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

THIRD SECTION

DECISION

Application no. 72586/11
E.K.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 11 July 2017 as a Committee composed of:

Luis López Guerra, *President,*
Dmitry Dedov,
Jolien Schukking, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 25 November 2011,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the parties' submissions,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr E.K., is an Afghan national who was born in 1947 and lives in the Netherlands. The President decided that the applicant's identity was not to be disclosed to the public (Rule 47 § 4 of the Rules of Court). The applicant was represented before the Court by Mr M.J.A. Leijen, a lawyer practising in Alkmaar.

2. The Dutch Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 23 November 1998 the applicant applied for asylum in the Netherlands, claiming fear of persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Refugee Convention"). On the same day the immigration authorities held a first interview (*eerste gehoor*) with the applicant about his identity, nationality and travel itinerary. A written record of this interview was drawn up and the applicant was given the opportunity to submit corrections and additions.

5. On 31 March 1999 a further interview (*nader gehoor*) was held with the applicant about his reasons for seeking asylum. A written record of this interview was drawn up and, on 19 April 1999, the applicant's lawyer submitted corrections and additions on behalf of the applicant.

6. The applicant stated that he was married and that he and his wife had seven children aged between 7 and 26. An eighth child had been killed, together with the applicant's mother, in 1998 during a bombing raid. He was a former member of the communist People's Democratic Party of Afghanistan (the "PDPA") and had been employed as a teacher from 1968 to 1981. He had then studied for three years at the police academy and from 1984 to 1998 had worked for the police in Mazar-e Sharif. He had been promoted at regular intervals and had worked in various departments. His final rank had been that of lieutenant general and his last position had been that of deputy secretary of the general political affairs directorate of the High Military Council in the northern area. In 1992 he had worked for four months in Kabul with Ahmad Shah Massoud and Abdul Rashid Dostum. During that period he had been deputy head of the political affairs department of Dostum, at whose request he had moved back to Mazar-e Sharif after four months. The applicant stated that, after the mujahideen seized power in April 1992, he had returned to Mazar-e Sharif, where he had worked as deputy head of the political affairs department until 6 June 1998, when the Taliban came to power. He and his family had lived in Mazar-e Sharif from October/November 1992 until 31 July 1998, when they had moved in with his brother-in-law. He had left Mazar-e Sharif on foot on 7 August 1998. His wife and their children had remained with his brother-in-law. He had left Afghanistan because the Taliban had been edging closer to Mazar-e Sharif and he feared that he and his family would all be killed. His children had studied in the Soviet Union and would thus be regarded as intellectuals. His oldest son P. (born in 1975) was married to a Russian woman.

7. In a letter dated 30 August 2000 the applicant was informed that his case file had been transmitted to a special 1F Unit of the Immigration and Naturalisation Service in order to examine whether Article 1F of the 1951 Refugee Convention applied to his case.

8. On 16 September 2000 the applicant's wife applied for asylum in the Netherlands, both for herself and on behalf of their minor children S (born in 1987), T (born in 1988) and U (born in 1990). The applicant's wife was

interviewed by the immigration authorities on 31 October 2002. On 15 November 2000 the applicant's son R (born in 1984) also applied for asylum in the Netherlands. He was interviewed by the immigration authorities on 15 January 2001.

9. On 26 January 2001 a supplementary interview (*aanvullend gehoor*) was held with the applicant in the course of which, amongst other things, he explained the relationship between the State Intelligence Agency (*Khadamat-e Aetela'at-e Dawlati*, better known by its acronym KhAD) and the police (*Sarandoy*). On 13 March 2001 the applicant's lawyer submitted corrections and additions to the written record of this interview.

10. On 11 May 2001 the applicant's oldest daughter O (born in 1972) – who apparently entered the Netherlands on the same date as her brother R (see paragraph 8 above) – was granted a residence permit valid from 15 November 2000 under a general protection policy. On 11 January 2006 she was granted an asylum-based residence permit as she had demonstrated that from a young age she had had a western lifestyle which formed a fundamental part of her identity.

11. On 4 September 2001 the applicant's son Q (born in 1979) applied for asylum in the Netherlands under another name. These proceedings ended on 17 May 2005.

12. On 20 November 2002 a further supplementary interview was held with the applicant, as well as with his wife and their son R, who had also applied for asylum in the Netherlands.

13. On 12 September 2003 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) notified the applicant of her intention to deny the applicant asylum pursuant to Article 1F of the 1951 Refugee Convention. She noted that the applicant had stated that he had been a police officer from 1984 to 1998 and in that capacity had been tasked with combating the mujahideen during the former communist regime, that he had been the deputy of the commander, General Joma Asek, and that they had coordinated activities in eight provinces from their base in B. province. According to the applicant, apart from their regular police tasks, the criminal investigation department had been involved in the same thing as the KhAD, namely combating the mujahideen. When the mujahideen had becomee active in a certain province, the applicant and a colleague from the security service had gone there in order to carry out counter-activities. Subsequently, they had had to report directly to [President] Najibullah that they had beaten the mujahideen, in the sense that they had driven them out from the village or town, or that they had been killed. Under General Dostum the applicant had been promoted to lieutenant-general and been put in charge of political affairs, KhAD and defence, amongst other things. He had later become deputy secretary of the general directorate of political affairs of the High Military Council, on which he had had a seat as police representative.

14. The Minister further noted that, according to an official report (*ambtsbericht*) about the police in Afghanistan published by the Minister of Foreign Affairs on 4 September 2002, Sarandoy units had been deployed in combating the mujahideen and this had frequently been accompanied by gross human rights violations such as looting, torture, and the rape and murder of civilians. In the period 1992-1996 the police had also committed human rights violations. According to the Minister of Foreign Affairs, the police force had performed inadequately and all of its members had been actively involved in human rights violations. Extortion, intimidation, robbery, rape, maltreatment, torture and arbitrary executions had been commonplace during that period. The Minister further noted the content of a general official report dated 29 February 2000 on "Security Services in Communist Afghanistan (1978-1992), AGSA, KAM, KhAD and WAD" ("*Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD*") on the basis of which the Netherlands immigration authorities had adopted the position that Article 1F of the 1951 Refugee Convention could be applied against virtually every Afghan asylum seeker who, during the communist regime, had worked for the KhAD, or its successor the WAD, at the rank of third lieutenant or higher.

15. Following a lengthy analysis of the applicant's individual responsibility under Article 1F of the 1951 Refugee Convention, based on the prescribed and so-called "knowing and personal participation" test, the Minister decided that Article 1F was to be applied in the applicant's case. The Minister concluded that, given the senior positions he had held, the applicant had known or should have known that crimes had been committed by the Sarandoy and by the police under General Dostum. The Minister did not believe the applicant's claim that no looting, torture, arbitrary executions or rape had been committed under his command.

16. On 9 October 2003 the applicant's lawyer submitted written comments on the Minister's intended decision.

17. In her decision of 30 January 2004 the Minister denied the applicant asylum pursuant to Article 1F. The Minister maintained the conclusions and findings she had set out in the notice of intent. The applicant's comments were dismissed as not warranting a different finding. In so far as the applicant had relied on Article 3 of the Convention, the Minister held that it could not be concluded from the applicant's asylum statement – viewed against the background of the current political and social situation in Afghanistan – that there existed a real and foreseeable risk that he would be subjected to treatment in breach of Article 3 of the Convention if he were to be removed to Afghanistan. There were no concrete indications that the Afghan authorities were targeting him and his claims were found to be based solely on conjecture.

18. On the same date the Minister also rejected the asylum requests submitted by the applicant's wife and the children R, S, T and U.

19. On 4 February 2004, the applicant and his wife together with S, T and U, and R lodged two separate appeals with the Regional Court of The Hague.

20. In its joint judgment of 9 June 2005, following a hearing held on 17 March 2005, the Regional Court of The Hague, sitting in Rotterdam, accepted the appeals brought by the applicant, his wife and their children R, S, T and U, quashed the impugned decisions of 30 January 2004, and ordered the Minister to issue fresh decisions. It held that the applicant had rightly been denied asylum pursuant to Article 1F and that, consequently, the asylum requests of his wife and R, S, T and U – whose asylum statements were dependent on the applicant's – had also been rightly rejected. However, the Regional Court found that the Minister had given insufficient reasons for rejecting the applicant's arguments under Article 3.

21. On 18 October 2005 a further supplementary interview was held with the applicant.

22. On 16 November 2005 the applicant's son Q filed a fresh asylum application, this time in his own name (see paragraph 11 above). This application was rejected and Q withdrew his appeal against this rejection on 6 December 2005.

23. On 27 March 2007 the Deputy Minister of Justice notified the applicant of her renewed intention to deny the applicant asylum pursuant to Article 1F. The Deputy Minister held that there were no reasons warranting a different finding in respect of the applicability of Article 1F to the applicant's case and, consequently, that he was to be denied asylum for that reason. As regards the claim that the applicant risked being subjected to treatment proscribed by Article 3 of the Convention in Afghanistan, the Deputy Minister opined that it was not for her to establish that the claimed risk did not exist but rather for the applicant to demonstrate the existence of this risk. The applicant had made statements in general terms, only, about this risk − saying that he feared problems from anyone now carrying a weapon in Afghanistan − and had failed to submit any concrete instances of having been personally targeted by specific individuals. The Deputy Minister therefore concluded that there was nothing in the applicant's submissions on the basis of which it could be argued that the applicant would be exposed to a real and personal risk of being subjected to treatment prohibited under Article 3 in Afghanistan. The Deputy Minister likewise found no reason to consider that the general situation in Afghanistan was so serious that the applicant's removal to that country would constitute, in itself, a violation of Article 3 of the Convention. The Deputy Minister also notified him of her intention to impose also an exclusion order (*ongewenstverklaring*) on him.

24. On 23 April 2007 the applicant's lawyer submitted written comments on the Deputy Minister's intended decision.

25. In her decision of 14 June 2007, the Deputy Minister again denied the applicant asylum under Article 1F and, in addition, imposed an exclusion order on him. Rebutting the applicant's comments, the Deputy Minister maintained that it had not been established that there was a risk that, if removed to Afghanistan, he would be subjected to treatment in breach of Article 3 of the Convention. In so far as the applicant sought to rely on Article 8 of the Convention, the Deputy Minister noted that he was living with his spouse in the Netherlands and that, with the exception of U, their children had all come of age. The Deputy Minister held that the refusal to admit the applicant to the Netherlands did not interfere with his family life with his spouse and those of his children who were living with him, as they had likewise not been admitted to the Netherlands. The Deputy Minister did, however, accept that the imposition of an exclusion order on the applicant interfered with his right to respect for his family life within the meaning of Article 8 of the Convention as regards his adult daughter O, who had been granted Netherlands nationality on 31 August 2006 and was living in the Netherlands with her husband and two minor children. However, having taken into account the "guiding principles" formulated in the Court's judgments of 2 August 2001 in *Boultif v. Switzerland*, (no. 54273/00, ECHR 2001 IX) and of 18 October 2006 in *Üner v. the Netherlands* ([GC], no. 46410/99, ECHR 2006 XII) and the seriousness of the crimes referred to in Article 1F, the Deputy Minister concluded that the general interest outweighed the applicant's personal interests and that the exclusion order imposed on him was therefore not a breach of his rights under Article 8 of the Convention. On 19 June 207 the applicant lodged an appeal against this decision with the Regional Court of The Hague.

26. On 15 June 2007 the Deputy Minister also rejected the asylum requests submitted by the applicant's wife and R, S, T and U. They lodged an appeal with the Regional Court of The Hague on 19 June 2007.

27. On 19 June 2007 the applicant also filed an objection with the Deputy Minister in respect of the decision to impose an exclusion order. On 20 November 2007 the applicant lodged an appeal with the Regional Court of The Hague concerning the Deputy Minister's failure to deliver a decision regarding his objection within a reasonable period of time.

28. On 11 January 2008, noting that the proceedings concerning the applicant's appeal against the decision to deny him asylum pursuant to Article 1F were still pending, the Regional Court of The Hague, sitting in Amsterdam, allowed the applicant's appeal of 20 November 2007 and ordered the Deputy Minister to deliver a decision regarding the applicant's objection of 19 June 2007 within six weeks.

29. The Deputy Minister rejected the applicant's objection on 8 July 2008, following a hearing held on 26 March 2008 before an official commission (*ambtelijke commissie*). After an extensive analysis of the evidentiary materials in the applicant's case file, the Deputy Minister

concluded that the decision of 14 June 2007 had been based on serious grounds for believing that the applicant had committed acts such as those referred to in Article 1F of the 1951 Refugee Convention. As regards Article 3, the Deputy Minister found that the applicant had not demonstrated any concrete indications of the existence of a real and personal risk that in Afghanistan the applicant would be subjected to treatment prohibited under this provision. The Deputy Minister also found that the exclusion order did not contravene the applicant's rights under Article 8 of the Convention. The Deputy Minister noted that the applicant's spouse and children had left Afghanistan because of the problems encountered there by the applicant. As no Article 3 obstacle to the applicant's return had been demonstrated, the same applied to his spouse. Furthermore, whilst acknowledging that a return to Afghanistan would entail adjustment difficulties for the applicant's children, these were of insufficient gravity to justify the granting of a residence permit, given the nature and seriousness of the crimes held against the applicant. Referring to the criteria defined by the Court in the cases of *Boultif* and *Üner* (cited above), the Deputy Minister found that a fair balance had been struck, since the interests of public order and national security and the need to prevent crime and protect the rights and freedoms of others outweighed the applicant's personal interest in having an unhindered family and private life in the Netherlands. The Deputy Minister therefore concluded that the imposition of the exclusion order constituted an interference with the applicant's rights under Article 8 § 1 which was justified under the terms of Article 8 § 2 of the Convention. The Deputy Minister did not find any special facts and circumstances in the applicant's case on the basis of which the Netherlands authorities would be under a positive obligation under Article 8 to grant the applicant a residence permit. On 1 August 2008 the applicant lodged an appeal with the Regional Court of The Hague.

30. On 25 June 2009 the applicant's son Q filed a third asylum application, which was rejected by the Deputy Minister on 3 May 2010. He lodged an appeal with the Regional Court of The Hague on 28 May 2010.

31. In a joint judgment of 11 March 2011, following a hearing held on 16 December 2010, the Regional Court of The Hague, sitting in Amsterdam, rejected the applicant's appeal against the exclusion order imposed on him and declared inadmissible his appeal against the decision to deny him asylum pursuant to Article 1F. Accepting that the applicant had submitted new facts and/or altered circumstances warranting a re-examination of his case, the Regional Court had carried out a full review. In the light of the applicant's asylum statement, it accepted that the Deputy Minister had rightly found Article 1F applicable to the applicant's case. On this point it found decisive the statements the applicant made during his further interview of 31 March 1999 – which matched existing general information regarding Afghanistan – from which it could be deduced that he

had held senior management positions in the Sarandoy, in the service of which he had forged a career involving tasks covering a large area of Afghanistan. It was apparent from an official report of 4 September 2002 on the police in Afghanistan (see paragraph 14 above) that, in both periods during which the applicant had worked for this service, the Sarandoy had been responsible for human rights violations targeting the civilian population. It found nothing in the applicant's new submissions to warrant a different finding. As regards Article 3 of the Convention, the Regional Court concluded – as had the Deputy Minister − that the applicant had not demonstrated that in Afghanistan he would risk being subjected to treatment prohibited under Article 3. As regards his reliance on Article 8 of the Convention, the Regional Court found that the decision to impose an exclusion order on the applicant constituted an interference with his rights under Article 8 § 1 but that, in particular given the weight of the wording of Article 1F, such interference was justified under the second paragraph of this provision. It also found that, as long as the exclusion order remained valid, the applicant was not eligible for any kind of residence permit and therefore had no legal interest in bringing proceedings (*procesbelang*) against the decision to deny him asylum.

32. The Regional Court granted the appeals lodged by the applicant's spouse and their daughter S. It quashed the decision of 15 June 2007 and ordered the Minister for Immigration, Integration and Asylum Policy to issue a fresh decision. It considered that, given their westernised lifestyle, a refusal to admit them to the Netherlands would violate their right to respect for their private life under Article 8. The Regional Court also granted the appeals in respect of the applicant's sons R, T and U, quashed the decision of 15 June 2007 in so far as it related to them, and ordered the Minister for Immigration, Integration and Asylum Policy to issue a fresh decision. The Regional Court rejected the appeal brought by the applicant's son Q.

33. On 8 April 2011 the applicant lodged a further appeal with the Administrative Jurisdiction Division. On the same day the Minister for Immigration, Integration and Asylum Policy lodged a further appeal with the Administrative Jurisdiction Division against the judgment of 11 March 2011 in so far as it concerned the applicant's wife and the children R, S, T and U. Although possible, no further appeal was lodged by Q.

34. On 2 November 2011 the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek*) of the Ministry of Security and Justice (*Ministerie van Veiligheid en Justitie*) held a "repatriation interview" ("*terugkeergesprek*") with the applicant, who declared that he was not prepared to cooperate in the organisation of his return to Afghanistan.

35. On 7 November 2011 the applicant's lawyer was informed by the Departure and Repatriation Service that the applicant would be placed in immigration detention (*vreemdelingenbewaring*) on 29 November 2011, pending removal.

36. On 15 November 2011 the applicant submitted a request for a provisional measure (*voorlopige voorziening*) to the Administrative Jurisdiction Division, seeking a stay of his removal pending the outcome of the further appeal proceedings. The President of the Administrative Jurisdiction Division rejected this request on 18 November 2011, finding that it was unclear whether removal would take place and, if so, when.

B. Events after the lodging of the application

37. The application was lodged with the Court on 25 November 2011, together with a request to issue an interim measure under Rule 39 of the Rules of the Court seeking that the applicant's removal to Afghanistan be stayed pending the proceedings before the Court.

38. On 2 December 2011 the Acting President of the Section to which the case had been allocated decided to grant the request to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be expelled to Afghanistan for the duration of the proceedings before the Court.

39. On 23 December 2011, following a hearing held on 31 October 2011, the Administrative Jurisdiction Division rejected the further appeal lodged by the applicant. It allowed the appeal brought by the Minister, quashed the impugned judgment in so far as it allowed the appeal brought by the applicant's three youngest children whilst rejecting the latter's appeal against the decision of 15 June 2007, and upheld the remainder of the impugned judgment. In the proceedings before the Administrative Jurisdiction Division the applicant's wife submitted, in the context of her claim that she could not return to Afghanistan on account of her western lifestyle, that she had given her daughters a modern education and that, in their former life in Afghanistan, it had only been possible for her to have such a western lifestyle because she had then been protected by the high-ranking position of her husband.

40. On 16 March 2012 the applicant's wife was granted an asylum-based residence permit, valid with effect from 15 November 2000, on the grounds that she would face a real and foreseeable risk of treatment proscribed by Article 3 if she returned to Afghanistan. No information has been submitted clarifying whether this decision was based on a specific individual risk or a risk of a more general nature. The children R, S, T and U were also granted a residence permits, but these were based on a general regularisation scheme (*RANOV pardonregeling*) for asylum seekers who had applied for asylum before 1 April 2001 and had been living in the Netherlands on an uninterrupted basis ever since.

41. On an unspecified date, Q was also granted a residence permit to stay with his wife in the Netherlands. This permit was withdrawn in 2015 after his marriage broke up. He is still residing in the Netherlands, and on an

unspecified date – and pending proceedings in which he was seeking to challenge the withdrawal of his residence permit – Q was eventually granted a residence permit on humanitarian grounds.

C. Relevant domestic law and practice

42. A general overview of the relevant domestic law and practice in respect of asylum proceedings, exclusion orders and enforcement of removals has been set out in K. v. the Netherlands ((dec.), no. 33403/11, §§ 16-32, 25 September 2012).

43. In the light of the strict separation under the provisions of the Aliens Act 2000 (*Vreemdelingenwet 2000*) between an asylum application and a regular application for a residence permit for a purpose other than asylum, arguments relying on Article 8 of the Convention cannot be entertained in asylum proceedings unless they relate to an application for an asylum-derived residence permit (*verblijfsvergunning met een afgeleide asielstatus*) for the purpose of refugee-family reunification (*nareisvergunning* – see *Gereghiher Geremedhin v. the Netherlands* (dec.), no. 45558/09, §§ 30-31, 23 August 2016). Such arguments should instead be raised in proceedings concerning a regular application for a residence permit (see *Mohammed Hassan v. the Netherlands and Italy and 9 other applications* (dec.), no. 40524/10, § 13, 27 August 2013; *J. v. the Netherlands* (dec.), no. 33342/11, § 9, 18 October 2011; and *Joesoebov v. the Netherlands* (dec.), no 44719/06, § 27, 2 November 2010) or proceedings concerning the imposition of an exclusion order (see *Üner v. the Netherlands* (cited above), and *Arvelo Aponte v. the Netherlands*, no. 28770/05, 3 November 2011).

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

45. The most recent official country assessment report on Afghanistan was drawn up by the Netherlands Ministry of Foreign Affairs in November 2016. The relevant part of this report reads:

> "3.5.9 (Former) communists
>
> Under 'potential risk profiles' in the UNHCR Eligibility Guidelines [for assessing the international protection needs of asylum-seekers from Afghanistan, 19 April 2016] no information is given about persons who identify with the communist ideology (or who are suspected thereof). In the part 'Exclusion from International Refugee Protection' the UNHCR does give information about former members of the KhAD and WAD.
>
> Many former members of the People's Democratic Party of Afghanistan (PDPA) and former employees of the former intelligence services the KhAD and the WAD are currently working for the Afghan Government. They have, for example, been

appointed as governors of provinces, occupy high positions in the army [or] the police, or are mayors. Some former PDPA members have founded new parties.

In so far as is known, ex-communists and their relatives have nothing to fear from the ... Government.

It therefore cannot be said that the group of (former) communists as a whole has reasons to fear being in Afghanistan. It depends on each individual person whether someone has or has not reason to fear being in Afghanistan, and this also applies to former employees of the KhAD/WAD."

D. Relevant international material

46. 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."

47. On 4 September 2003 the United Nations High Commissioner for Refugees (the "UNHCR") issued the "*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 "*Note on the Exclusion Clauses*" (UNHCR, 30 May 1997) and are 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. These guidelines state that in cases where the main asylum applicant is denied refugee status, his or her dependants need to establish their own grounds for obtaining such 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).

48. An overview of the relevant guidelines and country operations profile on Afghanistan of the United Nations High Commissioner for Refugees has recently been summarised in *A.G.R. v. the Netherlands* (no. 13442/08, §§ 32-41, 12 January 2016).

49. The most recent update of the "*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*" was released on 19 April 2016 ("the April 2016 UNHCR Guidelines") and replaced the August 2013 "*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from*

Afghanistan". As in the 2013 guidelines, the April 2016 UNHCR Guidelines do not include individuals who worked for the KhAD/WAD or the police during the former communist regime in the fifteen cited potential risk profiles. However, they again state that, as regards Article 1F of the 1951 Refugee Convention, careful consideration needs to be given in particular to former members of the armed forces and the intelligence/security apparatus – including KhAD/WAD agents during the former communist regimes under Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah – as well as former officials of those communist regimes.

50. The United Nations Office for the Coordination of Humanitarian Affairs (the "OCHA") reported in the *Humanitarian Bulletin Afghanistan* of 31 May 2016 on humanitarian access and aid-worker incidents as follows:

> "The total number of incidents relating to NGOs, UN and International Organizations from 1 January to 31 May 2016 stands at 91, which is slightly less than 2015. To date in 2016, national and international NGOs are the most directly affected with 56 incidents. Six aid workers have been killed, 12 injured and 81 abducted.
>
> The number of security incidents across the country is consistent with 2015 numbers, but there has been a significant increase in armed clashes as a percentage of overall security incidents. This has manifested itself by way of increased large scale ground engagements which have led to a reduction in access to many areas and for longer periods of time."

51. The report by the Secretary-General of the United Nations on "*The situation in Afghanistan and its implications for international peace and security, 10 June 2016*" (A/70/924-S/2016/532) reads under the heading "Security":

> "12. The security situation in Afghanistan deteriorated, with Taliban operations at an unprecedented high rate since the beginning of 2016. Armed clashes increased by 14 per cent in the first four months of the year compared with the same period in 2015 and were higher for each month compared with previous years. In April 2016, the highest number of armed clashes was reported since June 2014, a period that coincided with the presidential elections.
>
> 13. Notwithstanding the increase in armed clashes, overall security incidents decreased. Between 16 February and 19 May, the United Nations recorded 6,122 security incidents, representing a decrease of 3 per cent compared with the same period in 2015, attributed primarily to a reduction in incidents involving improvised explosive devices. The southern, south-eastern and eastern regions continued to account for the majority of incidents (68.5 per cent). Consistent with previous trends, armed clashes accounted for the majority of security incidents (64 per cent), followed by improvised explosive devices (17.4 per cent). Targeted killings decreased: from 16 February to 19 May, 163 assassinations, including failed attempts, were recorded, representing a decrease of 37 per cent compared with the same period in 2015. A total of 15 suicide attacks were reported, compared with 29 in the same period in 2015, as well as several high-profile incidents. The latter included a complex attack against the consulate of India in Jalalabad on 2 March, an attack against the residence of the acting Director of the National Directorate of Security in the city of Kabul on 21 March and the targeted killing of two high-ranking army commanders on 24 and

27 March in Kandahar and Logar provinces, respectively. The Taliban claimed responsibility for those two attacks.

14. Insurgent attacks increased notably after the beginning of the Taliban spring offensive, Operation Omari. In its declaration of 12 April launching the annual campaign, the Taliban pledged large-scale attacks against "enemy positions" alongside tactical attacks and targeted killings of military commanders. Unlike in previous years, the movement did not threaten civilian government officials specifically. In the first two weeks of the offensive, the number of Taliban-initiated attacks almost doubled compared with the previous two weeks, resulting in the highest number of armed clashes recorded for the month of April since 2001. Since the beginning of the offensive, the Taliban has launched 36 attacks on district administrative centres, including a concerted push on the city of Kunduz. The Afghan National Defence and Security Forces repelled the vast majority of those attacks. The offensive gained further momentum with the completion of the seasonal poppy harvest in Helmand Province early in May, resulting in increased clashes in the southern region. The Taliban also concentrated efforts to seize strategically important parts of Uruzgan Province along the Kandahar-Tirin Kot highway and retook control of strategic areas of Baghlan Province, where security forces had conducted a clearance operation in January.

15. The Afghan National Defence and Security Forces remained under pressure, in particular in Baghlan, Faryab, Helmand, Kunar, Kunduz, Nangahar and Uruzgan provinces, and were reinforced by Afghan special forces and international military assets. Notwithstanding intensified efforts to strengthen army units, in particular in Helmand Province, significant shortcomings remained in the areas of command and control, leadership, logistics and overall coordination. In the first four months of 2016, reports indicated rising casualties among the security forces. The sustainability of the forces remains a challenge in the light of high attrition rates. Even though recruitment was on target, re-enlistment rates remained particularly low and needed to be increased to compensate for other losses. In April 2016, army troop levels and Afghan National Police numbers reached 87 per cent and 74 per cent respectively, of the levels projected for August 2016. Some progress was made in increasing air capacity, and the air force carried out a limited number of air missions.

16. Discussions on the presence of the Resolute Support Mission of NATO beyond 2016 and future funding arrangements for the Afghan National Defence and Security Forces continued ahead of the NATO summit in July. The Secretary-General of NATO, Jens Stoltenberg, visited the city of Kabul on 15 and 16 March, during which he met with the President and the Chief Executive of Afghanistan, Abdullah Abdullah, and reaffirmed the commitment of NATO to Afghanistan. On 11 May, NATO members and donor representatives discussed financial support for the Afghan National Defence and Security Forces up to 2020 in a meeting in Brussels of the board of the Afghan National Army Trust Fund. On 20 May in Brussels, ministers for foreign affairs of participating countries agreed on the extension of the Mission beyond 2016.

17. Other armed groups maintained small presences on Afghan territory, including the Islamic Movement of Uzbekistan in northern Afghanistan and the Islamic State in Iraq and the Levant-Khorasan Province (ISIL-KP) in the east. Since my previous report, operations by the Afghan National Defence and Security Forces, supported by international military air strikes, further reduced the presence of ISIL-KP in Nangarhar Province, where the group also faced pressure from the Taliban. This contributed to ISIL-KP establishing a small, secondary presence in neighbouring Kunar and Nuristan provinces in search of safe havens and recruitment.

18. A total of 25 recorded incidents had an impact on the United Nations, including 6 cases of intimidation, 3 incidents relating to an improvised explosive device and 6 criminal-related incidents. On 20 May, a guard contracted by the United Nations was killed in the city of Kabul and another guard and a United Nations staff member were injured in a shooting incident, the circumstances of which are under investigation."

52. The German Federal Office for Migration and Asylum, Information Centre Asylum and Migration: Briefing Notes (27 June 2016) reported on Afghanistan:

"Security situation

In a report submitted to Congress, the U.S. Department of Defense notes a deterioration of security in view of the reduced international military presence and the weakness of the Afghan forces. While the Afghan government retained control of most city centres, the Taliban continued to expand their influence, especially in rural areas, the report says, demonstrating their resilience by attacks in Nangarhar, Herat, Kunduz and other northern provinces as well as in Helmand.

Increasingly, the Taliban insurgents were launching major attacks in urban centres, the report continues. From January to May, a total of 2,496 civilian casualties including 760 deaths were documented, the report went on.

In Nangarhar province, at least 135 rebels and 12 members of the security forces died in a clash between the Afghan military and ISIS rebels. The fight started on 24 June 2016, when hundreds of ISIS insurgents attacked a military post in Kot district.

Attacks

On 20 June 2016, an attack on a member of the Kabul provincial council left 6 people wounded, among them the council member and his body guard.

On the same day, a bomb planted in a motorbike killed 8 people and injured another 14 in a market in northern Badakhshan province.

Intra-Taliban fighting

On 22 June 2016, a spokesman of the governor of Herat province stated that 20 militants were killed in fights between a Taliban splinter faction supporting dissident Mullah Mohammed Rasool, who is opposing the appointment of Mullah Haibatullah Akhundzada as the new Taliban leader, and followers of Akhundzada. The clash did not result in any civilian casualties, it was stated.

Bus passengers kidnapped

On 22 June 2016, Taliban insurgents ambushed a series of buses and other vehicles in Gareshk district (southern Helmand province) and abducted around 60 passengers. Shortly afterwards, they let go those who were travelling with their families. In an internet message, the Taliban stated that they had detained '27 suspect individuals'. If these turned out to be working for the government, they would be submitted to the Islamic emirate's courts, the Taliban said. Tribal elders intervened and succeeded in releasing all but two hostages."

53. In November 2016 the European Asylum Support Office ("the EASO") released the country of origin information report *"Afghanistan Security Situation"*. This report, presenting information up to 31 August 2016, is an update of a previous report released by EASO in January 2015

and an update released in January 2016. It provides a general description of the security situation in Afghanistan, as well as a description of the security situation for each of the thirty-four provinces and Kabul. The report states:

> "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 (ANSF), supported by the International Military Forces (IMF), and Anti-Government Elements (AGEs), 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.
>
> The UN [Security Council] stated in June 2016 that:
>
> 'The security situation was characterized by continued and intense armed clashes, which were at their highest number recorded since 2001 and had a corresponding negative impact on civilians, with rising casualties and displacement rates.' ...
>
> The overall security situation deteriorated during 2015 since ANSF had to act independently without international support. The Taliban continued to conduct high-profile attacks in Kabul. Direct armed clashes and attacks intensified in the provinces of Baghlan, Faryab, Helmand, Kunar, Kunduz, Nangahar and Uruzgan. The Taliban also sometimes successfully captured urban areas. Some sources reported that the conflict was witnessing a fragmentation into more different militant groups, which had a negative impact on civilians, causing more crime growth and less controlled violence.
>
> In 2016, the security situation remained volatile. In June 2016, the UN reported a slight decrease in the overall number of security incidents compared to 2015 but the number of armed clashes, civilian victims and high-profile attacks in Kabul increased. Tolo News reported a 12 % decrease in security incidents and terror attacks during the first half of 2016."

COMPLAINTS

54. The applicant complained that, if removed to Afghanistan, he would risk being subjected to treatment proscribed by Articles 2 and/or 3 of the Convention by the Taliban.

55. He also complained that, owing to their duration, the proceedings concerning his asylum request must be regarded as amounting to degrading treatment in breach of Article 3.

56. The applicant also complained that, in denying him residence on the basis of Article 1F of the 1951 Refugee Convention, the Netherlands authorities had violated his right to respect for his private and family life with his wife, his children and his grandchildren as guaranteed by Article 8 of the Convention.

57. The applicant lastly complained that, in respect of his complaints under Article 3 and/or Article 8, he had not had an effective remedy within the meaning of Article 13 of the Convention.

THE LAW

A. Articles 2 and 3 of the Convention

58. The applicant complained that his removal to Afghanistan would violate his rights under Articles 2 and/or 3 of the Convention. Article 2 of the Convention 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.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

59. Article 3 of the Convention reads:

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

60. 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).

61. The Court refers to the relevant principles established in the Court's case-law concerning Article 3 of the Convention (see, most recently, *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 106-07, ECHR 2016, with further references) and reiterates 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. As indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, account should be taken 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)).

62. The Court also reaffirms that the right to political asylum and the right to a residence permit are not, as such, guaranteed by the Convention and that, under the terms of Articles 19 and 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).

63. As regards the individual features of the risk of ill-treatment claimed by the applicant, the Court notes that when the communist regime in Afghanistan was overthrown by mujahideen forces in April 1992 the applicant did not flee Afghanistan but continued to work for the police in Mazar-e Sharif until 6 June 1998, when the Taliban came to power. At that point in time he held the rank of lieutenant general and subsequently worked as deputy secretary of the general political affairs directorate of the High Military Council in the northern area. There are no indications in the case file that the applicant encountered any problems from the mujahideen between April 1992 and June 1998. It was after the Taliban seized power in June 1998, that the applicant decided to flee, fearing that the Taliban would kill him and his family.

64. It thus appears that the applicant did not attempt to flee Afghanistan in 1992 when – or directly after – the communist regime was defeated by mujahideen forces, but instead stayed on in the country without encountering any problems. He fled Afghanistan only after the Taliban had seized power in Mazar-e Sharif in June 1998.

65. The Court has found no indication that, since his departure from Afghanistan, the applicant has attracted negative attention from any governmental or non-governmental body or any private individual in Afghanistan on account of his involvement with the former communist regime or the regime in Mazar-e Sharif between 1992 and 1998. The Court further notes that the UNHCR does not include individuals with the applicant's profile in its potential risk profiles in respect of Afghanistan.

66. In view of the above, the Court does not find that it has been demonstrated that, on individual grounds, the applicant would be exposed to a real risk of being subjected to treatment proscribed by Article 3.

67. Regarding the question of 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* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013), the Court did not find that in Afghanistan there was a general situation of violence such that a real risk of ill-treatment would arise simply by virtue of an individual's being returned there. It confirmed this finding in its more recent judgments of 12 January 2016 in the cases of *A.W.Q. and D.H. v. the Netherlands* (no. 25077/06, § 71); *S.S. v. the Netherlands* (no. 39575/06, § 66); *S.D.M. and Others v. the Netherlands* (no. 8161/07, § 79); *M.R.A. and Others v. the Netherlands* (no. 46856/07, § 112); and *A.G.R. v. the Netherlands* (no. 13442/08, § 59). In the light of the evidence now before it, the Court has found no reason to hold otherwise in the case at hand.

68. The Court therefore finds that the 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 proscribed by Article 3 of the Convention if removed to Afghanistan.

69. In so far as the applicant also complained that, owing to their duration, the proceedings concerning his asylum application must be regarded as amounting to degrading treatment within the meaning of Article 3, the Court reiterates that the treatment proscribed by this provision, which enshrines one of the most fundamental values of democratic society, must attain a minimum level of severity if it is to fall within its scope. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Muršić v. Croatia* [GC], no. 7334/13, §§ 96-97 with further references, 20 October 2016). Although the Court appreciates that the duration of the proceedings of which complaint is made may have caused the applicant feelings of frustration, uncertainty and anxiety, it cannot find that they attain the minimum level of severity required for treatment to fall with the scope of Article 3 of the Convention.

70. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Article 8 of the Convention

71. The applicant also complained that, in denying him residence on the basis of Article 1F of the 1951 Refugee Convention, the Netherlands authorities had violated his right to respect for his private and family life as guaranteed by Article 8 of the Convention.

72. Article 8, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

73. The Court accepts that the applicant's relationships with his spouse and their children constitute "family life" for the purposes of Article 8 and that the decisions to apply Article 1F of the 1951 Refugee Convention and to impose an exclusion order on him affected that family life.

74. As regards the applicant's family life with his children, all of whom have come of age, it is the Court's well-established case-law that relationships between parents and adult children do not fall within the protective scope of Article 8 unless "additional factors of dependence, other

than normal emotional ties, are shown to exist" (see, for instance, *Z. and T. v. the United Kingdom* (dec.), no. 27034/05, ECHR 2006-III; *Konstatinov v. the Netherlands*, no. 16351/03, § 52, 26 April 2007; *Emonet and Others v. Switzerland*, no. 39051/03, § 35, ECHR 2007 XIV; and *Senchishak v. Finland*, no. 5049/12, § 55, 18 November 2014; and *A.A.Q. v. the Netherlands* (dec.), no. 42331/05, § 64 30 June 2015).

75. On the basis of the contents of the case file, the Court cannot find that, apart from normal emotional ties, that there are any further elements of dependency between the applicant and those of his adult children and the latter's offspring who are resident in the Netherlands that would bring their relationship into the protective sphere of Article 8 of the Convention.

76. As to the applicant's family life with his spouse, the Court reiterates 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 (see paragraph 60 above).

77. A State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there, and Article 8 does not entail a general obligation for a State to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit into its territory relatives of individuals residing there will vary according to the particular circumstances of those involved and the general interest, including that State's obligations under the 1951 Refugee Convention. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them or in a third country, and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion (see *A.A.Q. v. the Netherlands*, cited above, § 66 with further references).

78. The Court accepts that the decisions to deny the applicant asylum pursuant to Article 1F and to impose an exclusion order on him constituted an interference with his rights under Article 8 § 1 of the Convention. Consequently, it must be examined whether this interference was justified under the terms of the second paragraph of this provision.

79. The Court is satisfied that the decisions at issue were taken in accordance with domestic law and pursued the legitimate aims set out in the second paragraph of Article 8, in particular "for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". It thus remains to be determined whether the interference was "necessary in a democratic society".

80. Under the Court's well-established case-law, a measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as

being "necessary in a democratic society" if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national authorities enjoy a certain margin of appreciation in this matter (see *Keegan v. the United Kingdom*, no. 28867/03, § 31, ECHR 2006‑X). The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see *Boultif* (cited above), and *Slivenko v. Latvia* [GC], no. 48321/99, § 113).

81. The Court has held that, taking into account the seriousness of the crimes and acts referred to in Article 1F, the public interest served by the application of this exclusion clause weighs very heavily in the balance when assessing the fairness of the balance struck under Article 8 of the Convention, also bearing in mind that, according to the UNHCR guidelines on the application of the exclusion clauses of the 1951 Refugee Convention, the excluded individual is not able to rely on the right to family unity in order to secure protection (see *A.A.Q. v. the Netherlands*, cited above, §§ 46 and 71).

82. The Court notes that, unlike his spouse, the applicant has never been granted a residence permit in the Netherlands and that, given the decision to apply Article 1F in respect of his asylum applications, his residence status was such that the continuance of his family life in the Netherlands has always been precarious. The Court further notes that the applicant has lived for about 19 years in the Netherlands and that his departure from the Netherlands would entail a separation from his spouse. On this point, the Court considers it of relevance that the applicant's spouse must be regarded as having been aware of the nature of her husband's work for the Sarandoy.

83. It is noted that the applicant's spouse has been granted an asylum-based residence permit (see paragraph 40 above), but even assuming that there is an objective obstacle to the return of the applicant's spouse to Afghanistan with the applicant, the Court considers that it has not been established that it would be impossible for them to settle in a third country and exercise their family life there.

84. Having taken into account the above considerations and the particular features of the instant case, the Court finds that, in denying the applicant a residence permit, the Netherlands authorities cannot be regarded as having failed to strike a fair balance between the competing interests at issue. Accordingly, the Court finds that the interference in question is justified under the terms of Article 8 § 2 of the Convention.

85. It follows from the above that this part of the application is also manifestly ill‑founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Article 13

86. The applicant lastly complained, under Article 13 of the Convention, that he did not have an effective remedy in respect of his complaint under Article 3 and/or Article 8 of the Convention.

87. Article 13 provides as follows:

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

88. The Court reiterates the general principles and its recent findings in respect of Article 13 of the Convention taken together with Articles 3 and 8 of the Convention in respect of proceedings concerning residence permits and exclusion orders before the Regional Court and the Administrative Jurisdiction Division of the Council of State (see *A.M. v. the Netherlands*, no. 29094/09, §§ 61-71, 5 July 2016).

89. Even assuming that the applicant had an arguable claim for the purposes of Article 13, he had the opportunity to challenge the decisions taken in his case in appeal proceedings, which the Court has accepted as being effective for the purposes of Article 13 (see *A.A.Q. v. the Netherlands*, cited above, §§ 76-78). It has found nothing in the applicant's submissions that would warrant a different finding.

90. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

91. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 3 August 2017.

Stephen Phillips Registrar	Luis López Guerra President