994 without encountering any problems from the general population, and during which period the first applicant had been able to continue to work in Kabul, and that between March 1994 and May 1999 the first applicant, together with his family, had lived in Kunduz without encountering any problems from the mujahideen then in power there. The Government further submitted that the first applicant had not demonstrated that the mujahideen or the Taliban, the latter not having been in power since 2001, would currently be interested in him in connection with events which had taken place in the nineties.

62. In so far as the first applicant claimed that his removal to Afghanistan should be regarded as a "1F labelled" removal, the Government stressed that the allegation that only Afghans against whom Article 1F of the 1951 Refugee Convention has been held are removed from the Netherlands is factually incorrect. In any event, since December 2010, the UNHCR Guidelines on Afghanistan no longer included ex-communists and former KhAD/WAD personnel among the "groups at risk", and the official country assessment report on Afghanistan, drawn up by the Netherlands Ministry of Foreign Affairs in July 2012, indicated that many former members of the PDPA and former personnel of the KhAD/WAD were currently working for the Afghan authorities, for example as provincial governors or mayors or in senior positions in the army or police, and that former PDPA members had formed various new political parties. According to the Government, there were no indications that ex-communists risked persecution by the current Afghan government.

63. Accordingly, the Government were of the opinion that the first applicant had failed to establish that on individual grounds he would have reason to fear treatment contrary to Article 3 of the Convention in Afghanistan.

64. In respect of the current general security situation in Afghanistan, the Government submitted that although the security situation in Afghanistan still gave cause for great concern, it was not so poor that returning the first applicant to Afghanistan would in itself amount to a violation of the Convention. On this point, they referred, *inter alia,* to the Court's findings in the cases of *N. v. Sweden* (no. 23505/09, § 52, 20 July 2010);

Husseini v. Sweden, (no. 10611/09, § 84, 13 October 2011); *J.H. v. the United Kingdom* (cited above, § 55); *S.H.H. v. the United Kingdom* (no. 60367/10, 29 January 2013); and *H. and B. v. the United Kingdom* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013). Further pointing out that both the International Organisation for Migration and the UNHCR were assisting Afghans who wished to return voluntarily to Afghanistan, the Government considered that the general security situation in Afghanistan was not such that for this reason the first applicant's removal to Afghanistan should be regarded as contravening Article 3.

2. The Court's assessment

(a) General principles

65. The Court reiterates at the outset that the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Marguš v. Croatia* [GC], no. 4455/10, § 129 with further references, ECHR 2014 (extracts)).

66. It also reaffirms that a right to political asylum and a right to a residence permit are not, as such, guaranteed by the Convention and that, under the terms of Article 19 and Article 32 § 1 of the Convention, the Court cannot review whether the provisions of the 1951 Refugee Convention have been correctly applied by the Netherlands authorities (see, for instance, *I. v. the Netherlands* (dec.), no. 24147/11, § 43, 18 October 2011).

67. The Court further reiterates that the Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.

In such a case, Article 3 implies an obligation not to deport the person in question to that country. The mere possibility of ill-treatment on account of an unsettled situation in the requesting country does not in itself give rise to a breach of Article 3. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence, except in the most extreme cases where the general situation of violence in the country of destination is of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3.

The standards of Article 3 imply that the ill-treatment the first applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

Finally, in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the 1951 Refugee Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported

by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *M.E. v. Denmark*, no. 58363/10, §§ 47-51, with further references, 8 July 2014).

68. As regards the material date, the existence of such risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012). However, since the first applicant has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996-V).

(b) Application of the general principles to the present case

69. As regards the individual elements of the risk of ill-treatment claimed by the first applicant, the Court notes that after the collapse of the communist regime in Afghanistan in 1992 the first applicant did not flee the country but remained in Kabul, where he continued his work in the Army Museum. The Court further notes that the first applicant was not dismissed from his job, but resigned in March 1994, and that he and his family did not flee the country but moved to Kunduz, where they lived quietly for about four years without encountering any problems from the authorities, groups or individuals on account of his past activities for the KhAD. The first applicant also did not flee Afghanistan when the Taliban seized power in Kunduz on 26 June 1997. It was only in April or May 1998, after being denounced by relatives, that the first applicant was arrested and detained by the Taliban. After he had managed to abscond on an unspecified date, he fled to Mazar-e-Sharif, where he was joined by his family on 7 November 1999 and with whom he fled Afghanistan on 12 November 1999.

70. There is nothing in the case file before the Court specifically indicating that the first applicant, since his departure from Afghanistan, has attracted negative attention from any governmental or non-governmental quarter or any private individual in Afghanistan on account of being an atheist former member of the PDPA, of having been a career soldier in the Afghan army during the communist regime, and/or on account of any other personal element cited by him, including being visible in a 2010 Dutch film. The Court further notes that the UNHCR does not include members of the armed forces during the former communist regime in their potential risk profiles in respect of Afghanistan (see paragraphs 45-46 above) and that there is no indication in the two EASO reports on Afghanistan that members of the military or intelligence services under the former communist regime are specifically targeted by the Taliban or other insurgent groups in Afghanistan (see paragraphs 47 and 49 above).

71. The Court has next examined the question whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention. In its judgment in the case of *H. and B. v. the United Kingdom*, (cited above, §§ 92-93), it did not find that in Afghanistan there was a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there. In view of the evidence now before it, the Court has found no reason to hold otherwise in the instant case.

72. The Court is therefore of the opinion that the first applicant has failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that he would be exposed to a real and personal risk of being subjected to treatment contrary to Article 3 of the Convention if removed to Afghanistan.

73. Consequently, the applicant's expulsion to Afghanistan would not give rise to a violation of Article 3 of the Convention.

II. RULE 39 OF THE RULES OF COURT

74. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

75. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to strike the application out of its list of cases in accordance with Article 37 § 1 (b) of the Convention in so far as it concerns the complaints brought by the second applicant and by the applicants' four children;

2. *Declares* the remainder of the application admissible;

3. *Holds* that there would be no violation of Article 3 of the Convention in the event of the first applicant's removal to Afghanistan; and

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 12 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Luis López Guerra
Deputy Registrar	President

[1] Between 1978 and 1992 Afghanistan had a communist regime. It had an intelligence and secret police organisation called *Khadamat-e Aetela'at-e Dawlati* (State Intelligence Agency), better known by its acronym KhAD, which became *Wizarat-i Amaniyyat-i Dawlati* (Ministry for State Security), known as WAD, in 1986.