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

THIRD SECTION

DECISION

Application no. 41509/12
Mirwais SOLEIMANKHEEL and others
against the Netherlands

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

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

Having regard to the above application lodged on 4 July 2012,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix. All were represented before the Court by Mr P. van Schijndel, a lawyer practising in The Hague.

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

A. The circumstances of the case

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

4. The applicants are a married couple and their four children. The latter were born in 1995, 1998, 2004 and 2009. At the time the application was lodged, they all held Afghan nationality and were living in the Netherlands.

5. On 8 April 1998 the parents and their oldest child entered the Netherlands, where they applied for asylum and where, on the same day, the

parents' second child was born. The husband/father ("the first applicant") claimed to fear persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Refugee Convention") in Afghanistan. He stated that he was of Pashtun origin and that in 1987 – after six months' training in Minsk, and as a military professional – he had joined the Riasat-e Makhsous, a special unit of the Ministry of Interior Affairs Directorate for combating crime. He had held the rank of first lieutenant at that time. The tasks assigned to him entailed – as an agent of that unit – carrying out espionage activities and infiltrating mujahideen groups. He had to pretend to be a mujahid, and to collect intelligence such as the names of the commanders, lines of command, positions, arrivals of munition, plans for rocket attacks etc. He had gained cognisance of the mujahideen's military plans and passed on the information he collected. He had reported individuals – including three mujahideen commanders – knowing that they would be arrested and tried for treason, which carried a maximum penalty of capital punishment. When he reported the names he had not known what would happen to these individuals, but as a general rule such suspects would end up in the hands of the KhAD/WAD[1] and there was thus a chance that they would be tortured. Between 1989 and 1993 the applicant had studied law in Kyiv (Ukraine) and after graduating had returned to Afghanistan, where he started to work as a farmer. In December 1997 the then ruling Taliban had started to carry out purges in southern areas of Afghanistan. He had been absent when, at the end of January 1998, they reached his home area. A fellow resident had told him upon his return that the Taliban had been looking for him because he had worked for the communist regime and had studied in the Soviet Union and that he should report to them. On 10 March 1998 he and his family had therefore fled from Afghanistan to Pakistan, from where they had travelled to the Netherlands. The asylum statement given by his wife ("the second applicant") was based largely on the asylum statement of the first applicant.

6. On 8 February 2002 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) notified the first applicant of her intention to deny him asylum pursuant to Article 1F of the 1951 Refugee Convention, having examined his detailed statements about his work as an officer in the Riasat-e Makhsous. The Deputy Minister also took into account the content of an official report (*ambtsbericht*) released on 12 April 2000 (DPC/AM 661597), according to which the Riasat-e Makhsous had been responsible for the commission of serious crimes at the time when the first applicant was working for this unit. Although formally it did not constitute a part of the

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.

KhAD/WAD, it nevertheless collaborated closely with this agency and, in its manner of operating, could be equated with it. As regards the mode of operation of the KhAD/WAD, the Deputy Minister referred to a general official report, issued on 29 February 2000 (DPC/AM 663896) 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*"). Taking these factors into account, the Deputy Minister concluded that Article 1F should be applied in the first applicant's case. On 1 April 2002 the applicant's lawyer submitted written comments (*zienswijze*) on the Deputy Minister's intended decision.

7. In his decision of 11 February 2003 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) denied the first applicant asylum under Article 1F. In the relevant parts, the Minister did not deviate from the conclusions stated in the notice of intent of 8 February 2002 and indeed maintained them. The first applicant's comments were dismissed as not warranting a different finding. In so far as the first applicant had relied on Article 3 of the Convention, the Minister found that it had not been demonstrated that the first applicant would be exposed to a real and personal risk of being subjected to treatment proscribed by that Article if expelled to Afghanistan. The asylum applications of the second applicant and the children, which were mainly based on the first applicant's asylum statement, were also rejected by the Minister on 11 February 2003.

8. Appeals subsequently lodged by the applicants were rejected on 25 March 2004 by the Regional Court (*rechtbank*) of The Hague. Their further appeals were rejected on 8 September 2004 by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*). No further appeal lay against the ruling of 8 September 2004.

9. On 24 May 2006 the first applicant submitted a fresh asylum application. Pursuant to section 4:6 of the General Administrative Law Act (*Algemene wet bestuursrecht*), a repeat request such as the one submitted by the first applicant must be based on newly emerged facts and/or altered circumstances ("*nova*") warranting a reconsideration of the initial refusal. The first applicant based his repeat request on a number of documents, including a letter of 5 February 2004 from the Secretariat for Security of the Afghan Ministry of Interior Affairs. According to this letter, which was written by General X – who is also the brother of the first applicant's father-in-law – the three mujahideen had not been arrested through the efforts of the first applicant but on the KhAD/WAD's own initiative, and the men were still alive.

10. On 31 May 2006 the Minister decided to reject the new request as not being based on *nova* within the meaning of section 4:6 of the General

Administrative Law Act. As regards the letter of 5 February 2004, the Minister considered that, apart from the fact that its authenticity could not be established, its content did not warrant a reconsideration of the initial refusal. To the extent that the first applicant relied on Article 3 of the Convention, the Minister found that it had not been established that, in the event of his removal to Afghanistan, he would be exposed to a real risk of being subjected to treatment prohibited under this provision.

11. On 23 June 2006 the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague, sitting in Zwolle, rejected the first applicant's appeal as well as the accompanying request for a provisional measure (*voorlopige voorziening*) in the form of a stay of removal. The first applicant chose not to lodge a further appeal with the Administrative Jurisdiction Division although this would have been possible in respect of the dismissal of his appeal.

12. Following the decision to apply Article 1F in respect of the first applicant's asylum application, on 27 September 2006 the Minister notified the first applicant of her intention also to impose an exclusion order (*ongewenstverklaring*) on him. The first applicant submitted written comments in response to this intended decision on 29 October 2006. The decision to impose an exclusion order on the first applicant was finally issued by the Minister on 28 December 2006, thus also rejecting the applicant's arguments under Articles 3 and 8 of the Convention. An objection (*bezwaar*) lodged by the first applicant against this decision was rejected by the Minister on 27 March 2007.

13. On 11 June 2007 all the applicants submitted a request for deferral of removal under section 64 of the Aliens Act 2000 in the light of the rare and serious medical condition of one of the children.

14. On 4 March 2008 the decision of 27 March 2007 was annulled in view of the applicants' request of 11 June 2007.

15. On 30 January 2009 all the applicants, with the exception of the husband/father, were informed that they were eligible for residence permits under a general amnesty regulation (*pardonregeling*; WBV 2007/11) promulgated in 2007 for persons who had applied for asylum before 1 April 2001 and who had lived without interruption in the Netherlands since that date. On 11 February 2009 the second applicant voluntarily withdrew from all pending proceedings on behalf of herself and the children and all the applicants except the first were granted residence permits. On 15 April 2009 the second applicant and the children were granted residence permits.

16. The first applicant having been interviewed by an official board of inquiry (*ambtelijke commissie*) on 28 September 2009 and 9 November 2010, on 14 March 2011 the Minister for Immigration, Integration and Asylum Policy (*Minister van Immigratie en Asiel*) again dismissed the applicant's objection against the decision of 28 December 2006. The Minister did not find that the first applicant had demonstrated that, if

returned to Afghanistan, he would risk treatment proscribed by Article 3 of the Convention.

As regards Article 8 of the Convention, the Minister accepted that the first applicant and the other applicants had a family life and that the decision to impose an exclusion order on the first applicant entailed an interference with his right to respect for that family life but, taking into account the guiding principles set out in the Court's judgment in the cases of *Boultif v. Switzerland*, (no. 54273/00, § 48, ECHR 2001‑IX) and *Üner v. the Netherlands* ([GC], no. 46410/99, § 58, ECHR 2006‑XII), she considered – as explained in extensive reasoning – that the general interest in public safety and national security, as well as the prevention of crime and the protection of the rights and freedoms of others, weighed more heavily than the applicant's interest in an undisturbed family life. The Minister considered in particular that, although the first applicant had resided in the Netherlands for twelve years, he had lived in Afghanistan for most of his life and could be regarded as capable of fending for himself. Furthermore, the fact that the actions held against the applicant had taken place a considerable time ago did not, given their seriousness, give rise to a violation of Article 8. The Minister also took account of the fact that the second applicant had been aware of the first applicant's work-related activities. The Minister accepted that, on account of the serious medical condition of one of the children, for which insufficient treatment possibilities existed in Afghanistan, there was an objective obstacle to the applicants' return to Afghanistan in order to continue their family life there. However, this did not necessarily mean that their family life could only be pursued in the Netherlands: it was possible for the other applicants to accompany the first applicant to a third country if they wished to continue their family life with him. The Minister concluded that the interference was justified and not in breach of Article 8.

The Minister also rejected the first applicant's request for deferral of removal under section 64 of the Aliens Act 2000.

17. An appeal lodged by the first applicant against this decision, which included arguments based on Articles 3 and 8, was rejected by the Regional Court of The Hague, sitting in 's-Hertogenbosch, on 5 January 2012.

18. The first applicant lodged a further appeal with the Administrative Jurisdiction Division on 8 February 2012. Together with an accompanying request for a provisional measure (stay of removal), this further appeal was rejected on 18 July 2012 on the basis of summary reasoning by the President of the Administrative Jurisdiction Division. No further appeal lay against this ruling.

19. On 21 July 2012 the first applicant was removed to Afghanistan. On 12 September 2012 and 12 October 2012 he was verbally threatened by unknown persons. Towards the end of October 2012 the first applicant's father, who was in Pakistan at the time, heard that the first applicant had

been abducted in Kabul. After learning from his relatives and tribesmen of the ransom claimed by the kidnappers, the first applicant's father sold a house he owned in Kabul to the sitting tenant for 50,000 United States Dollars (USD). The first applicant was released on 8 November 2012 after his father had paid a ransom of USD 50,000. The first applicant also received a letter dated 8 November 2012 warning him that, if he intended to work as an interpreter for foreigners and to spy on Muslims, it was better for him to leave the country. The first applicant remained in Afghanistan, hiding at different addresses in and around Kabul.

20. On 17 December 2012 the first applicant lodged a complaint with the Counterterrorism Directorate of the Afghan Ministry of Interior Affairs about the two occasions on which he had been verbally threatened by unknown persons in September and October 2012. This complaint does not mention either his abduction in October 2012 or the letter of 8 November 2012.

21. On an unspecified date the first applicant left Afghanistan and travelled to Belgium where, using a different family name, he applied for asylum on 13 September 2013. On 7 January 2015 he was granted asylum in Belgium, where he is currently residing. In the meantime, on 11 March 2014 the other applicants were granted Netherlands nationality.

B. Relevant domestic law and practice

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

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

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

25. An official report on Afghanistan released in August 2002 by the Netherlands Ministry of Foreign Affairs recorded that there was an internal armed conflict in Afghanistan from 1978 to 1992 between forces opposing the communist regime and Islamic insurgents known as the mujahideen. In April 1992 the communist regime in Afghanistan fell. The various mujahideen factions who had fought the communists grabbed power where they could. In order to cope with the resulting chaos, the mujahideen decided to form an interim government. This resulted in the conclusion on 24 April 1992 of the Peshawar agreement. However, this agreement was short-lived and, on 7 March 1993, the mujahideen parties concluded a new agreement ("the Islamabad agreement"). Failure to respect parts of this agreement triggered a new conflict between various mujahideen factions. It was only after the Taliban seized power in 1996 that peace was restored in Afghanistan.

The Taliban's rise in Afghanistan had started in 1994, when a group of Afghans who had studied at madrassas (koranic schools) in Pakistan founded the Taliban movement. After seizing power in several important towns in Afghanistan, such as Kandahar, Herat and Jalalabad, the Taliban conquered the capital, Kabul, on 27 September 1996. The initial success of the Taliban was due in part to serious divisions among the various mujahideen factions. Only when the different mujahideen factions joined forces in June 1997 did it become possible to stop the Taliban. This coalition was called the "*United Islamic Front for the Salvation of Afghanistan*", also referred to as the "*United Front*" or the "*Northern Alliance*". Between 1997 and 2001, the Taliban managed to gain control over 90 to 95 per cent of Afghanistan. However, they were unable to defeat the Northern Alliance and were thus prevented from gaining control over the whole of Afghanistan.

On 7 October 2001 the United States of America launched military action against Taliban and Al Qaeda units in Afghanistan in reaction to the attacks in the United States on 11 September 2001. This military action weakened the Taliban and Al Qaeda units in Afghanistan to such an extent that in November and December 2001 the Northern Alliance, with the support of the United States, managed to bring Afghanistan under its control.

26. An official report on Afghanistan published on 4 July 2012 by the Netherlands Ministry of Foreign Affairs, and covering the period between September 2011 and June 2012, states in respect of abductions:

"Violence occurs throughout Afghanistan but affects different regions to differing degrees. Some regions are more stable than others, but bomb attacks and abductions can take place anywhere in Afghanistan. ...

Abductions also occurred during this reporting period. Abductions for ransom or as a method of intimidation are used by criminal gangs and insurgents, including the Taliban. During this reporting period a strong increase was noted in the abduction of NGO employees and businessmen. Other targets of abduction include people working for construction and mining projects, for foreign organisations or for the government, teachers, security agencies, journalists, foreigners, women (for example for forced marriages) and children (for example for revenge, ransom). ... ."

27. In respect of fraudulently obtained documents, it reads:

"Corruption in obtaining documents (including travel, identity, and marriage documents, job application letters, etc.) is widespread in Afghanistan. Documents can easily be forged in practice and can be obtained for cash in Kabul and other major cities. Even fake Taliban 'night letters' can be obtained for cash, as well as other false written statements and false flight accounts. The cost of obtaining these documents and information is considerable. Yet, it is a lucrative trade because of the Afghans' fear about the future. There is a wealthy Afghan class that is prepared to pay a lot of money to leave the country, and human traffickers offer various packages to help them flee. The costs thereof for refugees may run to more than US $ 20,000."

28. As regards former communists, the relevant part of this report reads:

"Many former members of the People's Democratic Party of Afghanistan (PDPA) and former employees of the former 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.

So far as is known, ex-communists have nothing to fear from the government. During the reporting period no reports were received regarding risks of human rights violations [in respect of PDPA members who did not] benefit from the protection of influential factions or from tribal protection, irrespective of the question of whether or not they had stayed for a long period in the former Soviet Union.

The most recent UNHCR Eligibility Guidelines do not contain, under 'potential risk profiles', any information about persons who currently identify with the communist ideology (or who are suspected thereof).

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 or not [he or she] has reason to fear being in Afghanistan, and the same applies to former employees of KhAD/WAD."

C. Relevant international material

29. 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."

30. 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 "*Note on the Exclusion Clauses*" (UNHCR, 30 May 1997) and are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. These guidelines state that in cases where the main asylum applicant is precluded from obtaining refugee status, his or her dependants will need to establish their own grounds for claiming such status. If the latter are recognised as refugees, the precluded individual is not able to rely on the right to family unity in order to secure protection or assistance as a refugee (paragraph 29).

31. An overview of the relevant guidelines and the 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).

32. Directive 2004/38/EC of the European Parliament and Council of 29 April 2004[2] regulates the right of citizens of the European Union (EU) and their family members, including those who are not EU citizens, to move and reside freely within the territory of the EU Member States.

COMPLAINTS

33. The applicants complained that the expulsion of the first applicant to Afghanistan had exposed him to a real risk of being subjected to treatment proscribed by Article 3 of the Convention on account of his professional activities during the communist regime and that it had separated him from his family in the Netherlands.

2. On the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

34. The applicants also complained that the exclusion order imposed on the first applicant breached their right to respect for family life as guaranteed by Article 8 of the Convention.

35. The applicants lastly complained that the first applicant did not have an effective remedy as required by Article 13 in respect of the decision to impose an exclusion order on him.

THE LAW

A. Article 3 of the Convention

36. The applicants complained that the first applicant's removal to Afghanistan had been contrary to Article 3 for three reasons: firstly because treatment in breach of this provision awaited him there due to his work for the Riasat-e Makhsous, a special unit of the Ministry of Interior Affairs during the communist regime, secondly because of the risk of attracting negative attention as a westernised person, and thirdly because it separated him from his family in the Netherlands, namely the other applicants.

37. Article 3 provides as follows:

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

1. The parties' submissions

(a) The Government

38. The Government submitted that, although the security situation in Afghanistan in general – and in particular in the province from which the first applicant originates – was very poor, it was not such that, at the time of his removal on 21 July 2012, returning the first applicant to Afghanistan in itself amounted to a violation of Article 3 of the Convention. Pointing out that both the International Organisation for Migration and the UNHCR were assisting Afghans who wished to return voluntarily to Afghanistan, the Government also referred to the Court's findings in *H. and B. v. the United Kingdom* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013) and *N. v. Sweden* (no. 23505/09, § 52, 20 July 2010), amongst others.

39. The Government also submitted that the first applicant had not demonstrated that his former activities as an officer in the Riasat-e Makhsous gave him reason to fear treatment proscribed by Article 3 of the Convention. He had encountered no problems between 1993, when he returned from Kyiv, and January 1998, when the Taliban arrived in his area. Moreover, the Taliban were no longer officially in power at the time of the applicant's removal in July 2012 and, although they had remained an

important presence in southern Afghanistan, attacks by them had been in the main directed against the Afghan National Security Forces, senior officials and supporters of the Afghan government, the United Nations and local UN staff. It seemed unlikely that the applicant would still be of any particular interest to the Taliban.

40. The Government also submitted that the first applicant had offered nothing to support his contention that men who have merely lived in the West for a long period of time run a real risk of treatment proscribed by Article 3. Nor had he demonstrated that he himself had become so westernised that he might encounter problems for that reason.

(b) The applicants

41. The applicants contended that the generally poor security situation in Afghanistan at the material time was, as admitted by the Government, one of the factors contributing to the real risk to which the first applicant was exposed when he was removed to Afghanistan in July 2012. However, this risk was exacerbated by his ties with the former communist regime, his westernisation due to his lengthy residence in the Netherlands, and the absence of any form of social "safety net" on which he could depend in Afghanistan. Referring to the abduction of the first applicant in Afghanistan in October 2012, the applicants argued that their fear that he would be subjected to treatment proscribed by Article 3 had thus proved to be well-founded.

42. They lastly maintained that the first applicant's removal to Afghanistan and consequential separation from his family in the Netherlands – that is to say, from the other applicants – was in itself a breach of their rights under Article 3.

2. The Court's assessment

43. 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. As indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, account should be taken of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Marguš v. Croatia* [GC], no. 4455/10, § 129 with further references, ECHR 2014 (extracts)).

44. 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 the correctness of the application of the provisions of the 1951 Refugee Convention by the Netherlands authorities (see, for instance, *I. v. the Netherlands* (dec.), no. 24147/11, § 43, 18 October 2011).

45. The Court reiterates the relevant principles in its case-law relating to Article 3 of the Convention (see, most recently, *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 77-106, ECHR 2016, with further references).

46. Noting that the applicant in the instant case was expelled to Afghanistan in July 2012, the question of whether he would face a real risk of persecution upon his return to Afghanistan must be examined from the perspective of the situation prevailing at the time of his removal.

47. As regards the individual features of the risk of ill-treatment claimed by the applicant, the Court notes that the applicant was studying law in Kyiv when the communist regime in Afghanistan was overthrown by mujahideen forces in 1992. He returned in 1993 to Afghanistan and started to work as a farmer without encountering any problems from the mujahideen or any other faction. It was only in January 1998, when the Taliban were conducting purges in his home area, that the first applicant was told that the Taliban were looking for him and, for that reason, decided to flee the country.

48. It does not appear from the applicant's submissions that he had attracted the negative attention of any governmental or non-governmental body or any private individual in Afghanistan on account of his work during the former communist regime either after his departure from Afghanistan in March 1998 and/or after his return there on 21 July 2012.

49. As regards the first applicant's claim that he had been abducted in October 2012 and released on 8 November 2012 after his father had paid a ransom of USD 50,000 to the kidnappers, the Court notes that abductions were apparently not uncommon in Afghanistan at the material time (see paragraph 26 above). However, it also notes that the applicant's complaint of 17 December 2012 to the Counterterrorism Directorate of the Afghan Ministry of Interior Affairs does not mention either his abduction in October 2012 or the letter containing threats of 8 November 2012. Furthermore, not a single document in substantiation of this claim has been produced, such as, for instance, documents detailing the sale in the last quarter of 2012 of the house belonging to the first applicant's father for the sum of USD 50,000, which provided the funds allegedly used to pay the ransom demanded for releasing the first applicant. It has, furthermore, remained unexplained why the first applicant did not report his alleged abduction and the letter of 8 November 2012 to the Afghan criminal investigation authority or other competent body. Given these circumstances, the Court must conclude that this claim has not been substantiated.

50. In view of the above, the Court does not find that it has been demonstrated that, on individual grounds, the first applicant was exposed to a real risk of being subjected to treatment prohibited by Article 3 when he was removed to Afghanistan on 21 July 2012.

51. Regarding the question of whether the general security situation in Afghanistan in July 2012 was 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. Taking into account the evidence now before it, the Court has found no reason to hold otherwise in the case at hand.

52. The Court therefore finds that the applicants have failed to adduce evidence capable of demonstrating that there were substantial grounds for believing that the first applicant was exposed to a real and personal risk of being subjected to treatment prohibited by Article 3 of the Convention when he was removed to Afghanistan on 21 July 2012.

53. In respect of the applicants' complaint that the first applicant's separation from the other applicants in itself breached their rights under Article 3, the Court cannot find that the application by the domestic authorities of the exclusion clause provided in Article 1F of the 1951 Refugee Convention – and the consequential separation of the applicant from his family, who had been admitted into the receiving state – can be regarded, either *per se* or in the particular circumstances of the instant case, as attaining the minimum level of severity required for treatment to fall within the scope of Article 3 of the Convention.

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

B. Article 8 of the Convention

55. The applicants complained that the exclusion order imposed on the first applicant breached their right to respect for family life as guaranteed by Article 8 of the Convention. In its relevant part, Article 8 of the Convention 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."

1. The parties' submissions

(a) The Government

56. Referring to the position of the UNHCR, according to which individual asylum-seekers in respect of whom the exclusion clause of Article 1F has been applied cannot rely on the right to family unity (see

paragraph 30 above), the Government submitted that in deciding to impose an exclusion order on the first applicant after denying him asylum under Article 1F of the 1951 Refugee Convention, the balance struck between the competing interests was not unfair as regards Article 8 of the Convention. In reaching this decision, the guiding principles formulated by the Court and as set out in the Court's judgments in the cases of *Boultif v. Switzerland* (no. 54273/00, § 48, ECHR 2001‑IX) and *Üner v. the Netherlands* ([GC], no. 46410/99, § 58, ECHR 2006‑XII) were applied.

57. Taking into account the nature and seriousness of the crimes referred to in Article 1F, the length of the first applicant's stay in the Netherlands, the time elapsed since the crimes referred to in Article 1F were committed, the situation of the first applicant's spouse and children – including the question of whether the second applicant was aware of her husband's professional activities during the communist regime – and the applicants' ties with the Netherlands, the Government contended that public interest considerations should be regarded as outweighing the applicants' personal interest in an undisturbed family life in the Netherlands.

(b) The applicants

58. The applicants disagreed, pointing out the existence of objective obstacles to the exercise of their family life in Afghanistan, namely the serious illness of one of the children, and their westernisation, given that – apart from the first applicant – since 1998 they have all been residing in the Netherlands, the country in which the three youngest applicants were born and have been brought up. The applicants argued that, given these factors, they could not safely return to Afghanistan and the assumption that the family could settle in a third country, such as Ukraine or Pakistan, was not realistic.

59. The applicants further submitted that the Netherlands authorities, in deciding to impose an exclusion order on the first applicant, had acted contrary to their obligations under the Convention on the Rights of the Child and the provisions of the Netherlands Civil Code on access rights between parents and children in that the separation of the first applicant from his children would be detrimental to theirs interests and development.

2. The Court's assessment

60. The Court accepts that the applicants' relationships with each other constitute "family life" for the purposes of Article 8 and that the decision to apply Article 1F of the 1951 Refugee Convention and to impose an exclusion order or entry ban on the first applicant affected that family life.

61. As regards the first applicant's family life with his spouse and their children, who were all still minors at the time of his removal to Afghanistan, the Court again emphasises 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 43 above).

62. 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 within 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. v. the Netherlands*, cited above, § 66 with further references).

63. The Court accepts that the decisions to deny the first applicant asylum pursuant to Article 1F and to impose an exclusion order on him interfered with the applicants' 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.

64. 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".

65. 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 measure 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*, cited above, §§ 46-47; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

66. The Court has held that, taking into account the seriousness of the crimes and acts referred to in Article 1F, the public interest served by the

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

67. The Court notes that, unlike his spouse and children, the first applicant has never been granted a residence permit in the Netherlands and that, given the decision to apply Article 1F in respect of his asylum application, his residence status was such that the continuance of his family life in the Netherlands had always been precarious. The Court further notes that the first applicant had been living in the Netherlands for 14 years prior to his removal from the country in July 2012, which entailed a separation from his spouse and children. On this point, the Court considers it of relevance that the first applicant's spouse, namely the second applicant, must be regarded as having been aware of her husband's work during the communist regime as her asylum application was mainly based on his asylum statement. The Court has found no indication that the first applicant's spouse was dependent on him or that he played a significant or indispensable role in the care and education of their children. Noting that the spouse and children were granted Netherlands nationality in 2014, and taking into account Directive 2004/38/EC of the European Parliament and Council of 29 April 2004, the Court further considers that – even assuming that there are objective obstacles to the return of the spouse and children to Afghanistan with the first applicant – it has not been established that it would be impossible for them to settle with the first applicant in Belgium, where he was granted asylum in 2013.

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

69. 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.

C. Article 13

70. The applicants lastly complained, under Article 13 of the Convention, that they did not have an effective remedy in respect of the decision to impose an exclusion order on the first applicant.

71. 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."

72. The Government disagreed.

73. 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).

74. 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. v. the Netherlands*, cited above, §§ 76-78). It has found no reason in the applicants' submissions that would warrant a different finding.

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

For these reasons, the Court, unanimously,

Declares the application inadmissible.

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

Stephen Phillips
Registrar

Luis López Guerra
President

APPENDIX

1. Mirwais SOLEIMANKHEEL who was born in 1970.
2. Mahmudeh SADAT who was born in 1973.
3. Eqbal SOLEIMANKHEEL who was born in 1995.
4. Alkahel SOLEIMANKHEEL who was born in 1998.
5. Soleiman SOLEIMANKHEEL who was born in 2004.
6. Hewa SOLEIMANKHEEL who was born in 2009.