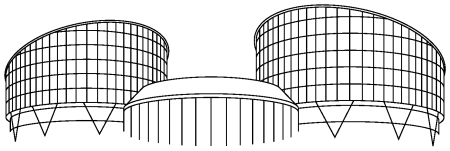

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF S.S. v. THE NETHERLANDS

(Application no. 39575/06)

JUDGMENT

STRASBOURG

12 January 2016

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

In the case of S.S. 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. 39575/06) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr S.S. ("the applicant"), on 4 October 2006.

2. The applicant was initially represented before the Court by Mr J. Enoch, a lawyer practising in Utrecht, who was succeeded by Mr P. Schüller, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant complained that he would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if expelled from the Netherlands to Afghanistan.

4. On 20 November 2008 the President of the Section to which the case had been allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be expelled to Afghanistan for the duration of the proceedings before the Court.

5. On 19 February 2009 the President communicated the application to the Government. The President further decided that the applicant's identity should not be disclosed to the public (Rule 47 § 4). The Government submitted written observations on 4 August 2009 and the applicant submitted observations in reply on 19 October 2009. The Government submitted further observations on 1 December 2009. On 1 October 2013, the parties were requested to submit additional written observations on the admissibility and merits. The Government submitted these on 4 November 2013 and the applicant on 17 December 2013. On 26 June 2014 the

applicant submitted additional, unsolicited observations which, under Rule 38 § 1 of the Rules of Court, were accepted by the President for inclusion in the case file. The Government submitted comments on those submissions on 15 September 2014.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is of Pashtun origin, was born in 1964 and has been in the Netherlands since 1998.

7. The applicant entered the Netherlands on 3 August 1998 and on 4 August 1998 applied for asylum, submitting the following account in his interviews with immigration officials held on 4 August 1998, 26 August 1998 and 21 March 2000.

8. After completing his elementary education in 1976, the applicant had attended the military academy in Kabul. He had graduated in 1982 and had started working in 1982 with the rank of second lieutenant at an administrative department of one of the directorates of the Afghan security service KhAD/WAD ("*Khadimat-e Atal'at-e Dowlati / Wezarat-e Amniyat-e Dowlati*")[1] during the former communist regime in Afghanistan. He had become head of this department – which was responsible for handling confidential documents – in 1988, which function he had continued to hold until the fall of the ruling communist People's Democratic Party of Afghanistan ("PDPA") in 1992. In 1990 he had been promoted to the rank of lieutenant-colonel.

9. The applicant's directorate had been assigned the task of negotiating and concluding agreements with groups that opposed and fought the communist Government, namely the mujahideen. These agreements entailed remunerated cooperation with the ruling PDPA. The applicant had attended meetings between thus "employed" mujahideen commanders and executives of the directorate. During these meetings the performance of such commanders was assessed and decisions were taken on whether or not they should continue to be paid. The applicant had taken minutes at those meetings. He believed that the mujahideen were holding him personally responsible for the discontinuation of their pay where decisions to that effect had been taken. In addition, these mujahideen commanders had never

[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.

admitted to cooperating with the KhAD and were very keen on keeping this a secret, for which reason they were interested in eliminating the applicant.

10. In 1992, after the fall of Kabul, these mujahideen commanders had come looking for the applicant. They were said to have come to his office and asked for him. The applicant had been informed of this by the president of the directorate he had worked for, who had maintained good relations with the mujahideen and hence had remained in post there.

11. The applicant and his family had fled to Mazar-e-Sharif, where they had led a quiet life until 1997, when various mujahideen groups had come to the city, including those mujahideen feared by the applicant. He had gone into hiding, during which period his house had been searched by the mujahideen. The applicant and his family had then fled to Pakistan.

12. On 15 September 1999, a person-specific official report (*individueel ambtsbericht*) not concerning the applicant was drawn up by the Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*). According to this report, torture was systemic in WAD interrogation centres and within the KhAD the loyalty of its staff was carefully controlled. It was considered impossible that persons belonging to the higher management of the KhAD/WAD had not been involved in the implementation of the above methods. This report was taken into account in the applicant's asylum procedure.

13. The applicant's asylum claim was also examined in the light of an official report, drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs, on "Security Services in Communist Afghanistan (1978-92), AGSA, KAM, KhAD and WAD" ("*Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD*") 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 (see *A.A.Q. v. the Netherlands* (dec.), no. 42331/05, §§ 50-52, 30 June 2015).

14. By a decision of 18 July 2000 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's asylum claim. The Deputy Minister held, *inter alia*, that serious reasons had been found for believing that the applicant had committed acts referred to in Article 1F of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Refugee Convention").

15. Referring to the official report of 29 February 2000 (see paragraph 13 above), the Deputy Minister emphasised the widely known cruel character of the KhAD, its lawless methods, the grave crimes it had committed such as torture and other human rights violations and the "climate of terror" which it had spread throughout the whole of Afghan society, including the army. The Deputy Minister underlined the vague definition of "enemy of the communist regime" used by the KhAD, how it found those enemies through an extensive network of spies, and how all of

this led to widespread and often random arrests of suspects. It was also noted that the KhAD was considered to be an elite unit of the communist regime, and that only those whose loyalty was beyond doubt were eligible for recruitment to the service. Furthermore, new recruits were initially assigned to KhAD/WAD sections actively engaged in tracking down "elements that posed a threat to the State", where – in order to prove their loyalty unequivocally – they were directly involved in the human rights violations the KhAD was associated with. In this regard the Deputy Minister emphasised that every promoted officer had been involved in arrests, interrogations, torture and even executions.

16. Having established, on the basis of elaborate argumentation based on various international documents, that those involved in the KhAD were likely to fall within the scope of Article 1F of the 1951 Refugee Convention, the Deputy Minister proceeded to an analysis of the applicant's individual responsibility under that Convention. In the light of the above, the applicant's plea that he had never been involved in any human rights violations and had worked his whole career for one department only was dismissed. In view of the applicant's career and several promotions, the Deputy Minister excluded the possibility of the applicant not having been involved in human rights violations committed by the KhAD.

17. The Deputy Minister underlined that the application of Article 1F of the 1951 Refugee Convention did not require proof that the applicant had personally committed the alleged crimes; it sufficed that serious reasons existed to consider that the applicant had, or should have had, knowledge of those crimes and that he bore responsibility for them, which responsibility he had voluntarily assumed. In this context the Deputy Minister referred, *inter alia*, to paragraphs 42 and 43 of "The Exclusion Clauses: Guidelines on their Application" (UNHCR, 1 December 1996), stating:

> "persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or condoned or acquiesced in the carrying out of any specified criminal acts by subordinates, should rightly be excluded. ... voluntary continued membership of a part of a government engaged in criminal activities may constitute grounds for exclusion where the member cannot rebut the presumptions of knowledge and personal implication."

18. The Deputy Minister further referred to a letter of 28 November 1997 sent by the Deputy Minister of Justice to the President of the Lower House of Parliament (*Tweede Kamer*) stating that Article 1F was also applicable when the person concerned had not himself committed any acts referred to in this provision but had been an active and conscious member of an organisation known for committing war crimes and crimes against humanity. As the applicant had not in any way distanced himself from or resisted the crimes committed by the KhAD, the Deputy Minister concluded that Article 1F was applicable to the applicant's case. Consequently, the applicant's asylum request was rejected and Article 1F held against him.

19. The Deputy Minister further found no grounds on the basis of which the applicant would be eligible for a residence permit on compelling humanitarian grounds (*klemmende redenen van humanitaire aard*). As regards the applicant's plea under Article 3 of the Convention the Deputy Minister held that, even assuming that a real risk existed of the applicant being subjected to treatment contrary to that provision in Afghanistan, Article 3 did not guarantee a right to residence. The Deputy Minister considered in this context that granting residence to the applicant would conflict with the State's interest in terms of its credibility on the international stage, particularly regarding its responsibility towards other States. In the Deputy Minister's view, a situation in which the Netherlands was forced to become a host State for individuals who had elsewhere shocked public and international legal order with acts considered to constitute grave crimes under both Dutch and international law was to be avoided.

20. The applicant's objection (*bezwaar*) to this decision was rejected, after he had been heard on it on 16 May 2003 before an official board of enquiry (*ambtelijke commissie*), on 11 August 2003 by the Minister of Immigration and Integration (*Minister van Vreemdelingenzaken en Integratie*), the successor to the Deputy Minister of Justice. The Minister endorsed the Deputy Minister's impugned decision and proceeded, in addition thereto, to an analysis of the applicant's individual responsibility under the 1951 Refugee Convention on the basis of the prescribed and so-called "personal and knowing participation test" and held Article 1F against him.

21. As regards the "knowing" element, the Minister – having regard to the official report of the Ministry of Foreign Affairs of 29 February 2000 (see paragraph 13 above) – found that the applicant had known or should have known about the criminal character of the KhAD. The Minister did not attach any credence to the applicant's submissions that he had not known about the human rights violations committed by the KhAD. Basing herself on the Ministry of Foreign Affairs official report of 29 February 2000, the Minister held that the commission of human rights violations by the KhAD under the PDPA rule was a fact of common knowledge and that, therefore, it was unthinkable that the applicant would have been ignorant of those acts. The Minister emphasised in this regard the high rank the applicant had held, the long period he had worked for the KhAD and the fact that he had attended meetings with the executives of the Directorate in which he had been employed. The Minister concluded that the applicant had knowingly participated in torture and executions.

22. As regards the applicant's personal participation in human rights violations attributed to the KhAD, the Minister found, basing herself to a large extent on the same factual information as the Deputy Minister had done in his previous decision, that the applicant had failed to demonstrate

that he had not committed such violations himself or that his conduct, or lack thereof, had prevented these violations from being committed. The Minister held, therefore, that the applicant had personally participated in the commission of acts referred to Article 1F of the 1951 Refugee Convention.

23. The Minister did not attach credence to the applicant's rebuttal, which amounted to his case having to be distinguished from the general situation with regard to the KhAD and its officers as described in the official report of 29 February 2000. The applicant had claimed that he had obtained a desk job not by proving his loyalty to the KhAD in sinister ways – as the official report stated – but rather through bribes. The Minister held that, based on the applicant's position and description of his tasks (including the processing of high-level classified information), he had attempted to trivialise his activities and had greatly impaired his credibility in consequence. On this point, the Minister relied, inter alia, on Amnesty International's "Reports of torture and long-term detention without trial" of March 1991, according to which the Directorate in which the applicant had been employed was engaged in systematic torture.

24. The Minister further identified several inconsistencies in the applicant's declarations and rebuttals, from which it was concluded that his declarations concerning certain of the tasks he stated he had performed were highly implausible. As regards the applicant's various rebuttals, it was found, in the relevant part, that the burden of proof in terms of Article 1F of the 1951 Refugee Convention was less stringent than in a criminal prosecution ("serious reasons for considering" that the applicant might have been guilty of human rights violations sufficed to render this provision applicable). Taking into account that the applicant had never sought to leave the KhAD or the WAD, for which he had worked for about ten years, in which his last held rank was that of lieutenant-colonel, and in which he had been promoted to head of his department, the Minister concluded that there were no indications that the applicant had been forced or had involuntarily worked for the KhAD/WAD.

25. As regards the applicant's claim that the official report of 29 February 2000 of the Ministry of Foreign Affairs was not accurate and was based on unreliable sources and that, therefore, it was too general in scope and could not be applied to his case, the Minister held that this report was founded on several acclaimed sources, such as the United Nations Special Rapporteur, Human Rights Watch, numerous Amnesty International reports, and a variety of United Nations publications.

26. The Minister went on to analyse, of her own motion, the applicant's eligibility for a residence permit for reasons not related to asylum. It was held that no such permit could be issued, since the application of Article 1F of the 1951 Refugee Convention gave rise to "contraindications" against the applicant in terms of his eligibility for other types of residence permit. However, while reiterating that Article 3 of the Convention did not

guarantee a right to residence, the Minister considered that it could not be ruled out that the applicant, in the present circumstances, would run a real risk of treatment contrary to that provision if expelled to Afghanistan, for which reason the applicant was not to be expelled.

27. The applicant lodged an objection against the refusal by the Minister to grant him a residence permit for reasons not related to asylum. This objection was rejected by the Minister on 16 January 2004, confirming her impugned refusal.

28. The applicant appealed against the Minister's decisions of 11 August 2003 and 16 January 2004 before the Regional Court (*rechtbank*) of The Hague, arguing, *inter alia*, that the factual underpinning of the Ministry of Foreign Affairs official report of 29 February 2000 contained errors, which had led the Minister to draw incorrect conclusions as to the applicant's personal and knowing participation in the crimes referred to in Article 1F of the 1951 Refugee Convention.

29. In its judgment of 10 February 2005, the Regional Court of The Hague sitting in Utrecht held that the official reports issued by the Ministry of Foreign Affairs, which lay to a great extent at the basis of the Minister's decisions, had been drafted in an unbiased manner, were accurate and objective, and provided the required insight in the relevant information, and that therefore, the Minister had been entitled to rely on them. In addition, the Regional Court noted that the evaluation of the credibility of facts adduced by asylum seekers fell to a large extent within the Minister's discretion and could, therefore, only be evaluated marginally by the court. The Regional Court agreed with the Minister on all points as to the latter's decision to hold Article 1F of the 1951 Refugee Convention against the applicant and, consequently, to refuse him an asylum-based residence permit. As regards the Minister's separate decision of 16 January, refusing the applicant a residence permit for reasons not related to asylum, the Regional Court adopted a different reasoning, but reached the same conclusion.

30. In respect of Article 3 of the Convention, the Regional Court held, with reference to case-law of the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*), that the 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 of the Convention. For that reason, the decision should demonstrate that the Minister had examined whether Article 3 of the Convention 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 Regional Court found, the Minister had failed to do in the present case, for which reason it quashed the Minister's decision of 11 August 2003 and remitted the case back to the Minister for a fresh decision.

31. After the applicant had once more been heard on 20 May 2005 before an official board of enquiry, the Minister rejected the asylum request anew in a fresh decision of 2 August 2005. In this fresh decision, the Minister limited herself to Article 3 of the Convention. She dismissed the applicant's fear of returning to Afghanistan as a (former) member of the PDPA and former officer of KhAD, referring to an official report issued by the Ministry of Foreign Affairs in January 2005 and holding that the sole fact that an asylum seeker had been a PDPA member was not enough in itself to render Article 3 applicable in the eventuality of expulsion. The Minister further noted that the mere fact that the applicant had a different political conviction from those currently in power in Afghanistan similarly did not suffice to render Article 3 applicable. The Minister further took into account that the applicant had stated that he was not a known person in Afghanistan. The applicant had no concrete indication that he would be searched for by any group or person. In addition, relatives of the applicant – including his father and brother – were still living in Afghanistan without ever having encountered any problem.

32. The Minister further addressed the applicant's claim that he had reason to fear certain named mujahideen commanders, who would identify him as the KhAD officer who had not paid them, or paid them less than agreed upon. The applicant had submitted that he had attended meetings – where he had only taken minutes – in the course of which cooperation agreements had been reached between the KhAD and a mujahideen commander. In addition, the applicant had alleged that these mujahideen commanders were keen on ensuring that nobody in present-day Afghanistan would find out that they had cooperated with KhAD in the past, for which reason they were interested in eliminating the applicant. On this point, the Minister held that the applicant had failed to establish these commanders' whereabouts and current influence in Afghan society. The Minister noted that according to the applicant's own statements, he did not believe that these individuals occupied high positions in today's Afghanistan. Furthermore, the Minister considered that the mujahideen commanders were aware of the applicant's role in those meetings as well as of the identity of the person taking the decisions as regards financial support of the mujahideen, and that it was therefore implausible that they would be after the applicant. Finally, it was underlined that the applicant had been able to stay in Afghanistan until 1997 without any problems. For these reasons, the applicant's claim that he was being sought by the mujahideen was dismissed as founded on nothing but suspicion and speculation. The claim based on Article 3 was consequently rejected.

33. The applicant appealed anew to the Regional Court of The Hague, arguing, *inter alia*, that the Minister had erred in finding him guilty of participation in torture under the auspices of the KhAD. In his view, the Minister had disregarded the fact that the applicant had held an

administrative position in KhAD which was only concerned with maintaining contacts with the mujahideen and reaching agreements with them. Furthermore, the Minister had been inconsistent in finding, on the one hand, that the applicant had participated in human rights violations, but, on the other hand, that the applicant had not held an important position within the PDPA party. The applicant submitted that it was likely that he was well known enough for his former adversaries, who were now those in power in Afghanistan, to find him and subject him to treatment contrary to Article 3 of the Convention.

34. The Regional Court of The Hague sitting in Amsterdam rejected the applicant's appeal on 12 April 2006. It noted that, according to a general official report on Afghanistan of July 2005 by the Ministry of Foreign Affairs, that some former military officials, members of the police and the KhAD/WAD security services possibly risk falling victim to human rights violations – not only by the authorities but also by the population (victims' relatives), unless they maintained relations with influential Islamic and political parties or tribes. According to the court, this did not mean that every former KhAD officer ran a real risk of treatment contrary to Article 3, and the applicant was thus required to establish the existence of such a risk in the particular circumstances of his case. The Regional Court agreed with the Minister that the applicant had failed to do so, as his claims were found to be merely based on unsubstantiated expectations, including his claimed fear of persecution by the mujahideen commanders who had been paid by the KhAD/WAD. No further appeal lay against this ruling.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

III. RELEVANT INTERNATIONAL LAW AND INTERNATIONAL MATERIALS

36. 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."

37. 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.

38. 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).

39. In July 2003, the UNHCR issued an "*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."

40. In May 2008, the UNHCR issued the "*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 as to the question whether or not individuals who had worked for the KhAD/WAD should be regarded as being eligible for international protection.

41. 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, ..."

42. 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. ..."

43. 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."

44. 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.

45. 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.

46. 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 being a spy, 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 individuals who had worked for the former communist armed forces of Afghanistan or intelligence service as a targeted profile.

47. The 2015 UNHCR country operations profile on Afghanistan reads in its relevant part:

> "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."

48. 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 ARTICLE 3 OF THE CONVENTION

49. The applicant complained that his removal to Afghanistan would violate his rights under Article 3 of the Convention, which reads:

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

50. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

52. The applicant argued that his expulsion to Afghanistan would expose him to a real risk of ill-treatment within the meaning of Article 3 due to his past work for the KhAD, in particular from the side of five identified former mujahideen commanders who had collaborated in the past with the KhAD. The applicant emphasised that, as a KhAD official, he had attended secret meetings with these mujahideen leaders, who still wielded considerable influence and power in Afghanistan and were keen to avoid their reputation being tarnished by ensuring that nobody in present-day Afghanistan should

learn of their past collaboration with the KhAD. The actual risk posed to him by these mujahideen leaders could not only be inferred from their present positions of power, but also because they were linked to human rights abuses, fraud and intimidation.

53. The applicant further based the claimed risk on his having pledged allegiance to the former communist regime, on being an (alleged) opponent of the present regime, on being a convinced atheist, on his long absence from Afghanistan, on the absence of a family of other protection network in Afghanistan, on his medical situation in that he was suffering from severe stress and psychological problems which also resulted in physical pain, and on the general security situation in Afghanistan, which had deteriorated since 2009, and particularly so in the Logar province from where he originated.

54. The applicant argued that, if the risks were weighed cumulatively, it was clear that he would run a real risk of being subjected to treatment contrary to Article 3 of the Convention. In addition, relying on the most recent amendment of 6 February 2014 to the Netherlands policy position in respect of Afghan asylum seekers, the applicant submitted that protection against persecution can only be obtained in Kabul and by Afghans who are from Kabul, which he was not. Furthermore, the former mujahideen leaders whom he feared were now holding positions of power, particularly in the Afghan Government based in Kabul.

(b) The Government

55. As regards the applicant's individual situation, the Government submitted that the names of the former mujahideen leaders whom the applicant now stated he feared did not correspond to the names given by him in the domestic proceedings, in particular when he was heard before the official board of enquiry on 20 May 2005 (see paragraph 31 above). In addition, the applicant has not adducted any evidence of ever having encountered any problems from these former mujahideen leaders. After the fall of the communist regime in 1992, he had stayed in Afghanistan until 1997 without experiencing any problems and, according to the Government, it was difficult to imagine that now – more than twenty-two years after the fall of the communist regime – the applicant would experience problems from these people; his fear of them was based only on suspicion on his part.

56. In so far as the applicant claimed a risk of ill-treatment in Afghanistan on his involvement with the former communist regime there, in particular his work for the KhAD, the Government submitted that, since its December 2010 Guidelines, the UNHCR Guidelines on Afghanistan no longer included ex-communists and former KhAD/WAD personnel among the "groups at risk". Furthermore, the official country assessment report on Afghanistan, drawn up by the Netherlands Ministry of Foreign Affairs in July 2012, indicates that many former members of the PDPA and former

personnel of the KhAD/WAD currently work for the Afghan authorities, for example as provincial governors or mayors, or in senior positions in the army or police, and that former PDPA members have formed various new political parties. According to the Government, as far as known, ex-communists have nothing to fear from the current Afghan government.

57. To the extent that the applicant argued that his medical condition was such that removal would be contrary to his rights under Article 3, the Government noted that this claim had remained unsupported by any medical documents and for this reason did not accept this part of the applicant's complaint.

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

59. In respect of the current general security situation in Afghanistan, the Government pointed out that the applicant would be removed to Kabul, and that it would then be up to him to decide in which part of Afghanistan he wished to live. Although the security situation in Afghanistan in general, including Kabul, still gave cause for great concern, it was not so poor that returning the applicant to Afghanistan, including Kabul, 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 (IOM) 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

60. 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)).

61. 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).

62. 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 Geneva Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic evidence as well as by evidence 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).

63. As regards the material date, the existence of such risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012). However, since the 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

64. The applicant gave both his personal situation as an employee of the KhAD and the general security situation in Afghanistan as reasons for his fear of ill-treatment in Afghanistan.

65. As regards the individual elements of the risk of ill-treatment claimed by the applicant, the Court notes that, after the collapse of the communist regime in Afghanistan in 1992, the applicant did not flee the country, but moved to Mazar-e Sharif where he lived a quiet life until 1997 without encountering any problems from the authorities, groups or individuals on account of his past activities for the KhAD. The Court further notes that there is nothing in the case file indicating in a concrete manner that the applicant, since he left Afghanistan in 1997, would have attracted negative attention from any governmental or non-governmental body or any private individual in Afghanistan. The Court lastly notes that, from 17 December 2010 and to date, the UNHCR no longer classifies former officials of the KhAD/WAD as one of the specific categories of person exposed to a potential risk of persecution in Afghanistan (see paragraphs 44-45 above), and that there is no indication in the two EASO reports on Afghanistan that members of the military or intelligence service under the former communist regime are specifically targeted by the Taliban or other insurgent groups in Afghanistan (see paragraphs 46 and 48 above).

66. 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.

67. The Court is therefore of the opinion that the applicant has failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that, at the time of his removal to Afghanistan, he was exposed

to a real and personal risk in Afghanistan of being subjected to treatment contrary to Article 3 of the Convention.

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

II. RULE 39 OF THE RULES OF COURT

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

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

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

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

Marialena Tsirli	Luis López Guerra
Deputy Registrar	President