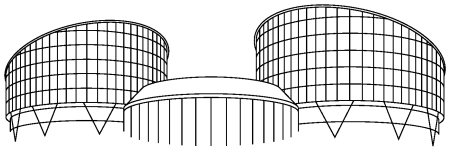

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF A.G.R. v. THE NETHERLANDS

(Application no. 13442/08)

JUDGMENT

STRASBOURG

12 January 2016

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

In the case of A.G.R. v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 15 December 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13442/08) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national of Pashtun origin, Mr A.G.R. ("the applicant"), on 19 March 2008.

2. The applicant was represented by Ms A Kessels, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicant initially complained that he would face a real risk if expelled from the Netherlands to Afghanistan of being subjected to treatment contrary to Article 3 of the Convention on account of his work for the security service of the former communist regime in Afghanistan. In his submissions of 26 November 2013 (see paragraph 5 below), he further complained that his wife and their four children, the latter born between 1984 and 1990, would also be exposed in Afghanistan to a real risk of treatment prohibited under Article 3 of the Convention.

4. On 22 January 2009 the President of the Section to which the case had been allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be expelled to Afghanistan until further notice. The President further decided that the applicant's identity should not be disclosed to the public (Rule 47 § 4). On the same day, the application was communicated to the Government.

5. The Government submitted written observations on 20 August 2009 and the applicant submitted observations in reply on 7 October 2009. On 11 November 2009, the Government informed the Court that they did not

wish to avail themselves of the opportunity to submit any further observations. On 1 October 2013, the parties were requested to submit additional written observations on the admissibility and merits. The Government submitted these on 4 November 2013 and the applicant on 26 November 2013.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1965 and has been residing in the Netherlands since 1997.

7. The applicant entered the Netherlands on 2 December 1997 and applied for a residence permit for the purpose of asylum as well as for reasons not related to asylum. In support of this application, he gave the following account in his interviews with immigration officials.

8. He had been a member of the communist People's Democratic Party of Afghanistan ("PDPA") since 1978/79, and had worked for the Afghan security service KhAD/WAD *("Khadimat-e Atal'at-e Dowlati / Wezarat-e Amniyat-e Dowlati")*[1] from 1982 to 1992. Upon the PDPA's advice the applicant had joined the KhAD as an alternative to mandatory military service. He had been stationed in Paktia from 1982 to 1986, where he had initially performed administrative tasks for one month within KhAD's local Political Affairs department, followed by preparing/compiling course materials for KhAD's internal training within the same department. He had done this until 1986. He had also been involved in the organisation of cultural events for KhAD's youth department.

9. In 1984 the applicant had been sent to the Union of Soviet Socialist Republics ("USSR") for six months for training (KhAD's organisation and the functioning of a secret service). Upon completion of this training he had been promoted to the rank of third lieutenant. In 1986 the applicant had participated in six months of political training, also in the USSR.

10. From 1987 to 1988 the applicant had worked for KhAD's Political Affairs department in Kandahar. From 1988 to 1992 he had worked for KhAD's "Directorate 89", located in Kabul, where he had been given the task of internal control and research into the functioning of KhAD staff. The applicant's highest attained military rank, through periodical promotions, was that of major.

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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.

11. The applicant had fled from Afghanistan to Pakistan on 5 May 1992, a week after the fall of the PDPA regime. After the applicant's flight, his father was assaulted in Afghanistan by mujahideen who had come to ask him about the applicant's whereabouts. The applicant's father had to have a kidney removed as a consequence of the battering he suffered at the hands of the mujahideen. The applicant's family had joined the applicant in Pakistan six months after the applicant's departure from Afghanistan, but they had lived separately for safety reasons. His family had lived with relatives in Pakistan, close to the Afghan border. The applicant himself had stayed in Karachi. On an unspecified date in 1995, unidentified mujahideen had come to the applicant's parents' home searching for the applicant. On that occasion, the applicant's youngest brother had been ill-treated and another brother had been taken away, tortured and killed by the mujahideen in their attempt to find the applicant.

12. On 21 April 1998, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's asylum request, holding that the applicant had failed to establish personal circumstances warranting a decision to grant him asylum. The applicant had never been approached personally by the mujahideen in Afghanistan; he had only made vague declarations about the post he had held in the KhAD, and he had lived for more than five years in Pakistan without experiencing problems and/or having been found by the mujahideen (who were said to be active in Pakistan too). Although they might have known where the applicant's family were, it was considered implausible that the mujahideen would have been aware of the applicant's whereabouts in Pakistan. The Deputy Minister also held that the applicant's submissions regarding the assault on his father and killing of his brother were brief and vague.

13. The Deputy Minister of Justice did, however, grant the applicant a conditional residence permit (*voorwaardelijke vergunning tot verblijf*), valid for one year from 3 December 1997, on the basis of a temporary categorial protection policy ("*categoriaal beschermingsbeleid*") in respect of Afghanistan.

14. On 18 May 1998 the applicant submitted an objection (*bezwaar*) to the Deputy Minister against the decision to reject his asylum request. On 21 January 2000, following a hearing held on 30 September 1999 before an official board of enquiry (*ambtelijke commissie*), the Deputy Minister rejected the applicant's objection. The Deputy Minister found, *inter alia*, that the applicant had failed to establish that he had held a position within KhAD of sufficient importance to warrant the conclusion that he would run a real risk of persecution upon his return to Afghanistan. The Deputy Minister further noted that the applicant had not experienced any problems with the mujahideen either, stressing that the applicant had easily crossed a mujahideen-controlled border crossing with Pakistan in 1992. The Deputy Minister further found that the applicant had failed to demonstrate that he

ran a real risk of persecution by the Taliban, who were in charge of most of Afghanistan at the time the impugned decision was taken. The Deputy Minister underlined in this regard the unlikelihood of the Taliban having been aware of the applicant's past activities for KhAD, including the two military training programmes he had allegedly attended in the USSR. The Deputy Minister also dismissed the applicant's argument that, in Afghanistan, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention.

15. The applicant lodged an appeal against this decision with the Regional Court (*rechtbank*) of The Hague. Pending these appeal proceedings, the applicant was informed that the Deputy Minister had decided, in view of the applicant's involvement with the KhAD, to examine the possible applicability of Article 1F of the 1951 Geneva Convention Relating to the Status of Refugees ("the 1951 Refugee Convention) to his case and that for this reason the impugned decision of 21 January 2000 was withdrawn. Thereupon, the applicant withdrew his appeal.

16. Meanwhile in December 2000, the situation in Afghanistan not having sufficiently improved, the applicant's conditional residence permit was converted *ex lege* into an indefinite residence permit after he had held it for a period of three years. Subsequently, with the entry into force of the Aliens Act 2000 (*Vreemdelingenwet 2000*) on 1 April 2001, the permit held by the applicant came to be named an indefinite residence permit for the purpose of asylum.

17. On 17 March and 9 April 2003, the applicant was interviewed by the immigration authorities about the nature of his activities for the KhAD.

18. On 22 March 2004 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) notified the applicant of her intention (*voornemen*) to revoke his residence permit and to hold Article 1F of the 1951 Refugee Convention against him. The applicant's asylum claim had been considered in the light of an official report (*ambtsbericht*), drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs on "Security Services in Communist Afghanistan (1978-1992), AGSA, KAM, KhAD and WAD" ("*Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD*") and concerning in particular the question whether, and if so which, former employees of those services should be regarded as implicated in human rights violations. On the basis of this report, the Netherlands immigration authorities had adopted the position that Article 1F of the 1951 Refugee Convention could be held against virtually every Afghan asylum seeker who, holding the rank of third lieutenant or higher, had worked during the communist regime for the KhAD or its successor the WAD.

19. The Minister found it established that the applicant had worked as a commissioned officer in the KhAD's Directorate 89 from 1988 to 1992 and considered that, in his account to the Netherlands authorities, he had sought

to trivialise his activities for the KhAD. She rejected the applicant's argument that the applicability of Article 1F of the 1951 Refugee Convention ought to have been examined at an earlier stage, holding that at the relevant time (1997/98) considerably less information had been available to the Netherlands asylum authorities about the full extent of the human rights violations committed by the KhAD, notwithstanding that to a certain extent there had been a general awareness of the nature of the former communist regime in Afghanistan.

20. The Minister then proceeded to an 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. Noting, *inter alia,* the applicant's steady career path in the KhAD, the Minister excluded the possibility of the applicant not having known or not having been involved in human rights violations committed by the KhAD. Relying on the official report of 29 February 2000, the Minister underlined the widely known cruel character of KhAD, its lawless methods, the grave crimes it had committed such as torture and other human rights violations as well as the climate of terror which it had spread throughout the whole of Afghan society. The Minister lastly emphasised that the applicant had done nothing to distance himself from KhAD during the ten years he had made a career there, referring to the applicant's own statement to the effect that he had consciously chosen to stay with KhAD in order to avoid being sent to the war front. The Minister considered that the consequences of that choice were for the applicant to bear.

21. On 28 April 2004, the applicant submitted written comments (*zienswijze*) on the Minister's intended decision and, on 19 May 2005, he was once more heard before an official board of enquiry.

22. On 6 January 2006 the applicant was served with an additional notice of intent in which the Minister examined whether the applicant's expulsion to Afghanistan would be compatible with his rights under Article 3 of the Convention, as required in expulsion cases according to the case-law of the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State. The Minister noted that, according to an official report on Afghanistan issued by the Netherlands Ministry of Foreign Affairs in July 2005, the position of ex-communists and persons associated with the former communist regime was not yet entirely clear. Members of the KhAD/WAD possibly ran a risk of becoming a victim of human rights violations from the side of the authorities (except for the government) but more so from the side of the population (victims' relatives) as they were identified with human rights violations during the communist regime. However, there were no indications that persons in Afghanistan should fear persecution merely because of their ties with the former communist regime. The Minister, therefore, held that the applicant had to demonstrate personal facts or circumstances warranting the

conclusion that his return to Afghanistan would be in breach of Article 3 of the Convention, and found that the applicant had not done so. In reaching this finding, the Minister noted that the applicant's fear of being subjected to treatment proscribed by Article 3 had remained unsubstantiated in any concrete manner and was only based on assumptions. The applicant had not specified which particular faction of the mujahideen had been looking for him shortly after he left Afghanistan, nor whether that faction was currently holding any position of power in Afghanistan. The Minister further took into account the applicant's statement made at the hearing of 19 May 2005 that in the meantime his parents and brother had returned to Kabul. Although the applicant's father had allegedly been approached in early 2005 by individuals asking for the applicant, the Minister held that it had not been demonstrated that the applicant's parents and brother had experienced serious difficulties from the authorities or any groups. The Minister further considered that the mere fact that Article 1F of the 1951 Refugee Convention was being held against the applicant did not in itself warrant the conclusion that, if expelled to Afghanistan, he would have to fear treatment contrary to Article 3 of the Convention. The Minister also rejected as still unsubstantiated the applicant's claims that he risked treatment contrary to Article 3 because he would be considered an infidel as his family was not professing Islam, as he drank alcohol and had studied, and also because of his ethnicity.

23. The applicant submitted additional written comments on 15 February 2006 and, on 18 May 2006, was heard once more before an official board of enquiry.

24. In her decision of 28 November 2006, the Minister revoked the applicant's residence permit. The notices of intent of 22 March 2004 and 6 January 2006 were added to the decisions and formed part of them. The Minister did not deviate, in the relevant part, from her earlier conclusions in the notices of intent and went on to confirm them on all points. The applicant's rebuttals were dismissed as not raising any new grounds. Moreover, in a letter of the same date the Minister informed the Public Prosecutor's Office (*Openbaar Ministerie*) that Article 1F of the 1951 Refugee Convention had been held against the applicant and asked the Public Prosecutor's Office to consider prosecuting the applicant under criminal law. No further information on any follow-up to this letter has been submitted.

25. On 11 December 2006, the Minister notified the applicant of her intention also to impose an exclusion order (*ongewenstverklaring*) on him. The applicant submitted written comments on this intended decision on 21 December 2006 and on 9 July 2007 was heard before an official board of enquiry.

26. An appeal by the applicant against the Minister's decision of 28 November 2006 was rejected on 13 July 2007 by the Regional Court of

The Hague, sitting in 's-Hertogenbosch. It accepted the Minister's impugned decision to hold Article 1F against the applicant as well as the underlying reasoning. It further upheld the Minister's decision and underlying reasoning that the applicant's removal would not be contrary to his rights under Article 3 of the Convention.

27. On 19 September 2007, the Administrative Jurisdiction Division rejected a further appeal by the applicant on summary grounds, holding:

> "What has been raised in the grievances ... does not provide grounds for quashing the impugned ruling. Having regard to section 91 § 2 of the Aliens Act 2000, no further reasoning is called for, since the arguments submitted do not raise questions which require determination in the interest of legal uniformity, legal development or legal protection in the general sense."

No further appeal lay against this ruling.

28. On 28 September 2007, the Deputy Minister of Justice imposed an exclusion order on the applicant. An objection by the applicant to this decision was rejected by the Minister on 8 January 2008. On 14 January 2008, the applicant appealed to the Regional Court of The Hague. No further information about these appeal proceedings has been submitted.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

III. RELEVANT INTERNATIONAL LAW AND INTERNATIONAL MATERIALS

30. 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."

31. On 4 September 2003 the United Nations High Commissioner for Refugees ("UNHCR") issued "*Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*". They superseded "*The*

Exclusion Clauses: Guidelines on their Application" (UNHCR, 1 December 1996) and the "*Note on the Exclusion Clauses*" (UNHCR, 30 May 1997) and intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

32. In July 2003, the UNHCR issued an "*Update of the Situation in Afghanistan and International Protection Considerations*". This paper stated, in respect of persons associated or perceived to have been associated with the former communist regime, that:

> "Some of the former military officials, members of the police force and Khad (security service) of the communist regime also continue to be generally at risk, not only from the authorities but even more so from the population (families of victims), given their identification with human rights abuses during the communist regime. When reviewing the cases of military, police and security service officials as well as high-ranking government officials of particular ministries, it is imperative to carefully assess the applicability of exclusion clauses of Article 1 F of the 1951 Geneva Convention. To some extent, many of these previous Afghan officials were involved, directly or indirectly, in serious and widespread human rights violations."

33. On 31 December 2007, the UNHCR released Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers ("the December 2007 Guidelines") in which, *inter alia*, it identified groups considered particularly at risk in Afghanistan and elaborated on the reasons for this risk at that time. Those Guidelines stated, *inter alia*, the following:

> "Significant numbers of former People's Democratic Party of Afghanistan (PDPA) – subsequently renamed Watan (Homeland) – members and former security officials, including the Intelligence Service (Khad), are working in the Government. ...
>
> While many former PDPA members and officials of the communist Government, particularly those who enjoy the protection of and have strong links to influential factions and individuals, are not at threat, a risk of persecution may persist for some high-ranking members of the PDPA, if they were to return to Kunar province and some districts of the eastern region. The exposure to risk depends on the individual's personal circumstances, family background, professional profile, links, and whether he or she has been associated with the human rights violations of the communist regime in Afghanistan between 1979 and 1992.
>
> Those former PDPA high-ranking members without factional protection from Islamic political parties or tribes, or influential personalities, who may be exposed to a risk of persecution, include the following:
>
> • high-ranking members of PDPA ...; and
>
> • former security officials of the communist regime, including Khad, also continue to be at risk, in particular from the population – i.e. families of victims– given their association with human rights abuses during the communist regime.
>
> When reviewing the cases of military, police and security service officials and high-ranking Government officials of particular ministries, it is imperative to carefully assess the applicability of exclusion clauses of Article 1F of the 1951 Convention, as many of these former Afghan officials were involved, to some extent, directly or indirectly, in serious and widespread human rights violations."

34. In May 2008, the UNHCR issued its "*Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992*" in the context of the need to assess the eligibility for international protection for Afghan asylum-seekers who were members of KhAD/WAD. It provides information on the origins of the KhAD/WAD, its structure and staffing, linkages between these services and the Afghan military and militias, the distinction between operational and support services, and rotation and promotion policies within the KhAD/WAD. As regards training programmes, it reads:

> "22. For all officers of KhAD/WAD, a mandatory training course was conducted at the KhAD/WAD training centre in Kabul. The training included logistics, recruitment, defamation techniques, organization and identification of covert meetings and networks and training in the use of small networks. Training for middle rank officers (i.e. first lieutenant to lieutenant colonel) was equally mandatory, and was organized in Tashkent (Uzbekistan). Unlike the mandatory training for all KhAD/WAD officers, it included training on interrogation and criminal investigation techniques. Training for high-ranking KhAD/WAD officers (from the rank of colonel upwards) was conducted in Moscow. This training included management and policy issues as well as financial affairs. There is no information available on the number of participants in these courses."

The Note did not express any views as to the question whether or not people who had worked for the KhAD/WAD should be regarded as being eligible for international protection.

35. In July 2009, the UNHCR issued Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the July 2009 UNHCR Guidelines") and set out the categories of Afghans considered to be particularly at risk in Afghanistan in view of the security, political and human rights situation in the country at that time. Those Guidelines stated, *inter alia*, the following:

> "Significant numbers of the former People's Democratic Party of Afghanistan (PDPA) – subsequently renamed Watan (Homeland) – members and former security officials, including the Intelligence Service (KhAD/WAD), are working in the Government. ...
>
> Former PDPA high-ranking members without factional protection from Islamic political parties, tribes or persons in a position of influence, who may be exposed to a risk of persecution, include the following: ...
>
> Former security officials of the communist regime, including KhAD members, also continue to be at risk, in particular from the population – e.g. families of victims of KhAD ill-treatment – given their actual or perceived involvement in human rights abuses during the communist regime.
>
> Former PDPA high-ranking members, or those associated with the commission of human rights violations during the former Communist regime, may also be at risk of persecution by mujaheddin leaders, and armed anti-Government groups. ...
>
> When reviewing the cases of military, police and security services officials, and those of high-ranking Government officials during the Taraki, Hafizullah Amin,

Babrak Karmal, and Najibullah regimes, it is important to carefully assess the applicability of the exclusion clauses in Article 1F of the 1951 Convention. ...

For individual cases of military officers of the Ministries of Defense and Interior and security services, it is relevant to assess their involvement in operations in which civilians have been subject to arrest, disappearances, torture, inhuman and degrading treatment and punishment, persecution and extrajudicial executions, ..."

36. On 17 December 2010, the UNHCR issued updated Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the December 2010 UNHCR Guidelines"). Those Guidelines read, *inter alia*:

"These Guidelines supersede and replace the July 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan. They are issued against a backdrop of a worsening security situation in certain parts of Afghanistan and sustained conflict-related human rights violations as well as contain information on the particular profiles for which international protection needs may arise in the current context in Afghanistan. ...

UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF); (ii) humanitarian workers and human rights activists; (iii) journalists and other media professionals; (iv) civilians suspected of supporting armed anti-Government groups; (v) members of minority religious groups and persons perceived as contravening Shari'a law; (vi) women with specific profiles; (vii) children with specific profiles; (viii) victims of trafficking; (ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals; (x) members of (minority) ethnic groups; and (xi) persons at risk of becoming victims of blood feuds. ...

In light of the serious human rights violations and transgressions of international humanitarian law during Afghanistan's long history of armed conflicts, exclusion considerations under Article 1F of the 1951 Convention may arise in individual claims by Afghan asylum-seekers. Careful consideration needs to be given in particular to the following profiles: (i) members of the security forces, including KHAD/WAD agents and high-ranking officials of the communist regimes; (ii) members and commanders of armed groups and militia forces during the communist regimes; (iii) members and commanders of the Taliban, Hezb-e-Islami Hikmatyar and other armed anti-Government groups; (iv) organized crime groups; (v) members of Afghan security forces, including the NDS; and (vi) pro-Government paramilitary groups and militias. ..."

37. The December 2010 UNHCR Guidelines further state:

"Members of the Security Forces, including KhAD/WAD agents and high-ranking officials of the Communist regimes, members of military, police and security services, as well as high-ranking Government officials during the Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah regimes, were involved in operations subjecting civilians to arrest, disappearances, torture, inhuman and degrading treatment and punishment, and extrajudicial executions. ...

In this context, careful consideration needs to be given to cases of former members of Khadamate Ettelaate Dowlati (KhAD), the State Information Service. Although the

> functions of KhAD/WAD evolved over time, culminating in the coordination and undertaking of military operations following the withdrawal of Soviet troops in 1989, it also included non-operational (support) directorates at central, provincial and district levels. Information available to UNHCR does not link the support directorates to human rights violations in the same manner as the operational units. Thus, mere membership to the KhAD/WAD would not automatically lead to exclusion. The individual exclusion assessment needs to take into consideration the individual's role, rank and functions within the organization."

38. Members of the former KhAD/WAD during the former communist regime were not included in the potential risk profiles set out in the December 2010 UNHCR Guidelines.

39. The most recent update of the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan was released on 6 August 2013 ("the August 2013 UNHCR Guidelines") and replaced the December 2010 UNHCR Guidelines. As in the latter guidelines, the August 2013 UNHCR Guidelines do not include persons having worked for the KhAD/WAD during the former communist regime in the thirteen cited potential risk profiles, but again state that, as regards Article 1F of the 1951 Refugee Convention, careful consideration needs to be given in particular to, *inter alia*, former members of the armed forces and the intelligence/security apparatus, including KhAD/WAD agents, as well as former officials of the Communist regimes.

40. The "Country of Origin Information Report: Afghanistan – Insurgent strategies – intimidation and targeted violence against Afghans", published in December 2012 by the European Asylum Support Office ("EASO") of the European Union, deals with strategies used by the Taliban and other insurgent groups in Afghanistan to intimidate the local population. It points out that the ongoing conflict in Afghanistan is largely defined by historical underlying mechanisms: local rivalries, power play and tribal feuds. It further notes regional differences in this campaign of intimidation and targeted violence, which vary for the range of targeted profiles studied in the report, which include government officials and employees, Afghan National Security Forces, government supporters, collaborators and contractors, Afghans working for international military forces; Afghans working for international organisations, companies and non-governmental organisations, civilians accused by the Taliban of being a spy, journalists, media and human rights activists, educational staff or students, medical staff, construction workers, truck drivers and those judged as violating the Taliban's moral code (for instance, prohibitions on shaving, women working outdoors, selling music and sweets or girls' education). This report does not mention persons having worked for the former communist armed forces of Afghanistan or intelligence service as a targeted profile.

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

"It is anticipated that the newly-formed national unity Government will demonstrate commitment to creating an enabling environment for sustainable returns. The withdrawal of international security forces, as well as a complex economic transition are, however, likely to affect peace, security and development in Afghanistan. Humanitarian needs are not expected to diminish in 2015. Support and assistance from the international community will be essential to ensure a transition towards more stable development.

The Solutions Strategy for Afghan Refugees (SSAR) remains the main policy framework for sustainable reintegration of those returning to Afghanistan. The National Steering Committee established in 2014 aims to facilitate the implementation and monitoring of the SSAR's initiatives.

Many returnees have migrated to towns and cities, contributing to the country's rapid urbanization. As rising poverty and unemployment in urban centres prevent them from reintegrating into society, many will need basic assistance. ...

Insurgency continues to spread from southern Afghanistan to large areas of the north and centre and is likely to remain a threat to stability in 2015. While violence may displace more people, insecurity is likely to continue restricting humanitarian access. Economic insecurity and the Government's limited capacity to provide basic services are also challenges. ...

Since 2002, more than 5.8 million Afghan refugees have returned home, 4.7 million of whom were assisted by UNHCR. Representing 20 per cent of Afghanistan's population, returnees remain a key population of concern to UNHCR. Refugee returns have dwindled during the past five years and owing to insecurity and a difficult socio-economic situation, only around 10,000 refugees returned during the first seven months of 2014.

In June 2014, following military operations in North Waziristan Agency, Pakistan, more than 13,000 families (some 100,000 people) crossed into Khost and Paktika provinces in south-eastern Afghanistan. Many of them settled within host communities, however approximately 3,300 families reside in Gulan camp, Khost province. A substantial number could remain in Afghanistan, despite expectations that an early return may be possible.

By mid-2014, 683,000 people were internally displaced by the conflict affecting 30 of the 34 Afghan provinces. More than half of Afghanistan's internally displaced people (IDPs) live in urban areas."

42. In January 2015 the EASO released its "Country of Origin Information Report: Afghanistan - Security Situation". It reads, *inter alia*,:

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

Several sources consider the situation in Afghanistan to be a non-international armed conflict. On 12 November 2014, the World Security Risk Index from the website Global Intake gave Afghanistan the second highest score (48), after Syria (59). Other conflict areas with high scores include: South Sudan (46); Iraq (45); Central African Republic (44); Somalia (41); Ukraine (38). ....

The Taliban are insurgent groups that acknowledge the leadership of Mullah Mohammad Omar and the Taliban Leadership Council in Quetta, Pakistan. The Taliban leadership ruled Afghanistan between 1996 and 2001 and regrouped after it was ousted from power. The different groups have varying operational autonomy, but there is a governing system under the Leadership Council with several regional and local layers. They have a Military Council and a command structure with, at the lowest level, front commanders overseeing a group of fighters. The governing structure and military command is defined in the Taliban's Lahya or Code of Conduct.

On 8 May 2014, the Taliban leadership announced that its spring offensive, called "Khaibar", would be launched on 12 May and would target "senior government officials, members of parliament, security officials, attorneys and judges that prosecute mujahideen, and gatherings of foreign invading forces, their diplomatic centres and convoys".

... the Taliban's core heartland is located in the south and their influence is strongest in the regions of the south-east and east, where they can count on support from affiliated networks. In terms of the Taliban's territorial control, there are only a limited number of districts under their full control, with most district administrative centres remaining under government control. However, outside these centres, there are varying degrees of Taliban control. They have exerted uninterrupted control over large swathes of territory, reaching from southern Herat and eastern Farah, through parts of Ghor (Pasaband), northern Helmand (Baghran and other districts), Uruzgan and northern Kandahar to the western half of Zabul (Dehchopan, Khak-e Afghan) and southern Ghazni.

The Haqqani network is an insurgent network in the south-east of Afghanistan, with its origins in the 1970s mujahideen groups. Its leader, Jalaluddin Haqqani, has attacked Afghan government officials since 1971. It is believed he fled to Pakistan in late 2001, where currently the network has its most important base in North Waziristan. Due to his age, he handed over the practical leadership to his son, Serajuddin Haqqani. Although the network has maintained an autonomous position, structure and its own modus operandi, it is considered part of the Taliban. It is known for various high-profile attacks on targets in Kabul city.

Hezb-e Islami Afghanistan (HIA) is an insurgent group led by Gulbuddin Hekmatyar. The group has the withdrawal of foreign troops as a goal, has conducted high-profile attacks in the capital, but has been more open to negotiation with the Afghan government than the Taliban. The latter criticise HIA for this and on occasions there has been fighting between both insurgent groups in different areas. On other occasions they have cooperated. HIA's strongholds are located in the east and south-east of Afghanistan, in the areas surrounding Kabul, in Baghlan and Kunduz. The group's major field commander is Kashmir Khan, who is active in eastern Afghanistan."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The applicant initially complained that his removal to Afghanistan would violate his rights under Article 3 of the Convention. In his submissions of 26 November 2013 (see paragraph 5 above), he further complained that his wife and their four children would also be exposed in Afghanistan to a real risk of treatment prohibited under Article 3 of the Convention. This provision reads as follows:

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

44. The Government contested that argument.

A. Admissibility

45. As to the applicant's complaint, raised for the first time in his submissions of 26 November 2013, that his wife and four children would also be exposed in Afghanistan to a real risk of treatment prohibited under Article 3 of the Convention, it does not appear from the case file that the applicant has been given the power to raise this complaint on behalf of his family members (all adults). Consequently, this part of the application must be rejected as incompatible *ratione personae* pursuant to Article 35 §§ 3 and 4 of the Convention. As regards the remainder of the application, the Court notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

46. The applicant argued that his expulsion to Afghanistan would expose him to a real risk of ill-treatment within the meaning of Article 3. It was known in his immediate personal environment in Afghanistan and it had been accepted by the Netherlands Government that he had been a PDPA member and had worked for the KhAD/WAD. That was why he feared that upon his return people and/or factions would link him to the KhAD/WAD and the former communist government. He had noticed that after the mujahideen had come to power people connected to the former communist government had been taken away and killed. The mujahideen had then also searched for him and threatened his father in order to find out the

applicant's whereabouts, and later his brother had been killed. The fact that the applicant himself had never experienced any actual problems did not alter this, bearing in mind what had happened to his father and brother, and for what reason. The applicant had left Afghanistan as a precaution within a week of the mujahideen's seizing power in 1992, and he had never returned since. He would surely attract attention if he returned from abroad, because people in boroughs, villages and so on usually know each other and the news of a person coming from "elsewhere" would possibly reach potential persecutors. People would have suspicions – although unfounded and unjust – that he had personally been involved in human rights violations committed by the KhAD/WAD. Combined with the absence of effective protection by influential relatives, factions or tribes, these factors would result, if he were expelled to Afghanistan, in the applicant's exposure to a real risk of being subjected to treatment prohibited by Article 3.

47. In addition, in his submissions of 26 November 2013, the applicant submitted also that his wife and their four children (three sons born between 1984 and 1990, and one daughter born in 1988), had travelled in 2002 from Pakistan, where they had been living since 1992, to the Netherlands, where they had been granted residence permits for family reunification with the applicant. When his residence permit had been revoked they had also lost theirs, as these were dependent on the applicant's entitlement to residence. Their applications for residence permits not dependent on the applicant had been rejected. Apart from the fact that the applicant's wife and especially the children had become completely integrated in the Netherlands, they had also become totally unaccustomed to and disconnected from Afghan society. If returned they were bound to attract negative attention as they could not and did not wish to follow the Taliban Islamic principles and standards. The applicant argued that these circumstances, taken together with his individual circumstances, led to the conclusion that he and his family would run a real risk in Afghanistan of being subjected to treatment prohibited under Article 3 of the Convention.

(b) The Government

48. The Government accepted, given the applicant's consistent and detailed statements given in the asylum proceedings, that he had been a PDPA member and that he had worked for the KhAD/WAD. However, they considered that his return to Afghanistan would not, solely for this reason, entail a risk of treatment in breach of Article 3 of the Convention.

49. The Government submitted that, as was apparent from various international reports such as the UNHCR Guidelines of December 2007 and July 2009, many former PDPA members and many staff of the former KhAD/WAD were currently employed by the Afghan government, either in the existing security service or otherwise. Furthermore, since December 2010 and to date, the UNHCR Guidelines no longer included ex-

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

50. It was therefore for the applicant to demonstrate special distinguishing features and suitable evidence proving that there were sufficient grounds for holding that in his case removal to Afghanistan would entail exposure to a real risk of being subjected to treatment contrary to Article 3. However, the applicant had failed to do so. He had not demonstrated that the current authorities, the mujahideen or members of the general population held him responsible for the human rights violations committed by the KhAD/WAD. The Government pointed out that, in the course of his interviews with the Netherlands authorities, the applicant had stated that his parents had returned to Afghanistan in January 2005, that he was in telephone contact with his parents every month, and that since their return to Afghanistan they had been approached only on one occasion by an unknown person asking about "the son who worked for the KhAD/WAD" in a normal and cordial conversation. Since then, the applicant's parents and brother had not heard of anyone else looking for the applicant, nor had they personally encountered any problems relating to the applicant's past since their return to Afghanistan. The Government were therefore of the opinion that the applicant had not satisfactorily established that, on account of his activities during the former communist regime, his return to Afghanistan would expose him to a real risk of being subjected to treatment contrary to Article 3.

51. The Government further contended that, although the general security situation in Afghanistan in general still gave cause for great concern, it was not so poor that returning the applicant to Afghanistan would in itself amount to a violation of the Convention. On this point, they referred, *inter alia*, to the Court's findings in the cases of *N. v. Sweden* (no. 23505/09, § 52, 20 July 2010); *Husseini v. Sweden*, (no. 10611/09, § 84, 13 October 2011); *J.H. v. the United Kingdom* (cited above, § 55); *S.H.H. v. the United Kingdom* (no. 60367/10, 29 January 2013); and *H. and B. v. the United Kingdom* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013). Further pointing out that both the International Organisation for Migration and the UNHCR were assisting Afghans who wished to return voluntarily to Afghanistan, the Government considered that the general security situation in Afghanistan was not such that for this reason the applicant's removal to Afghanistan should be regarded as contravening Article 3.

2. The Court's assessment

(a) General principles

52. The Court reiterates at the outset that the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Marguš v. Croatia* [GC], no. 4455/10, § 129 with further references, ECHR 2014 (extracts)).

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

54. The Court further observes that the Contracting States have the right, as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.

In such a case, Article 3 implies an obligation not to deport the person in question to that country. The mere possibility of ill-treatment on account of an unsettled situation in the requesting country does not in itself give rise to a breach of Article 3. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence, except in the most extreme cases where the general situation of violence in the country of destination is of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3.

The standards of Article 3 imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and

that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

Finally, in cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the 1951 Refugee Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *M.E. v. Denmark*, no. 58363/10, §§ 47-51 with further references, 8 July 2014).

55. As regards the material date, the existence of such a risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012). However, since the applicant has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996-V).

(b) Application of the general principles to the present case

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

57. As regards the individual elements of the risk of ill-treatment claimed by the applicant, the Court notes that, one week after the mujahideen seized power in Afghanistan in 1992 the applicant had fled to Pakistan and that, according to the applicant, his family had been visited twice by violent mujahideen who were looking for him; the first time in 1992 in Afghanistan shortly after the applicant had left for Pakistan, and the second time in 1995 in Pakistan close to the border with Afghanistan. After the return of the applicant's parents to Afghanistan in 2005, an unidentified person had asked them a question about the applicant.

58. Apart from these unsubstantiated claims, the Court has found nothing in the case file specifically indicating whether, and if so why, the mujahideen would have been interested in the applicant in 1992 and 1995. It has further found no tangible elements showing that the applicant has since 2005 attracted the negative attention of any governmental or non-governmental body or any private individual in Afghanistan on account of any individual element cited by the applicant. In this context, the Court lastly notes that, from 17 December 2010 and to date, the UNHCR no

longer classifies people who have worked for the KhAD/WAD as one of the specific categories of persons exposed to a potential risk of persecution in Afghanistan.

59. The Court has next examined the question whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention. In its judgment in the case of *H. and B. v. the United Kingdom*, (cited above, §§ 92-93), it did not find that in Afghanistan that was a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there. In view of the evidence now before it, the Court has found no reason to hold otherwise in the instant case.

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

II. RULE 39 OF THE RULES OF COURT

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

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to declare inadmissible the complaint under Article 3 of the Convention brought on behalf of the applicant's wife and their children;

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

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

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

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

Marialena Tsirli	Luis López Guerra
Deputy Registrar	President