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

THIRD SECTION

CASE OF M.R.A. AND OTHERS v. THE NETHERLANDS

(Application no. 46856/07)

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 M.R.A. and Others 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. 46856/07) 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 five Afghan nationals, Mr M.R.A. ("the first applicant"), his wife Ms F.A.K. ("the second applicant") and their three children, ("the third, fourth and fifth applicants"), on 25 October 2007.

2. The applicants were initially represented by Ms E. Garnett, a lawyer practising in 's-Hertogenbosch. She was succeeded by Mr F. van Nierop, a lawyer practising in Utrecht and who was subsequently succeeded by Mr R. Hijma, also a lawyer practising in Utrecht. 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 complained that their removal from the Netherlands to Afghanistan would be contrary to their rights under Articles 3 and 8 of the Convention, and that in respect of their rights under these two provisions they did not have an effective remedy within the meaning of Article 13 of the Convention.

4. On 19 February 2009 the President of the Section to which the case had been allocated communicated the application to the Government. The President further decided that the applicants' identity should not be disclosed to the public (Rule 47 § 4). The Government submitted written observations on 18 September 2009 and the applicants submitted observations in reply on 8 December 2009. The Government submitted further observations on 18 January 2010. 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 20 November 2013.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants are a married couple who were born in 1959 and 1966. The third, fourth and fifth applicants are their children, a daughter and two sons who were born in 1991, 1996 and 2007.

6. The first four applicants entered the Netherlands on 7 April 1999 and applied for asylum. In the course of the proceedings on this asylum application, the first and second applicants were both interviewed by the Netherlands immigration authorities on, *inter alia*, their reasons for seeking asylum.

7. The first applicant gave the following account to the immigration authorities. He had become a member of the communist People's Democratic Party of Afghanistan ("the PDPA") in 1978. During his studies he had volunteered for guard duties at the PDPA headquarters in Kabul's fifth district. He had been charged with guarding homes against possible mujahideen attacks and checking traffic at intersections for illegal weapons.

8. In order to avoid being sent to the front during his compulsory military service the first applicant had, upon graduating as a construction engineer from the University of Kabul, voluntarily reported for duty in 1982 to the security battalion of the Council of Ministers in Shar-e-Now, a neighbourhood in Kabul. After working there for three days, the first applicant had requested a transfer to Kabul's Pol-e-Charki prison, where working conditions were better as they were indoors. The first applicant had been stationed in block 3, where political prisoners were detained. With fifteen other colleagues he had been responsible for guarding the block. He had had no contact with the 150 to 200 prisoners for whom he had been responsible. His tasks had comprised cell patrol and occasional transport to hospital of prisoners who had fallen ill. He had never witnessed any ill-treatment or torture by the Afghan authorities of prisoners in that period. He had only once witnessed the ill-treatment of a prisoner, by a "*bashi*" (leader).

9. After six months the first applicant had applied for a transfer, which had been granted by the deputy head of the Afghan security service *Khadimat-e Atal'at-e Dowlati/Wezarat-e Amniyat-e Dowlati* ("KhAD/WAD")[1]. At the end of July 1982 the first applicant had started as a construction engineer within the ranks of KhAD, which position he had held until April 1992, when the mujahideen ended the PDPA's communist regime in Afghanistan. The first applicant had been employed in the buildings department of the Logistics Directorate of KHAD, which had been renamed Buildings Directorate in 1986. For this department/Directorate the first applicant and his team of 100-200 construction workers had constructed five buildings for KhAD, including an office building for KhAD's Directorate 1. He had also been responsible for the construction of twenty ammunition depots.

10. The first applicant had initially declared to the Netherlands authorities that the highest military rank he had attained was that of lieutenant-colonel, which he later changed to major. He further stated that he had been decorated three times for his achievements.

11. The first applicant had also been involved in the distribution of party propaganda, delivered to him by the Political Affairs Department of his Directorate, with which he also had meetings twice a week. In addition, he had organised courses for illiterate labourers.

12. After the fall of the PDPA regime in April 1992 the applicants had fled to Mazar-e-Sharif, where the first applicant had continued to work as a construction engineer for the municipality until 1998. On 10 August 1998 – one day after the Taliban had taken control of Mazar-e-Sharif – the applicants' home had been raided and searched by eight armed Taliban fighters, who had found, *inter alia,* the first applicant's PDPA identity card, some of his medals, and a bayonet. On the suspicion that the applicants had been keeping weapons in their home, the Taliban had arrested the first applicant and his brother.

13. The first applicant had been incarcerated for about seven months and had been questioned several times, during which he had disclosed in detail his past career in the KhAD/WAD. A nephew or cousin of the first applicant had bribed the Taliban commander concerned in order to obtain the applicant's release, which had been successful but on condition that the first applicant left Afghanistan immediately. On the evening of his

release, he was supposed to be executed. A number of his fellow detainees had indeed been executed, and according to the records, so was he – it was only because of the deal that had been struck with the commander that he had been secretly led away.

14. The first applicant further told the immigration authorities that he had heard from one of his relatives in Canada that another nephew or cousin, who had also been a member of the PDPA, had been killed in Kabul in 2005 by soldiers of the Ministry of the Interior who were mujahideen or Taliban.

15. In support of her request for asylum, the second applicant submitted the following account. She had studied educational theory in Kabul, after which she had been employed as a teacher at a high school in Kabul from 1989 to 1991. She had joined the women's organisation of the PDPA at the same time as taking up her duties as a teacher. She had stopped working when her first child was born. Out of fear of the mujahideen she had refrained from seeking employment during the time the family lived in Mazar-e-Sharif. She had once been beaten on the street for wearing a burka that was judged too short. This had occurred at the time her husband was incarcerated by the Taliban. According to the second applicant, her husband had been ill-treated and subjected to forced labour during his incarceration.

A. Proceedings on the first applicant's asylum request

16. After the first applicant had been interviewed on his asylum application, on 12 April and 25 November 1999 and 26 September 2000, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) issued on 9 October 2001 a notice of her intention (*voornemen*) to reject the first applicant's asylum application and to hold Article 1F of the 1951 Refugee Convention against him. The applicant's asylum claim had been considered in the light of, *inter alia*, an official 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*"; DPC/AM 663896) and concerning in particular the question whether, and if so which, former employees of those services should be regarded as implicated in human rights violations. On the basis of this report, the Netherlands immigration authorities had adopted the position that Article 1F of the 1951 Refugee Convention could be held against virtually every Afghan asylum seeker who, with the rank of third lieutenant or higher, had worked during the communist regime for the KhAD or its successor the WAD. In the notice of intent, the Deputy Minister analysed, on the basis of elaborate argumentation based on various international materials, the nature of the acts imputed to the first applicant in the framework of Article 1F of the 1951 Refugee Convention as well as his individual responsibility under that Convention.

17. Having regard to the official country report of 29 February 2000 as well as documentation from public international sources such as the United Nations, Amnesty International and Human Rights Watch, the Deputy Minister emphasised the widely known cruel character of the KhAD/WAD, 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. The Deputy Minister considered that this "climate of terror" was also felt within the KhAD/WAD itself. Staff members needed to prove their loyalty to the organisation on an almost daily basis, and a failure to do so put them at risk of being removed from the KhAD/WAD; often this entailed death for the person concerned.

18. The Deputy Minister was of the opinion that the first applicant must have known of the criminal nature of the methods employed by the organisation where he had made a career. Furthermore, relying on the official report of 29 February 2000, the Deputy Minister excluded the possibility that the first applicant had remained ignorant of the cruel working methods of the KhAD/WAD. She also did not attach credence to the first applicant's statement that he had not known of any atrocities committed in Pol-e-Charki Prison, where he had performed guard duty for six months. On this point, the Deputy Minister referred to a 1979 report from Amnesty International as well as to reports drawn up by the United States Department of State on this prison, from which it was obvious that Pol-e-Charki was widely associated with heinous crimes.

19. The Deputy Minister noted in this respect that the first applicant had initially declared that he had witnessed the ill-treatment of a prisoner by an assistant interrogator. No value was attached to the fact that the first applicant had subsequently corrected this initial statement and had submitted that this had concerned an incident amongst detainees. The Deputy Minister considered that the first applicant had had every reason to change his statements into more favourable ones once he learned of the investigation against him to assess whether Article 1F of the Refugee Convention applied to him. The Deputy Minister also noted that the first applicant's initial statements had been very detailed.

20. The Deputy Minister further noted that the first applicant had been granted permission, after six months of working as a guard in Pol-e-Charki Prison, to be transferred to a department more suited to his professional profile. According to the Deputy Minister, this meant that the first applicant's loyalty must have been found proven beyond any doubt, considering that he had been given his position with the KhAD after only a relatively short time in Pol-e-Charki, that the new position opened up opportunities to be promoted to (senior) officer, and that it enabled the first applicant to enter and study several if not many of the KhAD's buildings. The Deputy Minister concluded that there were serious reasons for considering that the first applicant had committed human rights violations, at least during his time in Pol-e-Charki Prison.

21. Taking into account, *inter alia*, an anonymised official report drawn up by the Ministry of Foreign Affairs on 15 September 1999 (DPC/AM 648554), the Deputy Minister further found it highly implausible that during his ten years of experience as a construction engineer for the KhAD/WAD the first applicant would not have become aware of certain uses for which KhAD/WAD's buildings had been designed, or at least of to what use they had *de facto* been put. As torture was systemic in KhAD/WAD interrogation centres, it should be considered impossible that persons belonging to the higher management of the KhAD/WAD had not been involved in this or would have been unaware of it. By reaching the rank of lieutenant-colonel the first applicant had entered the higher echelons of the KhAD/WAD. Further taking into account that the first applicant had been decorated for his achievements and that he had continued performing his duties until the fall of the communist regime, the Deputy Minister reached the conclusion that the first applicant's competence and loyalty must have been beyond doubt. Furthermore, due to the applicant's involvement with the Political Affairs Department, the Deputy Minister concluded that the first applicant must have been aware of human rights violations being committed. With reference to anonymised official reports of 15 December 2000 (DPC/AM 635082) and 20 February 2001 (DPC/AM 699244) drawn up by the Ministry of Foreign Affairs, the Deputy Minister considered as regards the political affairs departments that, in the relevant part, their main task had been to guarantee continued loyalty to the Afghan communist regime by means of the reporting of dubious behaviour of individuals to the KhAD/WAD. Political affairs departments cooperated closely with the KhAD/WAD in providing them with information.

22. These considerations led the Deputy Minister to conclude that the first applicant's personal participation in the human rights violations attributed to KhAD was an established fact. Considering the reputation of Pol-e-Charki Prison and the first applicant's denial of any human rights violations, the Deputy Minister could not attach any credence to the first applicant's statements. She found that the first applicant had failed in making plausible (*aannemelijk maken*) – on the basis of objective sources or any other means – his stated ignorance of human rights violations by the KhAD/WAD. In terms of the first applicant's activities for the KhAD/WAD, the Deputy Minister considered that the first applicant had, for a long time, been of service, albeit in an accessory capacity, to the KhAD/WAD, and that it would thus not have been able to perform its tasks without the first applicant's efforts. The Deputy Minister also found that the first applicant had supported the activities of the Political Affairs Department; although this department had not committed any atrocities itself, it had been an important element in the State apparatus.

23. The first applicant submitted written comments (*zienswijze*) on the notice of intent on 7 and 20 November 2001.

24. On 20 February 2002, the Deputy Minister rejected the first applicant's asylum application, confirming the reasoning as set out in her notice of intention of 9 October 2001 and rebutting the first applicant's written comments. Disagreeing with the first applicant, she considered that the official report of 29 February 2000 (see paragraph 17 above) which to a great extent lay at the basis of her decision, could not be seen as an isolated document, but rather as the product of thorough research based on objective sources. The Deputy Minister attached more credence to the report than the first applicant's unfounded rebuttals.

25. The Deputy Minister further dismissed the first applicant's argument that he had been too remotely connected to the human rights violations attributed to specific departments of the KhAD/WAD during his time as an engineer in that organisation. Relying on UNHCR's "*The Exclusion Clauses: Guidelines on their Application*" of December 1996 (see paragraph 71 below) and the official report of 29 February 2000, it was held in this respect that merely supporting an organisation like the KhAD/WAD may in itself suffice to render applicable Article 1F of the Refugee Convention.

26. The first applicant's appeal to the Regional Court (*rechtbank*) of The Hague sitting in Alkmaar was rejected on 26 February 2004. The Regional Court analysed the first applicant's accountability for the impugned human rights violations on the basis of the prescribed and so-called "personal and knowing participation" test.

27. As regards the "knowing" element, the Regional Court held that the Deputy Minister had not erred in imputing knowledge of the human rights violations committed by KhAD/WAD to the first applicant in the way she had. In this context the Regional Court found that the official reports issued by the Ministry of Foreign Affairs, which lay to a great extent at the basis of the Minister's decision, had been drafted in an unbiased manner, were accurate and objective, and provided the required insight in the relevant information, and therefore that the Minister had been entitled to rely on them. It further found that the first applicant had failed to furnish adequate evidence in support of his allegation that the official report of 29 February 2000 was inaccurate and that it could not be assumed that he had knowledge of the human rights violations committed in Pol-e-Charki Prison.

28. As regards the first applicant's personal participation in human rights violations attributed to the KhAD/WAD, the Regional Court reiterated that according to codified policy – the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire 2000*) – this notion included, besides personal commission of the impugned human rights violations by the person concerned, the facilitation of the said crimes. Facilitation was defined as a

substantial positive effect by means of the person's conduct on how these crimes had been committed, or a lack of such conduct in preventing these crimes from being committed. The Regional Court found that the first applicant had facilitated the human rights violations committed by the KhAD/WAD by having voluntarily chosen to work as a guard in Pol−e−Charki Prison and his subsequent request – also made voluntarily – to start working for the KhAD/WAD. In these circumstances the Regional Court concluded that the first applicant had facilitated – and thus personally participated in – the human rights violations attributed to the KhAD/WAD, despite his having been stationed in Pol-e-Charki Prison as a conscript rather than as a professional soldier.

29. Considering that Article 3 of the Convention did not guarantee a right of residence, the Regional Court also dismissed the first applicant's argument that the Deputy Minister had erred by not examining his asylum account under that provision.

30. The first applicant lodged a further appeal with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*), which quashed the Regional Court's judgment on 26 July 2004. As regards the Regional Court's finding in relation to Article 3 of the Convention, the Administrative Jurisdiction Division held that the Deputy Minister should, wherever possible, avoid creating a situation in which an asylum seeker is refused a residence permit but cannot be expelled to his/her country of origin for reasons based on Article 3. For that reason, the decision should demonstrate that the Deputy Minister had examined whether Article 3 would lastingly (*duurzaam*) stand in the way of expulsion to the country of origin and of the possible consequences for the residence situation of the person concerned. This, the Division found, the Deputy Minister had failed to do in the present case, for which reason it quashed the Regional Court's judgment and remitted the case to the Deputy Minister's successor, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) for a fresh decision.

31. The first applicant was once more interviewed by the immigration authorities on 10 March 2005, after which, on 3 August 2005, the Minister issued the first applicant with a notice of her intention to reject his asylum application. The Minister reached the same conclusions, based in the relevant part on the same grounds, as the Deputy Minister had reached in her notice of intent of 9 October 2001 and subsequent decision of 20 February 2002 in relation to the first applicant's knowing and personal participation in human rights violations attributed to his former employer – the KhAD/WAD – and consequent application of Article 1F of the Refugee Convention against him. The Minister to a large extent used as a basis for her notice a book by a Professor Dr. M. Osman Rostar entitled "*The Pulicharki Prison. A Communist Inferno in Afghanistan*". Prof. Rostar had been detained in Pol-e-Charki Prison for a considerable time during the period between 1981 and 1986-87.

32. As to Article 3 of the Convention, the Minister considered, in so far as relevant, that the first applicant had not furnished the required substantial grounds in support of a stated real risk of treatment contrary to Article 3 in case of his expulsion to Afghanistan. The first applicant's fear of the mujahideen, the Taliban and/or other armed groups not belonging to the Government persecuting the intellectual classes in Afghanistan, based on the first applicant's background as a former PDPA member and former employee of the KhAD/WAD, was dismissed by the Minister as based on mere suspicions. The Minister noted in this regard that the first applicant had declared, during the interview held with him on 10 March 2005, that he did not know of anyone specifically looking for him. It was further held that the killing of the first applicant's nephew or cousin by Afghan State agents because of his past support of the communist regime did not constitute an

individual fact or circumstance relevant to the first applicant's claim under Article 3 and that, furthermore, the source of the said information – a relative of the first applicant residing in Canada – was unreliable.

33. The Minister made reference to an official report drawn up by the Ministry of Foreign Affairs in January 2005, according to which former Afghan communists and those associated with the communist regime, including former KhAD/WAD personnel, possibly ran a risk of human rights violations in Afghanistan. She stressed, however, that this did not mean that every person meeting these criteria would run a risk of treatment contrary to Article 3 of the Convention upon his/her return to Afghanistan. The Minister underlined in this regard the fact that until 1998 the first applicant had not experienced any problems caused by his membership of the PDPA, his past activities for the KhAD/WAD, or his political convictions after the fall of the communist regime in 1992. The first applicant's argument that he would run a greater risk of kidnappings and robberies due to his fellow countrymen's perception of him as a rich person upon his return to Afghanistan was dismissed as unfounded.

34. The first applicant submitted written comments on the notice of intent on 26 August 2005. By a decision of 2 December 2005, the Minister once more rejected his asylum application. The Minister fully endorsed the reasons for the rejection as set out in the notice of intent and, in addition thereto dismissing the first applicant's written comments held, in the relevant part, the following.

35. The first applicant had, *inter alia,* argued that block 3 of Pol-e-Charki Prison, where he had worked, had not fallen under the responsibility of the KhAD/WAD and had been located in a separate building, hence away from the human rights violations allegedly committed in blocks 1 and 2. The first applicant had relied on an Amnesty International report in this regard. The Minister held that no support for such a distinction between blocks 1 and 2 on the one hand and block 3 on the other in terms of the commission of human rights violations could be found in the literature and reports written about Pol-e-Charki Prison. The first applicant also, unsuccessfully, advanced a number of inconsistencies in the book by Prof. Rostar.

36. With reference to the Ministry of Foreign Affairs official report of 29 February 2000, the Minister dismissed the first applicant's claim that he had not been involved in human rights violations committed by the KhAD/WAD, having regard to his position as a construction engineer in the said organisation. It was found that all officers of the KhAD/WAD had been involved in its more sinister departments and hence were responsible for the interrogation, torture and execution of suspects. The Minister further considered that, pursuant to the case-law of the Administrative Jurisdiction Division, she was entitled to rely on the official report as accurate and complete, and that this was not altered by the fact that other reports did not confirm certain findings reached in the official report.

37. As regards Article 3 of the Convention, the first applicant had argued that when the Minister had held that the applicants had not experienced any problems in Afghanistan between 1992 and 1998, she had failed to acknowledge that the applicants had been living in Mazar-e-Sharif, which had been a safe haven for former communists during that particular period of time. According to the first applicant, the Minister had also failed to acknowledge that he had experienced problems in 1998. He had further submitted that his brother had held a high position during the communist regime. The Minister, however, considered that none of these arguments constituted concrete and individual circumstances justifying the acceptance of the existence of a real risk of treatment contrary to Article 3 upon the first applicant's return to Afghanistan.

38. The first applicant's appeal was rejected by the Regional Court of The Hague sitting in 's-Hertogenbosch by judgment of 19 October 2006. Limiting itself to an analysis of the matter under Article 3 of the Convention, the Regional Court held that the first applicant had not sufficiently established that as a result of his membership of the PDPA and past activities for KhAD/WAD he would run a real and serious risk of treatment contrary to the said provision upon his return to Afghanistan. The court underlined that the first applicant had declared, in an interview held with the immigration authorities on 10 March 2005, that nobody in Afghanistan was specifically looking for him. Although the first applicant claimed that he had been detained by the Taliban in the past, it had not been established that the Taliban would still be looking for him or that he had remained an object of the Taliban's negative attention. The Regional Court emphasised in this regard that the first applicant's detention had taken place during a different political situation.

39. While the Regional Court accepted that, as set out in an official report of the Ministry of Foreign Affairs of January 2005, individuals associated with the former Afghan communist regime, including the KhAD/WAD, ran a possible risk of being subjected to treatment contrary to Article 3 of the Convention upon their return to that country, it held that this did not mean that everyone associated with the former regime ran a real and serious risk of that nature. The Regional Court noted that the first applicant's former position in KhAD/WAD could not be regarded as one of the high posts mentioned in this official report. The killing of the first applicant's nephew or cousin and that the second applicant would have had a western lifestyle did not alter the Regional Court's finding either.

40. The applicant's further appeal was rejected on 27 April 2007 by the Administrative Jurisdiction Division on summary reasoning. It found that the further appeal did not provide grounds for quashing the impugned ruling and that 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 determination in the interest of legal unity, legal development or legal protection in the general sense. No further appeal lay against this ruling.

41. On 27 August 2007 the Deputy Minister of Justice issued a notice of intention to declare the first applicant an undesirable alien entailing the imposition of an exclusion order (*ongewenstverklaring*) in accordance with article 67 § 1 (e) of the Aliens Act 2000, following the decision to hold Article 1F of the 1951 Convention against him in the asylum procedure. This intention was not followed by an actual decision to impose an exclusion order.

B. Proceedings on the second applicant's asylum request

42. The second applicant was interviewed by the immigration authorities on 12 April and 25 November 1999. On 10 October 2001 the Deputy Minister issued a notice of her intention to reject the second, third and fourth applicant's asylum application. The latter two applicants, being minors, were included in the second applicant's application for asylum throughout the proceedings. In so far as relevant, it was held that the second applicant's motives for asylum were to a large extent dependent on the first applicant's motives. The first applicant's application having been rejected, the Deputy Minister considered that the second applicant's asylum claims were to be assessed on their own merits.

43. Referring to a Ministry of Foreign Affairs official report of 16 September 1999, the Deputy Minister held that there was no general rule for assessing the risk which family members of individuals sought by the Taliban might run in Afghanistan. As a rule of

thumb, it could be assumed that such family members would only risk being detained by the Taliban as a means of forcing the person concerned to report to the authorities if that person was present in Afghanistan, or was at least suspected to be. Even if it was to be assumed that the first applicant was being sought by the Taliban, he had not been in Afghanistan since March 1999 and, by his own admission, was even believed by the Taliban to have been executed. It was unlikely, therefore, that the second applicant would attract the Taliban's attention on account of her husband's activities.

44. As regards the second applicant's claim that she had been threatened by the Taliban during the search of the family house in Mazar-e-Sharif, the Deputy Minister considered that any threats uttered had rather been directed at the two men – the first applicant and his brother – than at the women present. While it was regrettable that the second applicant had been subjected to ill-treatment after her burka had been judged to be of insufficient length, the Deputy Minister noted that this had been a single occurrence and that there were no indications that the Taliban continued to have an interest in her.

45. As regards Article 3 of the Convention the Deputy Minister considered that the second applicant had not advanced the required substantial grounds for believing that she would run a foreseeable, real and personal risk of treatment contrary to said provision. The single incident about the burka was insufficient for the second applicant to be able to rely on Article 3 successfully. In this respect the Deputy Minister also had regard to the fact that the second applicant had lived under Taliban rule for a relatively long period of time, but other than the aforementioned incident she had not reported any further occurrences relevant in terms of Article 3 of the Convention.

46. The Deputy Minister, furthermore, considered that the second applicant was to be excluded from the so-called "policy of protection for certain categories" (*categoriaal beschermingsbeleid*), in force for Afghan nationals at that time. The Deputy Minister considered in this regard that the rejection of the asylum application of the second applicant's husband on the basis of Article 1F of the Refugee Convention gave rise to a contraindication against the issuing of residence permits to his relatives, since the admittance of the second applicant and the applicants' children would in all likelihood bring about a protracted *de facto* stay in the Netherlands of the second applicant's husband.

47. The second applicant submitted written comments on the Deputy Minister's notice of intent on 7 November 2001. She was once more interviewed by the immigration authorities on 13 December 2002.

48. On 28 February 2003 the Minister for Immigration and Integration, the successor to the Deputy Minister, issued a fresh notice of his intention to reject the second applicant's asylum application, due to a relevant change of circumstances in Afghanistan.

49. While endorsing the Deputy Minister's finding as to the existence of a contraindication against the second applicant, the Minister went on to consider that, pursuant to a Ministry of Foreign Affairs official report of 19 August 2002, the general situation in Afghanistan no longer required the keeping in place of a categorial protection policy. Moreover, after the fall of the Taliban regime, the second applicant no longer had a reason to fear persecution at their hands, and – as also appeared from the official report of 19 August 2002 – the position of women in Afghan society had greatly improved. In this latter context, the Minister considered that gender in itself was not a conclusive factor in an assessment of the risk of persecution in Afghanistan. It was for the second applicant to make a plausible case for believing that she had a well-founded fear of persecution on the basis of her personal circumstances, seen against the background of the general situation in Afghanistan. It was found that she had failed to do

so. In this context, the Minister held that the second applicant had always lived in major cities in Afghanistan, where the situation for women had improved, as opposed to the situation in the countryside. The Minister saw no reason to assume that the second applicant, if expelled to Afghanistan, would not again settle in a major city.

50. The Minister further considered that the second applicant's membership of the women's organisation of the PDPA, her husband's membership of the PDPA, or his past activities for KhAD/WAD were not reason enough in themselves to grant the second applicant asylum, since according to the aforementioned official report there were no indications that people had to fear persecution in Afghanistan for the sole reason that they had previously had ties to the communist regime.

51. After receiving the second applicant's comments on this notice of intent, the Minister rejected the asylum application on 3 March 2004, adding that as the second applicant had not demonstrated that she was or had ever been the object of negative attention from the side of either the mujahideen or the Taliban, she had failed to establish that she would run a real risk of being subjected to treatment contrary to Article 3 of the Convention in Afghanistan.

52. The second applicant's appeal was rejected on 17 October 2006 by the Regional Court of the Hague sitting in 's-Hertogenbosch. It agreed with the Minister that the second applicant had failed to establish a real risk of being subjected to treatment contrary to Article 3 of the Convention if she was returned to Afghanistan. Her further appeal to the Administrative Jurisdiction Division was rejected on 27 April 2007 on summary reasoning. No further appeal lay against this ruling.

53. On 26 July 2007 the fifth applicant was born in the Netherlands to the first and second applicant.

C. Events and proceedings after the introduction of the application

1. The first applicant

54. On 24 April 2009, the first applicant submitted a fresh application for asylum and was interviewed on this new request on the same day. Following a notice of intention notified on 28 October 2009, this application was rejected by the Deputy Minister of Justice, again holding Article 1F of the 1951 Refugee Convention against the first applicant. This decision became final after the Regional Court of The Hague had rejected the first applicant's appeal on 4 March 2011, entailing that the first applicant was under an obligation to leave the Netherlands.

55. On 26 November 2012, the Deputy Minister for Security and Justice, noting that the first applicant had not left the Netherlands and cancelling the intention of 27 August 2007 (see paragraph 41 above), issued a notice of intention to impose an entry ban (*inreisverbod*) for ten years on the first applicant. No information has been submitted whether this intention has been followed by an actual decision to impose an entry ban.

2. The second, fourth and fifth applicants

56. On 3 July 2009, also the second applicant had made a fresh asylum application, also on behalf of her minor children, namely the fourth and fifth applicants. Following a successful appeal to the Regional Court of The Hague against the initial refusal of this request and on the basis of a new policy having entered into force on 3 May 2011 (WBV 2011/5; see paragraph 64 below), the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie en Asiel*) granted on 30 September 2011 the second, fourth and fifth applicant temporary residence permit for asylum purposes (*verblijfsvergunning asiel voor bepaalde tijd*), valid from 3 May 2011 until 3 May 2016. In the letter of 30 September 2011 notifying this decision, the Minister stated in respect of

the adult son (the third applicant) that, in so far as he wished to apply for asylum in reliance on the new policy (WBV 2011/5) that there existed a contraindication, namely his criminal record in the Netherlands, which would be taken into account in the examination of a possible future application.

3. The third applicant

57. Also on 3 July 2009, the third applicant, who had come of age, had made an asylum application on his own behalf which was rejected on 16 December 2009 by the Minister, who found that, given that he had been convicted twice in the Netherlands of acts of public violence, the third applicant presented a danger to public order. The Minister rejected the third applicant's argument that, being a westernised young man and given the deteriorated general security situation in Afghanistan, he would be exposed to a risk of being subjected to treatment contrary to Article 3 of the Convention if removed to Afghanistan. In so far as the third applicant relied on Article 8 of the Convention, the Minister considered that it was open for the third applicant to apply for a residence permit on that basis. The third applicant's appeal against this decision was rejected on 4 March 2011 by the Regional Court of The Hague sitting in 's-Hertogenbosch. No information has been submitted as to whether he has sought to challenge the judgment of 4 March 2011 by lodging a further appeal with the Administrative Jurisdiction Division.

58. On 5 December 2011, the third applicant made another asylum application, which was rejected by the Minister on 19 December 2011. The third applicant's appeal and accompanying request for a provisional measure were rejected on 9 January 2012 by the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Zutphen. To the extent that it was accepted that the fresh application was based on relevant newly emerged facts and circumstances ("*nova*") warranting reconsideration of the initial rejection as required by section 4:6 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), the provisional-measures judge did not find that the third applicant qualified for asylum on the basis of the alleged deterioration in the general security situation in Afghanistan or that, for this reason, he would be exposed to a real risk of treatment prohibited by Article 3 if he were removed to Afghanistan. The provisional-measures judge also accepted the Minister's decision, given the third applicant's criminal record, not to grant him a temporary residence permit for asylum purposes on the basis of the Minister's decision of 30 September 2011 to grant such a permit to the second, fourth and fifth applicant under the new policy which had entered into force on 3 May 2011. In so far as the applicant relied on Article 8 of the Convention the judge considered that given the strict separation in the system under the Aliens Act 2000 between an asylum-based application for a residence permit and a regular application (*reguliere aanvraag*) for a residence permit, it was considered that, if the applicant wished to reside in the Netherlands on the basis of his family life within the meaning of Article 8 of the Convention, he should make a regular application for a residence permit based on his rights under Article 8. The provisional-measures judge lastly noted that, in the event that the Netherlands authorities proceeded with the third applicant's removal from the Netherlands, he could avail himself of legal remedies to challenge this. There is no indication in the case file that the third applicant availed himself of the opportunity to lodge a further appeal against this judgment with the Administrative Jurisdiction Division.

59. On 15 February 2012, the third applicant made a regular application for a residence permit on the basis of his family life with his parents and siblings in the Netherlands. This application was rejected by the Minister on 28 September 2012. The Minister noted at the outset that the applicant did not hold the required provisional residence visa (*machtiging tot voorlopig verblijf*). Such a visa entitles the holder to enter

the Netherlands in order to apply for a residence permit for a stay exceeding three months. The Minister further noted that the third applicant did not fall within one of the defined categories of persons who are exempted from the obligation to hold a provisional residence visa. As to the third applicant's reliance on Article 8 of the Convention, the Minister noted that his mother and two younger siblings held a temporary residence permit for asylum purposes and that his father held no residence permit. Although the Minister accepted that there was family life between the third applicant and each of his parents and his siblings, and that there were objective obstacles to the exercise of family life between the third applicant and his mother and siblings outside the Netherlands, the Minister did not find that there was a positive obligation under Article 8 to grant the third applicant a residence permit on that basis. In reaching this finding, the Minister considered that a balance had to be struck between, on the one hand, the applicant's personal interests and, on the other, public interest considerations. The presence of an objective obstacle was a weighty but not necessarily a decisive factor in this balancing exercise, which also includes other factors such as the way in which family life was conducted in the country of origin, whether the minimum income requirements under the applicable immigration rules were met, public order considerations, and the situation in the country of origin. Noting that his father had been refused asylum because Article 1F of the 1951 Refugee Convention had been held against him, and that no obstacle based on Article 3 for his removal to Afghanistan had been found in the asylum proceedings, that the third applicant had been denied asylum on account of his criminal convictions in the Netherlands, that the third applicant was an adult, and that his submissions did not disclose that there would be "more than normal emotional ties" between his and his mother and siblings, that his mother and siblings lived separately from his father, and that the third applicant himself lived a wandering existence, staying occasionally with his mother and often with friends, and that also his ties with his father did not go beyond the normal ties between a parent and an adult son, the Minister concluded, in particular having regard to the third applicant's criminal record in the Netherlands, that public interest considerations outweighed the third applicant's personal interests. This decision also constituted a return decision (*terugkeerbesluit*). The third applicant was informed that he was now under the obligation to leave the Netherlands within twenty-four hours, failing which he would be eligible for removal, and that the submission of an objection (*bezwaar*) to the decision would not have any suspensive effect.

60. The third applicant submitted an objection to this decision to the Minister and requested the Regional Court of The Hague to issue a provisional measure allowing him to await the outcome of the objection proceedings in the Netherlands.

61. On 4 February 2012, the provisional-measures judge of the Regional Court of The Hague sitting in Utrecht granted the third applicant's request for a provisional measure, finding that it did not appear that, in his assessment, the Minister had taken into account - given the "guiding principles" formulated in the judgments of the European Court of Human Rights of 2 August 2001 in the case of *Boultif* and 18 October 2006 in the case of *Üner* - the duration of the third applicant's stay in the Netherlands, the nature and seriousness of the criminal offences of which the third applicant had been convicted, the time that had elapsed since these offences were committed and the third applicant's behaviour in that period, the social ties established by the third applicant in the Netherlands, and the possibility of return to Afghanistan. Considering that the Minister had attached decisive weight to the third applicant's criminal record without looking into the nature and seriousness of the offences concerned and without indicating what weight had been given to the other relevant circumstances on the basis of the 'guiding principles", the provisional-measures judge concluded that it could not be said that the objection would not have a reasonable chance of success. Consequently, the

provisional-measures judge granted the provisional measure and suspended the Minister's decision of 28 September 2012 pending the outcome of the objection proceedings.

62. No further information about these proceedings has been submitted.

II. RELEVANT DOMESTIC LAW, PRACTICE AND EVENTS

63. 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).

64. On 3 May 2011, a new immigration policy entered into force in respect of Afghan westernised school-aged girls (WBV 2011/5 *Beleid Afghaanse verwesterde schoolgaande meisjes*). Under this policy, such girls and young women became eligible for an asylum-based residence permit on the basis of section 29 § 1c of the Aliens Act 2000, provided that there are no public-order-related contraindications. Also, their parents and siblings can, in so far as they are not themselves eligible for asylum and in so far as there are no contraindications, become eligible for a dependent asylum−based residence permit (*afhankelijke asielvergunning*) on the basis of section 29 § 1e or f of the Aliens Act 2000.

65. On 17 September 2013, the Netherlands public prosecution service (*Openbaar Ministerie*) published official lists of the names of people who had been killed in 1978 and 1979 by the then Afghan communist authorities. These death lists had been obtained in the context of a criminal investigation opened in the Netherlands against an Afghan national, Mr A.O., who had applied for asylum in the Netherlands in 1993 and who had worked for the Afghan intelligence service as head of interrogation in the late seventies. On the basis of his statements made during his asylum interviews, in particular his admission that he had signed transfer orders for people who were to be executed, explaining that that had been expected of him and that failure to do so would have rendered it impossible for him to attain a high position, he was denied asylum in application of Article 1F. He was not expelled to Afghanistan, as this would have exposed him to a risk of being subjected to treatment proscribed by Article 3.

66. The Netherlands public prosecution service did, however, open a criminal investigation against A.O. for possible involvement in crimes referred to in Article 1F. In the course of this investigation, the public prosecution service obtained copies of death lists from a witness who had received them years earlier from a former United Nations official. The accuracy of the contents of the death lists was confirmed by accounts of relatives and the contents of original transfer orders, also held by the Netherlands public prosecution service. The prosecution of A.O. was discontinued after his sudden death in 2012. The Netherlands authorities decided in September 2013 to publish the lists on the Internet site of the public prosecution service, in order to end the uncertainty for families who had remained in the dark for decades about the fate of relatives who had disappeared in the period covered by the lists.

67. The lists, totalling 154 pages on which the then Afghan communist authorities recorded the regime's killings in 1978 and 1979, contain the names of nearly 5,000 people. Those killed are listed in chronological and alphabetical order. The lists also contain the names of their fathers, their professions, their place of residence and the nature of the accusations against them.

68. On 30 September 2013, following the publication of the lists, the President of Afghanistan declared two days of official mourning for people killed by the former communist regime.

69. According to a press release dated 30 October 2015 from the Netherlands public prosecution service, a 64-year-old Netherlands national of Afghan origin was arrested in Rotterdam on 27 October 2015 on suspicion of having committed war crimes in Afghanistan in 1979. As a former commander of commando unit 444 of the Afghan Army, the suspect is believed to have been involved in a mass killing in and around the Kerala area of Assadabad (Kunar Province) on 20 April 1979. This mass killing has no connection with the above death lists. This press release further reads:

> "**Undesirability of Impunity**
>
> Afghanistan has been in a state of war for more than 35 years. War Crimes should not remain unpunished. This conflict therefore still has the attention of the Dutch Public Prosecutor's Office. Previously, two former Afghan generals living in the Netherlands were convicted of acts of torture for which they were responsible during their time with the Afghan security service KhAD. Another investigation into Afghan War Crimes and enforced disappearance was closed prematurely in 2013, because the suspect living in the Netherlands died. It did, however, yield answers about the fate of thousands who had been arrested and killed by the regime at former regime.
>
> The Netherlands are committed to not being a safe haven for war criminals and aims to the fight against impunity for international crimes. Moreover, fighting impunity is important to Afghans in Afghanistan and abroad. Impunity also plays a role in the perpetuation of conflicts. The Netherlands International Crimes Unit is therefore dedicated to tracking and prosecuting war criminals, even if this takes years."

III. RELEVANT INTERNATIONAL LAW AND INTERNATIONAL MATERIALS

70. 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."

71. On 4 September 2003 the United Nations High Commissioner for Refugees ("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 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.

72. 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).

73. 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."

74. 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.

75. 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, ..."

76. 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. ..."

77. 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."

78. Persons having worked for the KhAD/WAD during the former communist regime were not included in the potential risk profiles set out in the December 2010 UNHCR Guidelines.

79. 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 persons having worked for the KhAD/WAD 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.

80. 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.

81. 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."

82. 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 3, 8 AND 13 OF THE CONVENTION

83. The applicants complained that the refusal to grant them a residence permit and consequential removal to Afghanistan would violate their rights under Articles 3 and 8 of the Convention and that, in respect of these grievances, they did not have an effective remedy within the meaning of Article 13 of the Convention.

Article 3 of the Convention reads:

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

84. Article 8 of the Convention provides in its relevant part:

"1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of 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."

85. Article 13 of the Convention reads:

"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."

86. The Government contested these claims.

A. Admissibility

1. The second, fourth and fifth applicant

87. The second, fourth and fifth applicants have all been granted a residence permit for asylum purposes on 30 September 2011 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.

88. Accordingly, to the extent that the application has been brought by the second, fourth and fifth applicants, it is appropriate to strike this part of the application out of the list of cases.

2. The third applicant

89. In respect of the third applicant's complaint under Article 3 and 13 of the Convention, the Court notes that the provisional-measures judge of the Regional Court of The Hague sitting in Utrecht granted his request for a provisional measure allowing him to remain in the Netherlands pending the outcome of his objection against the Minister's decision of 28 September 2012 on his request for a residence permit on the basis of his rights under Article 8 of the Convention. In so far as can be established from the content of the case file, these proceedings are currently still pending. Consequently, the third applicant is currently not at risk of being removed to Afghanistan. Moreover, in the event that practical steps are taken by the Netherlands authorities aimed at his effective removal, he may submit an objection to any act which is aimed at effective removal (*daadwerkelijke uitzettingshandeling*), as well as a subsequent appeal to the Regional Court of The Hague as well as a further appeal to the Administrative Jurisdiction Division (see *A.A.Q. v. the Netherlands*, cited above, § 43).

90. In these circumstances the applicant's complaints under Article 3 and 13 of the Convention are premature and must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

91. As regards the third applicant's complaint that his removal to Afghanistan would be contrary to his rights under Article 8, the Court notes that, on 4 February 2013, the provisional-measures judge of the Regional Court of The Hague sitting in Utrecht granted his request for a provisional measure allowing him to remain in the Netherlands pending the outcome of his objection to the Minister's decision of 28 September 2012 on the third applicant's request for a residence permit on the basis of his rights under Article 8 of the Convention. In so far as can be established from the content of the case file, these proceedings are currently still pending.

92. Consequently, that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4. It follows that his complaint under Article 13 taken together with Article 8 is premature and must be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

3. The first applicant

93. To the extent that the first applicant complained that the refusal to grant him a residence permit and his consequential removal to Afghanistan were contrary to his rights under Article 8 and under Article 13 taken together with Article 8, the Court observes – given the strict separation under the provisions of the Netherlands Aliens Act 2000 (*Vreemdelingenwet 2000*) between an asylum application and a regular application for a residence permit for another purpose than asylum – that arguments based on Article 8 of the Convention cannot be entertained in asylum proceedings but should be raised in, for instance, proceedings on 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 in proceedings concerning the imposition of an exclusion order (see *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006‑XII, and *Arvelo Aponte v. the Netherlands*, no. 28770/05, 3 November 2011).

94. As the Court has found no indication in the case file that the first applicant has raised his grievance under Article 8 of the Convention – either in form or substance and in accordance with the applicable procedural requirements – before any domestic authority, he has failed to exhaust domestic remedies as required by Article 35 § 1 of the

Convention in respect of his complaint under Article 8 which, therefore, must be rejected pursuant to Article 35 § 4. Consequently, his complaint under Article 13 taken together with Article 8 is premature and must be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

95. The Court further notes that the remainder of the application, namely the first applicant's complaints under Article 3 and Article 13 taken together with Article 3, is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that this part of the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

96. The first applicant argued that his removal 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 and his past work for the KhAD/WAD. He submitted that, although the August 2013 UNHCR Guidelines do not include former KhAD/WAD employees in their potential risk profiles, this group had attracted fresh negative attention in Afghan society as a result of the publication in September 2013 of death lists of victims of the former communist regime (see paragraphs 65-68 above) in that it resulted in a wave of public attention for the crimes committed during the communist era and, although they responded hesitantly, the Afghan authorities felt obliged to proclaim two days of official mourning. Referring to Internet press reports of 30 September 2013 and 1 October 2013 published by the *New York Times*, Fox News and the *Daily Afghanistan*, the first applicant claimed that there was a rising public interest for bringing the responsible persons to justice.

97. The first applicant feared that this recent wave of interest seriously increased his chance of becoming an easy victim of human rights abuses for being directly associated with the atrocities of the former communist regime. Although he had never been involved in any human rights abuses himself, this could not protect him against suspicion of personal involvement in such abuses. Furthermore, all his relatives having left Afghanistan, he had no family network or personal relations or connections to fall back on for protection. By Afghan standards, he would be an old man who, lacking connections, relatives and money, would unable to fend for himself in Afghanistan and who, by disclosing his professional career, would put himself at immediate risk.

98. The first applicant also submitted that now, on the basis of the deteriorating general security situation in Afghanistan, as reported in the August 2013 UNHCR Guidelines, his removal to Afghanistan should be regarded as contrary to his rights under Article 3 of the Convention.

99. The Government considered that the first applicant had made detailed and credible statements concerning his PDPA membership, his employment as a prison guard at Pol-e-Charki Prison and subsequent employment by the KhAD/WAD where he reached the rank of either lieutenant-colonel or major. However, the Government considered that his return to Afghanistan would not, solely for this reason, entail a risk of treatment in breach of Article 3 of the Convention.

100. The Government submitted that, as was apparent from various international reports such as the UK Home Office's "*Country of Origin Information Report – Afghanistan*" of 18 February 2009, many former KhAD/WAD staff were playing a normal part in Afghan society and that, according to the UNHCR Guidelines of December 2007

and July 2009, many former PDPA members and many staff of the former KhAD/WAD were currently employed by the Afghan government, either in the existing security service or elsewhere.

101. Furthermore, since December 2010 and to date, the UNHCR Guidelines no longer included ex-communists and former KhAD/WAD staff among the potential risk profiles, and there were no indications that ex−communists faced a risk of persecution by the current Afghan government. Accordingly, as many of this group were taking part normally in Afghan society, it could not be said that this category of person was systematically exposed to a risk of inhumane treatment or that the mere fact of belonging to this group implied that such individuals ran a real risk of treatment prohibited by Article 3.

102. It was therefore for the applicant to demonstrate special distinguishing features and suitable evidence that there were sufficient grounds for holding that in his case removal to Afghanistan would entail exposure to a real risk of being subjected to treatment contrary to Article 3. However, the applicant had not demonstrated that the current authorities or – in the first applicant's words – the fundamentalists (the mujahideen, Taliban and other hardliners) were holding him responsible for the human rights violations committed by the KhAD/WAD because he had worked for it or that for this reason he was specifically targeted by armed individuals. According to the Government, the applicant had not satisfactorily established that, on account of his activities during the former communist regime, his return to Afghanistan would expose him to a real risk of being subjected to treatment contrary to Article 3.

103. The Government further contended that, although the general security situation in Afghanistan in general still gave cause for great concern, it was not so poor that returning the 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 applicant's removal to Afghanistan should be regarded as contravening Article 3.

2. The Court's assessment

(a) General principles

104. 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)).

105. 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).

106. The Court further observes 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 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).

107. As regards the material date, the existence of such a 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 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

108. The first applicant cited both his personal situation as a former employee of the KhAD/WAD, and the general security situation in Afghanistan, as reasons for his fear of a risk of ill-treatment in Afghanistan.

109. As regards the individual elements of the risk of ill-treatment claimed by the first applicant, the Court notes that, after the mujahideen seized power in Afghanistan in 1992, the first applicant did not flee the country but moved to Mazar-e-Sharif where, apparently without encountering any problems from the authorities or any groups or

private individuals on account of his past activities for the KhAD/WAD, he continued to work as a construction engineer for the municipality until August 1998 when the Taliban seized power in Mazar-e-Sharif. One day after they had taken control of Mazar-e-Sharif, the Taliban arrested the first applicant and detained him until he managed to abscond after about seven months and subsequently fled Afghanistan. The Court lastly notes that, in an interview held on 10 March 2005 with the Netherlands immigration authorities, the first applicant stated that nobody in Afghanistan was specifically looking for him.

110. To the extent that the first applicant's claims under Article 3 are based on the consequences of the appearance of the death lists published by the Netherlands authorities in September 2013, the Court notes that this resulted in Afghanistan in two days of official mourning for people killed by the former communist regime. However, it does not appear, that in Afghanistan this publication has triggered off any concrete acts of persecution, prosecution or treatment prohibited by Article 3 directed against agents of the former communist regime, including former employees of the KhAD/WAD.

111. The Court has found nothing in the case file indicating that the mujahideen would have been interested in the first applicant in the period between 1992 and 1998. It has further found no tangible elements showing that the first applicant has since 2005 attracted the negative attention of any governmental or non-governmental body or any private individual in Afghanistan on account of any individual element cited by the first applicant. In this context, the Court lastly notes that, from 17 December 2010 and to date, the UNHCR no longer classifies people who have worked for the KhAD/WAD as one of the specific categories of person exposed to a potential risk of persecution in Afghanistan.

112. 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.

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

114. As regards the applicant's complaint under Article 13 of the Convention, the Court reiterates that this provision guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective. The expression "effective remedy" used in Article 13 cannot be interpreted as a remedy that is bound to succeed; it simply means an accessible remedy before an authority competent to examine the merits of a complaint (see, most recently, *Koceniak v. Poland* (dec.) no. 1733/06, § 72 with further references, 17 June 2014).

115. Even assuming that the first applicant has an arguable claim for the purposes of Article 13, he was able to have the negative decision on his asylum applications reviewed by the Regional Court of The Hague and subsequently the Administrative Jurisdiction Division, albeit unsuccessfully. The Court further notes that, both in the

proceedings before the Regional Court and before the Administrative Jurisdiction Division, the first applicant was given ample opportunity to state his case, to challenge the submissions by the adversary party and to submit whatever he found relevant for the outcome. The Court last notes that the first applicant's arguments under Article 3 of the Convention were considered and determined in the proceedings at issue.

116. In these circumstances the Court is of the opinion that there has been no violation of Article 13 in conjunction with Article 13 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* 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, fourth and fifth applicant;

2. *Decides* to declare inadmissible the application in so far as it has been brought by the third applicant;

3. *Decides* to declare inadmissible the first applicant's complaints under Article 8 of the Convention and under Article 13 taken together with Article 8 of the Convention;

4. *Decides* to declare admissible the remainder of the application;

5. *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

6. *Holds* that there has been no violation of Article 13 of the Convention taken together with Article 3.

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.