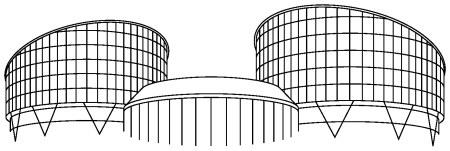

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Applications nos. 43538/11 and 63104/11
E.P. against the Netherlands
and A.R. against the Netherlands

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

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

Having regard to the above applications lodged on 14 July 2011 and 11 October 2011 respectively,

Having regard to the interim measure indicated in the two applications to the respondent Government under Rule 39 of the Rules of Court and the fact that these interim measures have been complied with,

Having regard to the parties' submissions,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, E.P., is an Afghan national who was born in 1964 and lives in the Netherlands.

2. The applicant in the second case, A.R., is an Afghan national who was born in 1960 and also lives in the Netherlands.

3. Both applicants were represented before the Court by Mr J. Verstrepen, a lawyer practising in Oosterhout. The decision was taken that the applicants' identities should not to be disclosed to the public (Rule 47 § 4 of the Rules of Court).

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

A. The circumstances of the cases

5. The facts of the cases, as submitted by the parties, may be summarised as follows.

1. Application no. 43538/11

6. On 24 August 2000 the applicant, together with his wife and their three children (born in 1990, 1992 and 1996), entered the Netherlands. The applicant applied for asylum, claiming to fear persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Refugee Convention") by the Taliban, who had arrested him and held him for one night in June 2000. He was of Tajik origin and the Taliban disliked Tajiks. He also believed that he had been arrested by the Taliban because of critical conversations held in his shop about the situation in Afghanistan under Taliban rule. In his interviews with the Netherlands immigration authorities he also stated that he had worked for the KhAD/WAD[1] from 1983 to 1992, when the mujahideen had seized power in Afghanistan. His final rank in the KhAD/WAD had been that of captain. From 1992 until 2000, when he fled Afghanistan, he had run a store in Kabul. In a later interview he stated that he also feared persecution by the mujahideen for having worked for the KhAD/WAD.

7. On 27 September 2000 a fourth child was born to the applicant and his wife.

8. On 18 March 2004 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) notified the applicant of her intention to deny the applicant asylum pursuant to Article 1F of the 1951 Refugee Convention, having considered the applicant's detailed statements about his work for and career path within the KhAD/WAD and also the statement given by his wife, who had likewise applied for asylum and had confirmed that the applicant had been actively involved in the KhAD/WAD. The Minister also took into account the content of an official report (*ambtsbericht*), released on 29 February 2000 by the Netherlands Ministry of Foreign Affairs, entitled "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), according to which the cruel character of the KhAD/WAD was widely known in Afghanistan; through its relentless and often arbitrary actions it had intentionally generated a climate of terror for the purposes of nipping in the bud any resistance among the civilian population against the communist regime. The Minister stated that

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.

there were serious grounds for surmising that, in his account to the Netherlands authorities, the applicant had partly misrepresented the facts about his work and responsibilities within the KhAD/WAD, had sought to trivialise his account and had withheld important information. Following a lengthy analysis of the applicant's individual responsibility under Article 1F of the 1951 Refugee Convention, based on the prescribed and so-called "knowing and personal participation" test, the Minister concluded that Article 1F should be applied in the applicant's case. On 15 April 2004 the applicant's lawyer submitted written comments (*zienswijze*) on the Minister's intended decision.

9. In her decision of 28 April 2004 the Minister denied the applicant asylum under Article 1F. The Minister did not deviate, in the relevant part, from the conclusions stated in the notice of intent of 18 March 2004 and maintained them on all points. The applicant's comments were dismissed as not warranting a different finding. Although the applicant had relied on Article 3 of the Convention, the Minister found that it had not been demonstrated that he would be exposed to a real and personal risk of being subjected to treatment proscribed by that Article if expelled to Afghanistan. Referring to the fact that the applicant had stated that he had medical problems, the Minister opined that the applicant could apply for a regular (non-asylum based) residence permit for the purpose of medical treatment in the Netherlands.

10. In a judgment of 1 August 2005 the Regional Court (*rechtbank*) of The Hague, sitting in Zutphen, rejected an appeal by the applicant against the decision of 28 April 2004. A further appeal by the applicant to the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State was declared inadmissible on 6 January 2006 for failure to comply with a procedural requirement. No further appeal lay against this ruling.

11. On 21 January 2008, apparently at the applicant's request, the Consulate-General of the Islamic Republic of Afghanistan in The Hague issued a written declaration stating that the applicant "is an Afghan national and has not committed any crime against human rights during his duty in the former Government national Security [*sic*] of Afghanistan".

12. On 10 April 2008 the applicant submitted a fresh asylum request, relying on the written declaration of 21 January 2008. Pursuant to section 4:6 of the General Administrative Law Act (*Algemene wet bestuursrecht*), a repeat request such as the one submitted by the applicant must be based on newly emerged facts and/or altered circumstances ("*nova*") warranting a reconsideration of the initial refusal. On 11 April 2008 the applicant was interviewed by the immigration authorities concerning the new facts and circumstances (*gehoor inzake nieuwe feiten en omstandigheden*) on which his fresh asylum application was based.

13. On 16 April 2008 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) decided to reject the new request for not being based on *nova* within the meaning of section 4:6 of the General Administrative Law Act. On the same day the applicant filed an appeal with the Regional Court of The Hague accompanied by a request for a provisional measure, namely stay of removal pending the appeal proceedings, as the appeal did not have suspensive effect. On 14 May 2008 the applicant also submitted to the Regional Court a copy of the "Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992" issued by the United Nations High Commissioner for Refugees (UNHCR) on 13 May 2008.

14. On 20 May 2008 the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague, sitting in Arnhem, found that the content of the UNHCR Note of 13 May 2008 raised doubts about the correctness and/or comprehensiveness of the official report of 29 February 2000 (see paragraph 8 above) and that this constituted a *novum* within the meaning of section 4:6. The judge therefore accepted the applicant's appeal, quashed the decision of 16 April 2008 and ordered the Deputy Minister to issue a fresh decision.

15. On 27 May 2008 the Deputy Minister filed a further appeal with the Administrative Jurisdiction Division. On 12 November 2008 the Administrative Jurisdiction Division rejected the further appeal and confirmed the impugned ruling of 20 May 2008. No further appeal lay against this ruling.

16. On 1 April 2009 a fresh interview was held with the applicant concerning the new facts and circumstances (*gehoor inzake nieuwe feiten en omstandigheden*) on which his repeat asylum application was based.

17. On 1 October 2009 the Deputy Minister notified the applicant of her intention to deny the applicant's second asylum application pursuant to Article 1F of the 1951 Refugee Convention. She had established that, in a ruling handed down on 24 September 2009, the Administrative Jurisdiction Division had found that the UNHCR Note of 13 May 2008 did not offer concrete pointers (*concrete aanknopingspunten*) for doubting the official report of 29 February 2000. As the applicant had not submitted any new facts or circumstances in respect of the alleged risk in Afghanistan of being subjected to treatment contrary to Article 3 of the Convention, the Deputy Minister found no reason to review her finding that this provision did not preclude the applicant's removal to Afghanistan. Lastly, having noted the medical advice drawn up in respect of the applicant by the Medical Assessment Section (*Bureau Medische Advisering*; "BMA") of the Ministry of Justice, the Deputy Minister likewise did not find that, for reasons related to the applicant's health, Article 3 precluded his removal to Afghanistan.

18. On 22 October 2009, assisted by a lawyer, the applicant submitted written comments on the notice of intent. On 25 November 2009 the Deputy Minister rejected the applicant's second asylum application, confirming the

reasoning set out in her notice of intent of 1 October 2009 and rebutting the applicant's written comments.

19. The applicant's appeal was rejected on 26 October 2010 by the Regional Court of The Hague sitting in 's-Hertogenbosch. A further appeal to the Administrative Jurisdiction Division was dismissed on 24 January 2011.

20. On an unspecified date in 2010, the applicant's wife and their four children were granted an asylum-based residence permit under the terms of section 29 § 1 (b) of the Aliens Act 2000 (*Vreemdelingenwet 2000*).

21. On 14 July 2011 the applicant lodged the present application with the Court and on 25 July 2011 requested that, under Rule 39 of the Rules of Court, the Court indicate to the Government that he should not be expelled pending the proceedings before it. On 26 July 2011 the President of the Section to which the case had been allocated decided to apply Rule 39 and complied with his request.

22. In the meantime, on 25 November 2009, the Deputy Minister had notified the applicant of her intention to impose an exclusion order (*ongewenstverklaring*) on him in accordance with section 67 § 1 (e) of the Aliens Act 2000, following the decision to apply Article 1F of the Refugee Convention against him in the asylum proceedings. The applicant's lawyer submitted written comments on this intention on 21 December 2009.

23. The decision to actually impose this exclusion order on the applicant was taken on 11 February 2014 by the Deputy Minister of Security and Justice (*Minister van Veiligheid en Justitie*). The Deputy Minister did not find it established that the applicant would be at risk of being subjected to treatment contrary to Article 3 of the Convention in Afghanistan either on the basis of his individual circumstances or on the basis of the general situation in Afghanistan. As regards Article 8 of the Convention, having taken into account the "guiding principles" formulated in the judgments of the European Court of Human Rights in the case of *Boultif v. Switzerland* (no. 54273/00, ECHR 2001 IX) and, in an extensive reasoning, *Üner v. the Netherlands* ([GC], no. 46410/99, ECHR 2006 XII) – and having noted that since 2011 the applicant was apparently no longer registered as living in the Netherlands – the Deputy Minister concluded that the applicant's personal interests in remaining in the Netherlands with his spouse and children were outweighed by public interest considerations, given the nature and seriousness of the crimes with which the applicant was associated and on the basis of which Article 1F had been applied and of which his spouse was deemed to have been aware – given the reputation of the KhAD/WAD – when she married him in 1989. On 10 March 2014 the applicant filed an objection (*bezwaarschrift*) against this decision with the Deputy Minister.

24. On 2 May 2014 the Deputy Minister notified the applicant of his intention to accept the objection as it had become known during the

objection proceedings that the applicant was still in the Netherlands, and to impose a ten-year entry ban (*inreisverbod*). The applicant's lawyer submitted written comments on this notice of intent on 15 May 2014.

25. On 4 June 2014 the Deputy Minister imposed a ten-year entry ban on the applicant. Although the latter had relied on Articles 3 and 8 of the Convention, the Deputy Minister referred to the reasons given in the decision of 11 February 2011 and in the preceding notice of intent. On 5 June 2014 the applicant filed an appeal with the Regional Court of The Hague.

26. A judgment of 24 February 2015 handed down by the Regional Court of The Hague sitting in 's-Hertogenbosch rejected the applicant's appeal. As regards the applicant's reliance on Article 8, the Regional Court held:

> "It appears from the notice of intent and the impugned decision that the [Deputy Minister] has considered all the interests raised by the [applicant] in assessing whether there is a violation of Article 8 of the Convention. In that connection the [Deputy Minister] has taken into account not only the interests of the [applicant's] children and his spouse, but also the long duration of the [applicant's] stay in the Netherlands. It is not apparent that the [applicant] plays a special role in the care and education of his (adult) children or that his spouse is dependent on him. The [applicant's] claim that the [Deputy Minister] has insufficient expertise to assess whether his wife can fulfil the role of parent in a complete and good manner on her own ignores the above considerations. In addition, the [applicant] has not proved by way of expert reports or in any other manner that his spouse would be unable to do this, even with the potential support of professional and social services. Nor has it been sufficiently contested that there are no objective obstacles to the exercise of family life in a country other than Afghanistan. All in all, the court finds the sum total of facts and circumstances which are of significance for the balance to be struck does not provide a basis for concluding that – in striking such a fair balance between the [applicant's] interest on the one hand and the public interest of the Netherlands on the other – the [Deputy Minister] has unjustly found the interference in the exercise of the right to respect for family and private life to be justified."

Although the applicant relied on Article 3 of the Convention, the Regional Court reiterated that the judicial finding that he would not be exposed to a real risk of being subjected to treatment proscribed by this provision was final and the applicant had not shed any new light on this in the proceedings at hand.

27. A further appeal by the applicant was rejected on summary reasoning on 6 August 2015 by the Administrative Jurisdiction Division. No further appeal lay against this ruling.

2. Application no. 63104/11

28. On 21 September 1999 the applicant, together with his wife and their three children (born in 1990, 1993 and 1995), entered the Netherlands. The applicant applied for asylum, claiming to fear persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees

("the 1951 Refugee Convention"). During his interviews with the immigration authorities the applicant stated that he hailed from Kabul, that he was of Tajik origin, that he had studied medicine from 1981 to 1985, that during his studies he had been an active member of the communist People's Democratic Party of Afghanistan ("the PDPA"), that after his studies he had been appointed as an officer in the KhAD/WAD and that he had worked for this agency from 1985 until 1992, when the mujahideen had taken over control in Afghanistan. He had worked for the political affairs management team of the KhAD/WAD and, in that capacity, had written two political books which had been published. His final rank had been that of lieutenant-colonel. After a while the mujahideen had invited those who had worked for the police, the army and the KhAD/WAD to continue their work for the new government. He had then returned to work once or twice per week to sign an attendance register demonstrating that he had not fled. During the rule of the mujahideen he had worked as a pharmacist, until the Taliban seized power in 1997. He had then stayed at home in Kabul for about eight months and had later gone to the northern provinces of Kunduz and Takhar, where he had sold medicines. He had returned once a month to Kabul to see his family. During that period, the Taliban had searched his home in Kabul on four occasions, also asking his wife about his whereabouts. On their third visit in March 1998, the Taliban had taken the applicant's brother with them. When they returned for a fourth visit in June or July 1999, the Taliban had told the applicant's wife that they had killed the applicant's brother. They further threatened that they would marry her off under Sharia law if the applicant did not reappear within three months. The applicant had then decided to flee Afghanistan.

The asylum application filed by the applicant's spouse was based mainly on the applicant's asylum statement. In addition, she stated that she had encountered problems in Afghanistan, herself being of Pashtun origin, and having married a Tajik. This had always been a problem for her family. Until 1992 she had taught Dari and Pashtun to very young children. She had resigned because more and more women had fallen victim to physical aggression. She also related that the Taliban had come to her house, searching for the applicant − who was in hiding – and that on their third visit they had beaten and taken away the applicant's brother. During their fourth visit in July 1999 they had told her that the applicant's brother had been killed.

29. On 12 June 2000 a fourth child was born to the applicant and his wife.

30. On 7 May 2002 the Deputy Minister of Justice issued notice of her intention to reject the first applicant's asylum request pursuant to Article 1F of the 1951 Refugee Convention. The Deputy Minister found it established − as confirmed by the asylum statement given by the applicant's spouse − that the applicant had worked as an officer for the KhAD/WAD. In the light

of the contents of the official report dated 29 February 2000 (see paragraph 8 above), the Deputy Minister considered that it should be examined whether Article 1F of the 1951 Convention was applicable to the applicant's asylum claim. In her notice of intent, the Deputy Minister analysed, on the basis of elaborate argumentation citing various international materials and the prescribed and so-called "knowing and personal participation" test, the nature of the acts imputed to the applicant within the framework of Article 1F of the 1951 Refugee Convention, as well as his individual responsibility under that Convention. She concluded that Article 1F was applicable to the applicant's case and, consequently, rejected his asylum application.

31. On 4 June 2002 a lawyer submitted written comments to the Deputy Minister on behalf of the applicant.

32. On 12 June 2002 the Deputy Minister rejected the applicant's asylum application, confirming the reasoning set out in her notice of intent of 7 May 2002 and rebutting the applicant's written comments. She also rejected the applicant's reliance on Article 3 of the Convention. The applicant filed an appeal with the Regional Court of The Hague.

33. In its judgment of 25 March 2004 the Regional Court of The Hague, sitting in Roermond, rejected the applicant's appeal.

34. A further appeal lodged by the applicant was accepted by the Administrative Jurisdiction Division on 23 November 2004. It quashed the impugned judgment, accepted the applicant's appeal against the decision of 12 June 2002 and quashed this decision. It accepted the decision in so far as Article 1F had been applied to the applicant's asylum claim but found that the Deputy Minister should also have examined whether Article 3 of the Convention constituted a sustained obstacle to the applicant's removal to Afghanistan. Consequently, the Deputy Minister's examination had been incomplete and the decision thus lacked sufficient reasoning.

35. On 20 July 2005 the immigration authorities conducted a supplementary interview (*aanvullend gehoor*) with the applicant in connection with Article 3 of the Convention. During this interview he stated, among other things, that he feared problems from the mujahideen and the Taliban for having been a member of the PDPA, for his work during the former communist regime, for two political books he had written and which had been published in 1990, and for a poetry book he had written and which had been published in the Netherlands in 2005.

36. On 24 February 2006 the Minister for Immigration and Integration notified the applicant of her fresh intention to deny him asylum pursuant to Article 1F of the 1951 Refugee Convention. The Minister noted that the applicant had not submitted any concrete facts or cited circumstances affecting the conclusion affirming the applicability of Article 1F. Consequently, reiterating the considerations set out in the decision of 12 June 2002 and in the rulings of 25 March 2004 and 23 November 2004,

the Minister decided to apply Article 1F against the applicant. As regards Article 3 of the Convention, having found no indication that the applicant had attracted the negative attention of the mujahideen in the period 1992-1996 and given that the Taliban were no longer in a position of power in Afghanistan and that the applicant's fears were based on conjecture, the Minister concluded that it had not been established that the applicant would, in the event of his removal to Afghanistan, be exposed to a real and foreseeable risk of being subjected to treatment prohibited under Article 3.

37. Also on 24 February 2006 the Minister for Immigration and Integration notified the applicant of her intention to impose an exclusion order on him under the provisions of section 67 § 1 (e) of the Aliens Act 2000 based on the application of Article 1F in the applicant's case.

38. The applicant's lawyer submitted written comments on the two notices of intent on 21 March, 13 April and 18 July 2006.

39. In her decision of 23 November 2006 the Minister denied the applicant asylum pursuant to Article 1F and imposed an exclusion order on him. She maintained her conclusion that the applicant had not demonstrated that, if removed to Afghanistan, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. As regards the applicant's arguments under Article 8 of the Convention, the Minister accepted that a family life existed between the applicant and his wife and their children, but found that the Netherlands were not under a positive obligation under this provision to grant the applicant a residence permit. The Minister found that public interest considerations outweighed the applicant's personal interests and that no objective obstacle to the exercise of a family life for the applicant with his wife and children outside of the Netherlands was apparent.

40. The applicant filed an appeal with the Regional Court of The Hague against the decision to deny him asylum and an objection with the Minister against her decision to impose an exclusion order.

41. On 25 April 2008 the Consulate-General of the Islamic Republic of Afghanistan in The Hague issued a written declaration stating that the applicant "has no record of any crimes in Afghanistan". The applicant's lawyer sent this declaration on 13 May 2008 to the Deputy Minister of Justice in support of his objection against the exclusion order.

42. On 2 July 2008 the applicant was questioned regarding his objection before an official board of enquiry (*ambtelijke commissie*).

43. On 25 July 2008 the Deputy Minister of Justice rejected the applicant's objection concerning the decision to impose an exclusion order on him. As regards the applicant's claim under Article 3 of the Convention, the Deputy Minister maintained that the applicant had not established that in Afghanistan he would be exposed to a real and foreseeable risk of being subjected to treatment proscribed by this provision. The Deputy Minister also rejected the applicant's arguments under Article 8 of the Convention.

44. On 29 April 2009 the Regional Court of The Hague, sitting in Breda, declared inadmissible the applicant's appeal against the decision to deny him asylum pursuant to Article 1F. It found that the applicant had no legal interest in a determination of his appeal given the exclusion order that had been imposed on him, this order having been based on the decision to apply Article 1F as upheld by the Administrative Jurisdiction Division. Although possible, the applicant chose not to file a further appeal against this ruling to the Administrative Jurisdiction Division.

45. On the same day, the court accepted the applicant's appeal against the decision of 25 July 2008 to impose an exclusion order, finding that the Deputy Minister could not base the impugned decision on the official report of 29 February 2000 (see paragraph 8 above) without further investigation. The Deputy Minister filed a further appeal with the Administrative Jurisdiction Division.

On 7 December 2009 the Administrative Jurisdiction Division accepted the Deputy Minister's further appeal, and quashed the ruling of 29 April 2009. Referring to a ruling it had handed down in another case on 24 September 2009 (no. 200901907/1/V1; ECLI:NL:RVS:2009:BJ8654), the Administrative Jurisdiction Division agreed with the Deputy Minister that the documents referred to in the impugned ruling could not be regarded as providing any concrete elements that cast doubts on the correctness and completeness of the information contained in the official report of 29 February 2000. It remitted the case to the Regional Court of The Hague for a fresh decision.

46. On 22 July 2010 the Regional Court of The Hague, sitting in 's-Hertogenbosch, rejected the appeal lodged by the applicant against the decision of 25 July 2008. It held that, although it had accepted the applicant's appeal in its decision of 23 November 2004, the Administrative Jurisdiction Division had in that ruling also accepted the decision to apply Article 1F in respect of the applicant's asylum application, which had thus become final. This meant that this finding was legally binding unless there were newly emerged facts and circumstances. It concluded that the arguments submitted by the applicant could not be regarded as such. It also rejected the applicant's argument under Article 3 of the Convention, finding that the applicant had not established that his removal to Afghanistan would expose him to the risk of being subjected to treatment proscribed by this provision. As regards the applicant's reliance on Article 8 of the Convention, it noted that neither the applicant nor any member of his family had a residence permit and found no obstacles to the exercise of their family life outside the Netherlands.

47. On 16 August 2010 the applicant filed a further appeal against the ruling of 22 July 2010 with the Administrative Jurisdiction Division.

48. On 25 July 2011 the applicant was informed by the Aliens Police Department (*vreemdelingenpolitie*) that his presentation to the Afghan

mission for the purpose of obtaining a travel document had been scheduled for 16 September 2011 and that he would be placed in immigration detention (*vreemdelingenbewaring*) if he did not cooperate, or cooperated insufficiently, with his removal from the Netherlands.

49. On 5 September 2011 the applicant asked the Administrative Jurisdiction Division to issue a provisional measure allowing him to remain in the Netherlands pending the outcome of his further appeal of 16 August 2010. On 30 September 2011 the President of the Administrative Jurisdiction Division rejected this request.

50. On 11 October 2011 the applicant lodged the present application with the Court accompanied by a request under Rule 39 of the Rules of Court that the Court indicate to the Government that he should not be expelled pending the proceedings before the Court. On 17 October 2011 the Acting President of the Section to which the case had been allocated decided to apply Rule 39 and complied with his request.

51. On 31 January 2012 the Administrative Jurisdiction Division rejected the applicant's further appeal of 16 August 2010 and confirmed the impugned ruling of 22 July 2010. No further appeal lay against this ruling.

52. On 22 October 2015 the applicant's spouse and children were granted a Netherlands residence permit. Although possible, the applicant chose not to request the lifting of the exclusion order on the basis of this development.

B. Relevant domestic law and practice

53. A general overview of the relevant domestic law and practice in respect of asylum proceedings, exclusion orders and enforcement of removals has been set out in *K. v. the Netherlands* (cited above, §§ 16-32).

54. The implementation with effect from 1 January 2012 of EU Directive 2008/115/EC of 16 December 2008 (on common standards and procedures in Member States for returning illegally staying third-country nationals) entailed the replacement of exclusion orders (*ongewenstverklaring*) for non-EU nationals – valid only on the territory of the Netherlands – by entry bans (*inreisverbod*) which are valid throughout the entire Schengen area.

55. This had no consequences for persons on whom an exclusion order had already been imposed and in relation to which decisions had already obtained the force of *res judicata*. Exclusion orders which were not yet final were revoked and replaced by entry bans with the possibility of challenging this in administrative appeal proceedings.

56. In the light of the strict separation under the provisions of the Aliens Act 2000 between an asylum application and a regular application for a residence permit for a purpose other than asylum, arguments relying on Article 8 of the Convention cannot be entertained in asylum proceedings

unless the latter relate to an application for an asylum-derived residence permit (*verblijfsvergunning met een afgeleide asielstatus*) for the purpose of refugee-family reunification (*nareisvergunning* – see *Gereghiher Geremedhin v. the Netherlands* (dec.), no. 45558/09, §§ 30-31, 23 August 2016). They should instead be raised in proceedings concerning a regular application for a residence permit (see *Mohammed Hassan v. the Netherlands and Italy* and 9 other applications (dec.), no. 40524/10, § 13, 27 August 2013; *J. v. the Netherlands* (dec.), no. 33342/11, § 9, 18 October 2011; and *Joesoebov v. the Netherlands* (dec.), no 44719/06, § 27, 2 November 2010) or proceedings concerning the imposition of an exclusion order (see *Üner v. the Netherlands* (cited above), and *Arvelo Aponte v. the Netherlands*, no. 28770/05, 3 November 2011) or proceedings concerning an entry ban (see, on the entry ban, *A.K.C. v. the Netherlands* (dec.), no. 36953/09, §§ 14-15, 30 August 2016).

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

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

> "3.5.9 (Former) communists
>
> Under 'potential risk profiles' in the UNHCR Eligibility Guidelines [for assessing the international protection needs of asylum-seekers from Afghanistan, 19 April 2016] no information is given about persons who identify with the communist ideology (or who are suspected thereof). In the section entitled 'Exclusion from International Refugee Protection' the UNHCR gives information about former members of the KhAD and WAD.
>
> Many former members of the People's Democratic Party of Afghanistan (PDPA) and former employees of the erstwhile intelligence services KhAD and WAD are currently working for the Afghan Government. They have, for example, been appointed as governors of provinces, occupy high positions in the army [or] the police, or are mayors. Some former PDPA members have founded new parties.
>
> As far as is known, ex-communists and their relatives have nothing to fear from the ... Government.
>
> It therefore cannot be said that the group of (former) communists as a whole has reason to fear being in Afghanistan. It depends on each individual person whether he or she has reason to fear being in Afghanistan, and this also applies to former employees of the KhAD/WAD."

C. Relevant international material

59. 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."

60. On 4 September 2003 the United Nations High Commissioner for Refugees (UNHCR) issued its "Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees". They superseded "The Exclusion Clauses: Guidelines on their Application" (UNHCR, 1 December 1996) and "Note on the Exclusion Clauses" (UNHCR, 30 May 1997) and are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. These guidelines state, *inter alia*, that in cases where the main asylum applicant is denied refugee status, his or her dependants need to establish their own grounds for obtaining such status. If the latter are recognised as refugees, the excluded individual is not able to rely on the right to family unity in order to secure protection or assistance for him- or herself as a refugee (paragraph 29).

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

62. The most recent update of the "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan" was released on 19 April 2016 ("the April 2016 UNHCR Guidelines") and replaced the August 2013 "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan". As in the 2013 Guidelines, the 2016 Guidelines do not include persons who worked for the KhAD/WAD or the police during the former communist regime in the fifteen cited potential risk profiles. However, they again state that, as regards Article 1F of the 1951 Refugee Convention, careful consideration needs to be given, in particular, to former members of the armed forces and the intelligence/security apparatus – including the KhAD/WAD agents during the former communist regimes under Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah – as well as former officials of those communist regimes.

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

"The total number of incidents relating to NGOs, UN and International Organizations from 1 January to 31 May 2016 stands at 91, which is slightly less than 2015. To date in 2016, national and international NGOs are the most directly affected with 56 incidents. Six aid workers have been killed, 12 injured and 81 abducted.

The number of security incidents across the country is consistent with 2015 numbers, but there has been a significant increase in armed clashes as a percentage of overall security incidents. This has manifested itself by way of increased large scale ground engagements which have led to a reduction in access to many areas and for longer periods of time."

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

"12. The security situation in Afghanistan deteriorated, with Taliban operations at an unprecedented high rate since the beginning of 2016. Armed clashes increased by 14 per cent in the first four months of the year compared with the same period in 2015 and were higher for each month compared with previous years. In April 2016, the highest number of armed clashes was reported since June 2014, a period that coincided with the presidential elections.

13. Notwithstanding the increase in armed clashes, overall security incidents decreased. Between 16 February and 19 May, the United Nations recorded 6,122 security incidents, representing a decrease of 3 per cent compared with the same period in 2015, attributed primarily to a reduction in incidents involving improvised explosive devices. The southern, south-eastern and eastern regions continued to account for the majority of incidents (68.5 per cent). Consistent with previous trends, armed clashes accounted for the majority of security incidents (64 per cent), followed by improvised explosive devices (17.4 per cent). Targeted killings decreased: from 16 February to 19 May, 163 assassinations, including failed attempts, were recorded, representing a decrease of 37 per cent compared with the same period in 2015. A total of 15 suicide attacks were reported, compared with 29 in the same period in 2015, as well as several high-profile incidents. The latter included a complex attack against the consulate of India in Jalalabad on 2 March, an attack against the residence of the acting Director of the National Directorate of Security in the city of Kabul on 21 March and the targeted killing of two high-ranking army commanders on 24 and 27 March in Kandahar and Logar provinces, respectively. The Taliban claimed responsibility for those two attacks.

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

parts of Uruzgan Province along the Kandahar-Tirin Kot highway and retook control of strategic areas of Baghlan Province, where security forces had conducted a clearance operation in January.

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

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

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

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

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

"**Security situation**

In a report submitted to Congress, the U.S. Department of Defense notes a deterioration of security in view of the reduced international military presence and the weakness of the Afghan forces. While the Afghan government retained control of most city centres, the Taliban continued to expand their influence, especially in rural

areas, the report says, demonstrating their resilience by attacks in Nangarhar, Herat, Kunduz and other northern provinces as well as in Helmand.

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

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

Attacks

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

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

Intra-Taliban fighting

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

Bus passengers kidnapped

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

66. In November 2016 the European Asylum Support Office ("the EASO") released the country of origin information report "Afghanistan Security Situation". This report, presenting information up to 31 August 2016, is an update of a previous report released by EASO in January 2015 and an update released in January 2016. It provides a general description of the security situation in Afghanistan, as well as a description of the security situation for each of the thirty-four provinces and Kabul. The report states:

"The general security situation in Afghanistan is mainly determined by the following four factors: The main factor is the conflict between the Afghan National Security Forces (ANSF), supported by the International Military Forces (IMF), and Anti-Government Elements (AGEs), or insurgents. This conflict is often described as an "insurgency". The other factors are: criminality, warlordism and tribal tensions. These factors are often inter-linked and hard to distinguish. Several sources consider the situation in Afghanistan to be a non-international armed conflict.

The UN [Security Council] stated in June 2016 that:

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

COMPLAINTS

67. The applicants complained that, if removed to Afghanistan, they would risk being subjected to treatment proscribed by Article 3 by various opposition groups, war lords and the Taliban on account of their activities during the former communist regime.

68. The applicants also complained under Article 6 of the Convention in relation to the so-called "knowing and personal participation" test carried out in the proceedings on their asylum application.

69. The applicants further complained that the refusal by the Dutch authorities to grant them a residence permit violates their right under Article 8 of the Convention to respect for their family life with their respective spouses and children.

70. The applicants lastly complained under Article 13 of the Convention that they did not have an effective remedy for their complaints under Article 3 of the Convention.

THE LAW

A. Joinder of the cases

71. The Court considers that the applications should be joined, given their related factual and legal background (Rule 42 § 1 of the Rules of Court).

B. Article 3

72. The two applicants complained under Article 3 of the Convention that, if expelled to Afghanistan, they would be exposed to a real risk of being subjected to treatment prohibited by Article 3 of the Convention on account of work they had carried out during the communist regime in Afghanistan. Article 3 provides as follows:

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

73. The Court reiterates the relevant principles in the Court's case-law under Article 3 of the Convention (see, most recently, *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 106-07, ECHR 2016, with further references) and 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)).

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

75. As regards the individual features of the risk of ill-treatment claimed by the applicants, the Court notes that when the communist regime in Afghanistan was overthrown by mujahideen forces in 1992 the applicants did not flee Afghanistan. During the reign of the mujahideen in Afghanistan between 1992 and 1997, the applicant in case no. 43538/11 – who had been a captain in the KhAD/WAD – ran a store in Kabul and the applicant in case no. 63104/11 – who had been a lieutenant-colonel in the KhAD/WAD – worked as a pharmacist in Kabul. The Court has found no indications in the case file that they encountered any problems from the mujahideen during that period.

76. After the Taliban seized power in Afghanistan in 1997, the applicant in case no. 43538/11 decided to flee after being arrested by the Taliban in June 2000 and was released the next day. The applicant in case no. 63104/11 decided to flee Afghanistan in July 1999 after the Taliban searched his home on four occasions, enquiring about his whereabouts, and subsequently told his wife that they had killed his brother.

77. It thus appears that the applicants did not attempt to flee Afghanistan in 1992 when or directly after the communist regime was defeated by

mujahideen forces, but instead stayed on in the country. They only fled Afghanistan several years after the Taliban had seized power in 1997.

78. The Court has found no indication that, since their departure from Afghanistan, the applicants have attracted negative attention from any governmental or non-governmental body or any private individual in Afghanistan on account of their involvement with the former communist regime. The Court further notes that UNHCR does not include persons involved in the former communist regime in its potential risk profiles in respect of Afghanistan.

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

80. Regarding the question of whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention, in its judgment in the case of *H. and B. v. the United Kingdom* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013), the Court did not find that in Afghanistan there was a general situation of violence such that a real risk of ill-treatment would arise simply by virtue of an individual's being returned there. It confirmed this finding in its more recent judgments of 12 January 2016 in the cases of *A.W.Q. and D.H. v. the Netherlands* (no. 25077/06, § 71); *S.S. v. the Netherlands* (no. 39575/06, § 66); *S.D.M. and Others v. the Netherlands* (no. 8161/07, § 79); *M.R.A. and Others v. the Netherlands* (no. 46856/07, § 112); and *A.G.R. v. he Netherlands* (no. 13442/08, § 59). In view of the evidence now before it, the Court has found no reason to hold otherwise in the two cases at hand.

81. The Court therefore finds that the applicants have failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that they would be exposed to a real and personal risk of being subjected to treatment contrary to Article 3 of the Convention if removed to Afghanistan.

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

C. Article 6

83. The applicants also raised a complaint under Article 6 of the Convention in connection with the proceedings concerning their asylum application. In its relevant part, Article 6 provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

84. The Court reiterates its well-established, constant case-law that proceedings and decisions concerning the entry, stay and removal of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him or her within the meaning of Article 6 § 1 of the Convention (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X; *Szabó v. Sweden* (dec.), no. 8578/03, ECHR 2006-VIII; *Tatar v. Switzerland*, no. 65692/12, § 61, 14 April 2015; and *A.A. v. Austria* (dec.), no. 44944/15, § 19, 17 May 2016).

85. Accordingly, the complaint under Article 6 must be rejected under Article 35 § 3 (a) and § 4 of the Convention for being incompatible *ratione materiae* with the provisions of the Convention.

D. Article 8

86. The applicants further complained that the Netherlands authorities, in denying them residence on the basis of Article 1F of the 1951 Refugee Convention, had violated their right to respect for their private and family life as guaranteed by Article 8 of the Convention, as their spouses and children had been admitted to and were living in the Netherlands and could not be expected to return to Afghanistan.

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

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

88. The Court accepts that the applicants' relationships with their respective spouses and children constitute "family life" for the purposes of Article 8 and that the decisions to apply Article 1F of the 1951 Refugee Convention and to impose an exclusion order or entry ban on them affected that family life.

89. As regards the applicants' family life with their adult children, the Court reiterates that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, among many other authorities, *A.A.Q.*, cited above § 64 with further references). On the basis of the content of the two case files, the Court cannot find that, apart from the normal emotional ties, there are further elements of dependency between the two applicants and their respective adult children bringing their relationships into the protective sphere of Article 8 of the Convention.

90. As to the applicants' family life with their respective spouses and children who are still minors, the Court emphasises once more that the Convention and its Protocols cannot be interpreted in a vacuum but must be

interpreted in harmony with the general principles of international law of which they form part (see paragraph 73 above).

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

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

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

94. Under the Court's well-established case-law, a measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as being "necessary in a democratic society" if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national authorities enjoy a certain margin of appreciation in this matter (see *Keegan v. the United Kingdom*, no. 28867/03, § 31, ECHR 2006‑X). The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see *Boultif v. Switzerland*, no. 54273/00, §§ 46-47, ECHR 2001-IX, and *Slivenko v. Latvia* [GC], no. 48321/99, § 113).

95. The Court has held that, taking into account the seriousness of the crimes and acts referred to in Article 1F, the public interest served by the application of this exclusion clause weighs very heavily in the balance when

assessing the fairness of the balance struck under Article 8 of the Convention, also bearing in mind that, according to the UNHCR guidelines on the application of the exclusion clauses of the 1951 Refugee Convention, the excluded individual is not able to rely on the right to family unity in order to secure protection (see *A.A.Q.*, cited above, §§ 46 and 71).

96. The Court notes that, unlike their respective spouses and children, the applicants have never been granted residence permits in the Netherlands and that, given the decision to apply Article 1F in respect of their asylum applications, the applicants' residence status was such that the continuance of their family life in the Netherlands has always been precarious. The Court further notes that the applicants have lived for 16 and 18 years respectively in the Netherlands and that their departure from the Netherlands would entail a separation from their respective spouses and minor children. On this point, the Court considers it of relevance that the applicants' spouses must be regarded as having been aware of their husbands' work for the KhAD/WAD – the cruel nature of which was widely known in Afghanistan – and that the applicants' minor children are both sixteen years old; it has not been demonstrated that the applicants' respective spouses are dependent on them or that the applicants play a significant or indispensable role in the care and education of their respective minor children, who were both born in 2000. The Court has also noted that the spouse and children of the applicant in case no. 43538/11 have been granted asylum-based residence permits. The spouse and children of the applicant in case no. 63104/11 have also been granted residence permits but it is not known whether these were asylum-based residence permits or ones granted for another purpose. In any event, even assuming that there is an objective obstacle to the respective spouses' and children's return to Afghanistan with the applicants, the Court considers that it has not been established that it would be impossible for them to settle in a third country and exercise their family life there.

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

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

E. Article 13

99. The applicants lastly complained, under Article 13 of the Convention, that they did not have an effective remedy in respect of their complaints under Article 3 and/or Article 8 of the Convention.

100. Article 13 provides as follows:

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

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

102. Even assuming that the applicants had an arguable claim for the purposes of Article 13, they had the opportunity to challenge the decisions taken in their cases in appeal proceedings, which the Court has accepted as being effective for the purposes of Article 13 (see *A.A.Q.*, cited above, §§ 76-78). It has found no reason in the applicants' submissions that would warrant a different finding.

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

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

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

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

Stephen Phillips
Section Registrar

Luis López Guerra
President