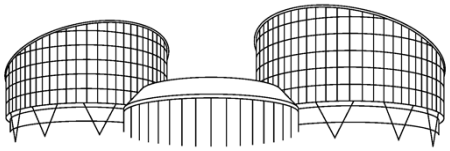

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF A.S.N. AND OTHERS v. THE NETHERLANDS

(Applications nos. 68377/17 and 530/18)

JUDGMENT

Art 3 • Expulsion • No risk of ill-treatment in case of removal of Afghan Sikhs to Afghanistan • Adequate assessment of the risks by the domestic authorities • No compelling humanitarian grounds against removal

STRASBOURG

25 February 2020

Request for referral to the Grand Chamber pending

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.S.N. and Others v. the Netherlands,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Paul Lemmens,
Carlo Ranzoni,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 9 July and 10 December 2019,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 68377/17 and 530/18) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Afghan nationals. The Court decided that the applicants' names should not be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The first application was lodged on 11 September 2017 by a married couple, Mr A.S.N. and Mrs T.K.M., who were born in 1977 and 1982, respectively, and who reside in Capelle aan den IJssel. They lodged the application also on behalf of their minor son and daughter, who were born in 2006 and 2008, respectively.

3. The second application was lodged on 7 December 2017, also by a married couple, Mr S.S.G. and Mrs M.K.G., as well as by Mr S.S.G.'s mother, Mrs D.K.G. These applicants were born in 1974, 1982 and 1947, respectively, and reside in Emmen. Mr S.S.G. and Mrs M.K.G. lodged the application also on behalf of their minor daughter and sons, who were born in 2002, 2008 and 2016, respectively.

4. The applicants were represented by Mr F.L.M. van Haren, a lawyer practising in Amsterdam. The Dutch Government ("the Government") were represented by their Deputy Agent, Ms K. Adhin, of the Ministry of Foreign Affairs.

5. The applicants alleged that their removal from the Netherlands to Afghanistan would violate their right to life under Article 2 of the Convention and would expose them to a real risk of ill-treatment contrary to Article 3 of the Convention.

6. On 22 November 2017 application no. 68377/17 was communicated to the Government.

7. On 16 January 2018, pursuant to a request to that effect by the applicants in application no. 530/18, the Duty Judge decided to apply Rule 39 of the Rules of Court in that application, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court that the applicants should not be expelled to Afghanistan for the duration of the Court's proceedings. The application was communicated on the same day.

8. The Government and the applicants each filed written observations on the admissibility and merits of the applications. In addition, in application no. 68377/17, third-party submissions were received from the Office of the United Nations High Commissioner for Refugees (UNHCR) and Defence for Children – the Netherlands, both of which had been given leave by the President to intervene under Article 36 § 2 of the Convention and Rule 44 § 3. The parties to application no. 68377/17 replied to those submissions.

9. On 27 June 2018 the applicants' representative submitted additional information and observations to the Court. The Court decided, pursuant to Rule 38 § 1 of the Rules of Court, to include this material in the case file for the Court's consideration. A copy was forwarded to the Government, who submitted comments on 10 August 2018.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Application no. 68377/17

10. The applicant family, consisting of a husband, wife and two minor children who were originally from Kabul, Afghanistan, applied for asylum in the Netherlands on 22 October 2015. At that time the children were nine and seven years old, respectively. Officers of the Immigration and Naturalisation Department (*Immigratie- en Naturalisatiedienst*; "IND") of the Ministry of Security and Justice (*Ministerie van Veiligheid en Justitie*) held interviews with the husband and wife on 11 and 13 January 2016. Reports were drawn up of these interviews, which were conducted in Punjabi with the help of an interpreter. The applicants were given the opportunity to make written substantive changes and/or corrections to the reports, which a lawyer did on their behalf on 14 January 2016. Their asylum account may be summarised as follows.

11. On a Friday morning in May 2015 the wife had asked the husband for permission to go to the nearby *Gurdwara* (Sikh temple) together with her sister who had come to visit them. The husband had consented to this. After the wife and her sister left the *Gurdwara*, the sister had been seized and dragged into a white car by unknown men. Unlike the wife, the sister

had not yet put on her burqa. The wife had run straight back to the *Gurdwara*.

12. The husband had still been in bed when his wife's brother had come to the door. He had a threatening letter with him which he had just received, and which said that his sister had been kidnapped, and that the family must not tell anyone this, or they would come for his other sister – the wife – as well. The husband had told him that the two sisters had gone to the *Gurdwara* together. He had then gone straight to the *Gurdwara*, where his wife was still sheltering.

13. The wife's brother had subsequently received more threatening letters, demanding a ransom of four million Afghani. If they did not pay, the kidnapped sister would be killed and his other sister – the wife – would be kidnapped as well. The letters had been signed by the Taliban.

14. Approximately two and a half months after the kidnapping, the applicants had become unable to contact the wife's brother. His shop had been closed and no one knew where he was. The applicants had then started receiving threatening letters at their home address, demanding to be told where the wife's brother was. If they did not do so, the applicants and their children would be kidnapped and murdered.

15. The husband had come into contact with a man who could take people abroad. As it had taken some time to organise the journey (which involved the selling of the family home in order to pay for the trip), the applicants had left Afghanistan five months after the wife's sister had been kidnapped, namely on 16 October 2015. During those months, the wife and her children had not left the house. The husband had continued to go to his work in a fabric shop during this period. He would always ensure that the door to the house was locked, including when he was at home, and the family would live very quietly and without putting any lights on to make it look as if the house was uninhabited.

16. Accompanied by a "travel agent", the applicants had flown from Kabul airport to Dubai, from which city they had taken another flight to an Islamic country whose name they did not know. A taxi had taken them to a river which they had crossed by boat. According to the husband they had then travelled on to the Netherlands by taxi, whereas the wife stated that they had also travelled by train on this part of their journey. They had arrived in the Netherlands on 19 October 2015.

17. In addition to the problems described above, the applicants also stated that they and their children, like other Sikhs, had been bullied and beaten by Muslims on account of the fact that they were Sikhs. They had been verbally abused, people had thrown beef, bottles of urine and stones at them, and had spat at them. The children would be followed by persons with scissors threatening to cut off their hair. They had not been able to play outside and they had last gone to school (for Sikh children) a year before they had left Afghanistan.

18. On 13 July 2016 the Deputy Minister of Security and Justice (*staatssecretaris van Veiligheid en Justitie*) issued a written notification of his intent (*voornemen*) to deny the applicants' asylum applications. The applicants were given the opportunity to submit a written response to the notification (*zienswijze*), which a lawyer did on their behalf by letter of 5 September 2016.

19. The Deputy Minister rejected the applicants' asylum application on 7 September 2016. Based on their statements and the Afghan identity cards of the husband and the wife that had been submitted and been found to be authentic, the Deputy Minister considered their identity, nationality, origins and ethnicity credible. However, although they had shown that they originated from Afghanistan and were familiar with Kabul, they had not established that they had left that country only recently. In this context it was noted, *inter alia*:

- that no tickets and travel documents had been submitted capable of establishing the date the family had left Kabul, even though they claimed to have left on an international flight;
- that the identity cards had been issued a long time previously (the husband's when he was about six years old and the wife's in 1991);
- that the children's identity cards, on the basis of which it could have been established that the applicants had been in Afghanistan at the time of issuance of the cards, had not been submitted, for which fact a series of inconsistent and implausible explanations had been proffered; and
- that the children spoke no Dari or Pashtu, the most commonly spoken languages in Afghanistan, which they would have been expected to speak to some extent, even if they spoke only Punjabi at home and at school, in order to get by in Afghan society.

20. The Deputy Minister further noted that, even if it were to be accepted that the applicants had recently left Afghanistan, it was most unlikely that the wife and her sister would have decided, and been allowed, to go to the *Gurdwara* by themselves. In this context regard was had to the applicants' own statements about the impossibility for Sikh women to go out without male accompaniment, and to country-of-origin information from public sources which confirmed that it was nowadays inconceivable for a Sikh man to allow a female relative to go outdoors unaccompanied. It was similarly found unlikely that the sister would have left the *Gurdwara* while not yet wearing her burqa. The Deputy Minister noted, moreover, that from the interviews held with the applicants it appeared that the husband knew more details of the kidnapping than his wife even though he had not been present and she had. It was further considered remarkable that the Taliban had not contacted the husband directly if they were unable to find his brother-in-law, as they obviously knew the husband's address and, even if the family made it look as if their house was uninhabited, the Taliban could have gone to the husband's shop which he had continued to run. In

addition, it was also considered odd that the kidnappers' demands had changed: whereas they had wanted money from the wife's brother, they had demanded information about that brother's whereabouts from the applicants.

21. The Deputy Minister concluded that as the applicants' account had been found to lack credibility, they had failed to make a plausible case for believing that they feared persecution within the meaning of the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention"). In assessing the risk of treatment contrary to Article 3 of the Convention, he considered that, as the general security situation in Kabul did not amount to one of a most extreme case of general violence, there could not be said to be a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return to that city. It was further concluded that, although the applicants did belong to a minority group which had been designated as vulnerable in the asylum policy in force (see paragraphs 58-60 and 62 below), they had failed to make plausible their fear of treatment contrary to Article 3 of the Convention by submitting "specific individual characteristics" (*specifieke individuele kenmerken*) within the meaning of that policy, nor had it transpired that human rights violations had occurred in their "immediate circle" (*naaste omgeving*).

22. The applicants, through their lawyer, lodged an appeal against this decision, submitting, *inter alia*, that the husband deeply regretted his mistake of allowing his wife and her sister to go to the *Gurdwara* unaccompanied. They emphasised that the information which the husband had about the kidnapping of his sister-in-law had been told to him by his wife and that any discrepancies between the two accounts were minor. They also argued that the persecution which the Sikhs in Afghanistan had had to endure since the 1990s from the Mujahedeen and the Taliban had led to their children being kept indoors and not going to school. These children had therefore never been in a position to pick up Dari.

Moreover, the applicants submitted that in the impugned decision it was disregarded that, in the event that the applicants were not granted asylum for the reason that they had left Afghanistan already a considerable time ago, they would be forced to return to Afghanistan where the Sikh community was no longer a factor of social significance and the number of its members had been decimated. According to the applicants they ought to be granted a residence permit in the Netherlands in accordance with the asylum policy in force**,** according to which Sikhs were considered vulnerable, even if it were assumed that they had left Afghanistan already some years previously, for the reason that if a Sikh family returned to Afghanistan, there would – solely due to the fact that they would be recognised as Sikhs – immediately be a "limited indication of problems" (*geringe aanwijzing*; see paragraphs 58-59 below) within the meaning of that policy.

23. On 10 March 2017 the Regional Court (*rechtbank*) of The Hague, sitting in Haarlem, rejected the appeal, after having held a hearing on 30 January 2017. It considered that the Deputy Minister had on correct grounds found the applicants' account relating to the kidnapping of their sister(-in-law) and the threatening letters to lack credibility, and it was therefore not necessary to deal with the question whether or not the applicants had left Afghanistan recently. Since the applicants had, moreover, not adduced any individualised arguments concerning problems which other Sikhs in their "immediate circle" had experienced, the Deputy Minister had rightly taken the view that the applicants had not made a plausible case for believing that, upon their return to Afghanistan, they would run a real risk of treatment in breach of Article 3 of the Convention (see paragraphs 58-59 below).

24. The applicants' further appeal and request for a provisional measure, lodged by a lawyer on their behalf to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), were rejected on 4 April 2017. The appeal was found not to provide grounds for quashing the impugned ruling (*kan niet tot vernietiging van de aangevallen uitspraak leiden*). Having regard to section 91(2) of the Aliens Act 2000 (*Vreemdelingenwet 2000*), no further reasoning was called for as the arguments submitted did not raise any questions requiring a determination in the interest of legal unity, legal development or legal protection in the general sense. No further appeal lay against this decision.

25. On 12 April 2017 the applicants completed a form in order to notify the IND that they wished to lodge a new asylum application. In an accompanying letter of the same date, their lawyer wrote that, even assuming the applicants had left Afghanistan a number of years before applying for asylum in the Netherlands, the fact remained that it was not in dispute that they were Sikhs from Afghanistan, who would have to return to that country if their asylum applications were refused. The lawyer added that Sikhs in Afghanistan, and more particularly in Kabul, no longer constituted an ethnic/religious community whose members were capable of exercising their civil rights. They had withdrawn into the *Gurdwara* in the Karte Parvan district and there were reportedly also two Sikh families living in the *Gurdwara* in the Shor Bazar district. Moreover, all reports of States and NGOs on the position of Sikhs in Afghanistan were agreed on the end of the social relevance and independent functioning of the Sikh community in Afghanistan. The position of Sikhs in Afghanistan had become marginalised to such an extent that they could not reasonably be presumed capable of providing Sikhs returning from Europe with a safe reception within their community.

26. The applicants lodged their fresh application for asylum on 6 June 2017 and they were interviewed on the same day. They also submitted a letter of 13 April 2017 written by the officer in charge of the office in the

Netherlands of the United Nations High Commissioner for Refugees (UNHCR) to the applicants' legal representative in which, having been informed of the imminent deportation of the Afghan Sikh families concerned, UNHCR wished to draw the attention of the IND to the situation of Sikhs in Afghanistan. In that context, they cited the section on Hindus and Sikhs from their Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan of April 2016 (see paragraph 74 below), on the basis of which UNHCR considered that, depending on the individual circumstances of the case, members of the Sikh community may be in need of international protection. It was additionally noted in the letter that, since the aforementioned Guidelines had been published, the Sikh community in Afghanistan had continued to face threats and flee Afghanistan; it was estimated that in three decades 99% of the Sikh community had left the country. UNHCR further emphasised that when a group had been determined to be at risk, as the Deputy Minister of Security and Justice had done as regards Sikhs in Afghanistan, this reduced the requirement for other types of evidence such as past persecution. In UNHCR's view, it was sufficient for the applicant to establish the fact that he or she belonged to the group because of the risk of harm that had already been objectively established for members of that group. Based on this analysis as well as on the constantly worsening situation of Sikhs in Afghanistan, UNHCR urged the IND to reassess the applicants' refugee claim.

27. The report drawn up of the interview conducted with the husband contains, *inter alia*, the following:

> "*Are you still in touch with anybody in Afghanistan?*
>
> No.
>
> *You said your children cannot go to school. Did your children ever go to school?*
>
> There are public schools, but there are many restrictions there for children who are not Muslim. They could not go to school there.
>
> ...
>
> *Why do you think you will end up in prison or killed?*
>
> I mean that we feel imprisoned. We can only stay in the *Gurdwara*. Not outside. And we no longer have work."

The report of the interview with the wife includes the following:

> "*Are there any other reasons why you have applied for asylum again?*
>
> We cannot return to Afghanistan because the situation for Sikhs is very bad, it is not safe for women, children cannot go to school and even for men it is not safe."

28. On 7 June 2017 the applicants were notified of the Deputy Minister's intention to declare their second asylum application inadmissible for the reason that no new elements or findings, relevant for the assessment

of their application, had been presented by them or had arisen. As to the letter from the officer in charge of the UNHCR office in the Netherlands (see paragraph 26 above), the Deputy Minister noted that this referred to country-of-origin information which already existed at the time of the proceedings on the applicants' first asylum application and could thus have been submitted in those proceedings, but had not been. For that reason, that information could not be considered as new elements or findings. The Deputy Secretary further observed that the applicants had once again claimed that the difficult situation for Sikhs in Afghanistan rendered it dangerous for them to return and that their children would be unable to go to public schools; he considered that these claims also did not amount to new elements or findings. He further referred to the policy in force (see paragraphs 58-59 below) and held that the applicants had not made plausible the existence of "limited indications", required to accept that they feared treatment in breach of Article 3 of the Convention.

On behalf of the applicants, their lawyer responded in writing to the notification, and he also made written substantive changes and/or additions to the reports of the interviews, on the same day.

29. On 8 June 2017 the Deputy Minister declared the applicants' second application inadmissible. Reference was made to the considerations set out in the notification (see paragraph 28 above), which were to be seen as an integral part of the decision. The response to those considerations submitted on behalf of the applicants had not led the Deputy Minister to come to a different opinion.

30. In their appeal against the Deputy Minister's decision, lodged on their behalf by a lawyer, the applicants referred, *inter alia*, to the case of a Sikh Afghan man who, together with his wife and child, had been expelled to Kabul from the Netherlands in March 2017, despite UNHCR having urged the Dutch authorities – in a letter in much the same terms as the one mentioned in paragraph 26 above – to reassess the family's refugee claim. This man had recently informed the UNHCR office in Kabul that he and his family were living with a friend in a relatively underprivileged and poor neighbourhood, near a *Gurdwara*, where other members of the Sikh community also resided (as well as Muslims). An attempt had been made to rob him and he had since been receiving threatening phone calls telling him that next time the callers would know what to do with him. They had also insulted his religion. The man had reported this incident to the police. In their report of their meeting with the man, UNHCR expressed the hope that the Netherlands and other European States would take due account in future of the dire situation in Kabul as well as the Afghan Government's lack of capacity for providing adequate reintegration support and effective State protection.

31. Following a hearing on 29 June 2017, the appeal was dismissed by the Regional Court of The Hague, sitting in Middelburg, on 6 July 2017. It

considered that the Deputy Minister had rightly found that no new elements or findings had been submitted.

32. In their further appeal against that ruling, the applicants argued that the Dutch Ministry of Foreign Affairs' country reports on Afghanistan had been stating for years that the Sikhs in Afghanistan were suffering many forms of harassment, and the applicants had also described how they themselves had been exposed to aggression and threats, just like other Sikhs living in their neighbourhood. It had therefore been wrong to hold, as the Regional Court had done, that the applicants had failed to adduce individualised arguments relating to problems experienced by other Sikhs in their "immediate circle".

On 27 July 2017 the provisional-measures judge of the Administrative Jurisdiction Division of the Council of State rejected the further appeal, as well as the request for a provisional measure, both of which had been lodged by a lawyer on the applicants' behalf, with the same reasoning as set out in paragraph 24 above.

B. Application no. 530/18

33. The applicant family, originally from Kabul, lodged a first asylum application on 6 June 2014. At that time the family consisted of a grandmother, father, mother and two children[1], who were at that time five and eleven years old, respectively. The IND held interviews, conducted in Punjabi with the help of an interpreter, with the adult members of the family on 28 and 30 July 2014. Reports were drawn up of those interviews and the applicants were given the opportunity to make written substantive changes and/or additions to those reports, which a lawyer did on their behalf on 22, 29 and 31 July 2014. Their asylum account may be summarised as follows.

34. About eight months prior to the family's departure, three people had forced their way into their home. The father had not been at home. Those present in the house had been told that they were to give the intruders everything they had. As this was not enough, the intruders had grabbed the mother and tried to kidnap her. The grandmother, together with her husband, had tried to protect their daughter-in-law, but the grandmother's husband was hit on the head and beaten. After the grandmother and the mother had shouted for help, the intruders had left. The grandmother's husband had died as a result of the beating.

35. The applicants further described how they had constantly been subjected to harassment in Kabul on account of their adherence to the Sikh religion: they had been spat at, insulted, called "infidels", and pressured into converting to Islam. The grandmother had had a stone thrown at her head while on her way home from the *Gurdwara*, and the father had had his

1. The youngest son had not yet been born.

turban pulled off his head. The women and children of the extended family had barely ventured outside, and the children had therefore not gone to school. A school for Sikh children had closed down; although they were allowed to go to Islamic schools, the applicants considered it too dangerous for them to do so. For this reason, the children only spoke Punjabi – the language spoken at home – and not Dari.

36. After the grandmother's husband had been killed, they had held a family council, together with the grandmother's brother and the latter's wife who lived above them, and it had been decided that all of them would leave Afghanistan. They had sold their house and the fabric store owned by the grandmother's husband and his brother, where the father also worked. During this time they had received two threatening letters, in which they had been called infidels. The grandmother's brother and his wife had gone to the United Kingdom. Although the applicants would also have liked to go there because they had family living there, their "travel agent" had informed the father that that would take some time to organise and, wishing to leave Afghanistan for a destination safe for Sikhs as soon as possible, they had agreed to go to the Netherlands.

37. On 4 June 2014, accompanied by a "travel agent", the applicants flew from Kabul to Dubai, from where they used a connecting flight to travel to an unknown city. They were then taken by car to the Netherlands, where they arrived the next day.

38. In the Netherlands, the applicants were also interviewed for the purposes of language analysis. In reports drawn up by the IND's Language Analysis Section (*Bureau Land en Taal*) of 1 September 2014, it was concluded that, on the basis of their proficiency in Punjabi and Dari (as well as Pashtu in the case of the father), the applicants unequivocally displayed the linguistic characteristics of Afghans.

39. On 1 December 2014, the Deputy Minister of Security and Justice notified the applicants in writing of his intention to reject their asylum applications. The applicants were given the opportunity to respond in writing to that notification, which a lawyer did on their behalf on 29 December 2014 and 20 January 2015.

40. The Deputy Minister rejected the asylum applications on 9 February 2015 primarily on the grounds that it was not considered credible that the applicants had only recently left Afghanistan. It was held in this context, *inter alia*:

- that they did not have up-to-date knowledge of the situation in Kabul where they claimed to have been residing (for example, they did not know the name of the mayor of Kabul);
- the mother could name only one street in Kabul;
- the father did not know the exact location of a polling station in their neighbourhood and his claim that this was because Sikhs did not vote was demonstrably incorrect;

- the father claimed to have spent just six weeks in military service in 1992 and having been tasked only with building-maintenance duties, which was considered unlikely given that the Afghan army had been engaged in combat with the Mujahedeen at the time;

- according to the applicants there were a number of *Gurdwaras* in Kabul, but they appeared unaware that at the alleged time of their departure only one of those had still been active;

- their description of the *Gurdwara* attended by them was incorrect;

- contrary to the applicants' claims, a school for Sikh children had been open in Kabul around the time of their alleged departure; and

- it was unlikely that the children would not have been taught Dari, the most commonly spoken language in Afghanistan, if they genuinely had been living in that country.

Having regard, also, to the dates on which the father and mother's identity cards had been issued (1974 and 1986, respectively), it was even considered possible that the applicants had not been living in Kabul for decades.

Not believing that the applicants had recently been resident in Kabul, the Deputy Minister found that no credence could be attached to the events which they claimed had taken place in the period preceding their departure for the Netherlands. Moreover, the Deputy Minister considered that the applicants' accounts of those alleged events contained many contradictions and inconsistencies, in particular as regards the incident during which the grandmother's husband had allegedly been killed and the threatening letters which they had purportedly received. For that reason it was not believed that those events had actually taken place. Although it was believed that the applicants were Afghan Sikhs, who were considered a "vulnerable minority group" under Netherlands asylum policy (see paragraphs 58-60 and 62 below), the applicants had failed to make plausible their fear of treatment contrary to Article 3 of the Convention by submitting "specific individual characteristics", nor had it transpired that any human rights violations had been committed in their "immediate circle".

41. On the applicants' behalf, a lawyer lodged an appeal against this decision. He argued, *inter alia*, that the assumption that the applicants had been gone from Afghanistan already for a protracted period of time meant that there was even less reason than in the case of a recent departure to accept that they could receive social and economic assistance from their own Sikh community. If expelled to Kabul the applicants would be confronted with such deplorable humanitarian conditions that it would amount to a breach of their rights under Article 3 of the Convention.

42. Following a hearing on 7 July 2015, the applicants' appeal was upheld by the Regional Court of The Hague on 26 October 2015 in view of the fact that asylum had been granted in a number of other cases concerning Sikhs from Afghanistan despite the fact that in those cases also it had not

been believed that the persons concerned had left their country of origin shortly before arriving in the Netherlands.

43. However, on a further appeal lodged by the Deputy Minister, the Administrative Jurisdiction Division of the Council of State found against the applicants on 29 August 2016. It held that some of the decisions invoked by the applicants concerned cases which were not sufficiently similar to theirs and that the other decisions to which they referred amounted to an erroneous application of the policy in force. As the impugned decision of the Regional Court, therefore, could not stand, the Administrative Jurisdiction Division of the Council of State went on to examine itself the grounds of appeal that had been submitted by the applicants to the Regional Court. It noted that according to the applicants, they ought to be granted a residence permit under the asylum policy in force, claiming that the following circumstances should qualify as "limited indications of problems" within the meaning of that policy: only very few Sikhs remained in Kabul; as Sikhs, they would be immediately recognisable and subjected to violence; they would be homeless and economically disadvantaged; and due to the small number of Sikhs in Afghanistan and the fact that they had not been living in that country for some time, they would not be able to call on the remaining Sikhs for help. Reiterating that in order to be eligible for a residence permit under the terms of the policy in force, the applicants were required to demonstrate "limited indications", the Administrative Jurisdiction Division of the Council of State found that the circumstances adduced by the applicants were not "specific individual characteristics" and nor did they relate to problems experienced by other Sikhs in their "immediate circle". Given that they had not been living in Afghanistan for some time, that their asylum accounts had been considered as lacking in credibility, and that they had not argued that others in their "immediate circle" had experienced problems as Sikhs, the Administrative Jurisdiction Division of the Council of State concluded that they had not plausibly demonstrated the existence of "limited indications".

44. The applicants announced their intention to lodge a new asylum application with the immigration authorities on 24 February 2017. In an accompanying letter of the same date – the contents of which were almost the same as that of the letter mentioned in paragraph 25 above –, their lawyer pointed to the worsening security situation of Sikhs in Afghanistan and referred to a letter of 19 April 2017 concerning the applicants, written by the officer in charge of UNHCR's office in the Netherlands, the text of which was virtually the same as that of the letter mentioned in paragraph 26 above.

The letter of the applicants' lawyer further contained the following:

> "It is also important to take account of the fact that D.K.G, born ... on 1 January 1947, is a member of the family. ... This 70-year-old woman's medical file indicates that she requires practically continuous medical care which she will be unable to

receive as an elderly Sikh lady in Islamic Kabul. ... The family also comprises H.S.G. who was born in the Netherlands and is currently nine months old. Due to the fact that the family counts a very young child and a very old woman amongst its members it will be even more difficult to find a safe place of refuge in Kabul than would in any event be the case."

45. The applicants lodged their new asylum request on 20 September 2017 and they were interviewed on the same day. At their request, the interviews took place in Dari, with the help of an interpreter. The report drawn up of the interview with the father contains, *inter alia*, the following:

"*Are there other reasons why you are applying for asylum again?*

My mother is sick. She is very old and will not get the help she needs in Afghanistan.

...

My wife is unable to go outside in Afghanistan and my daughter cannot go to school there.

...

Have you had any contacts with persons in Afghanistan recently?

No. We have not had any contacts with persons in Afghanistan."

The report of the interview with the mother includes the following:

"*Do you have any relatives in Afghanistan with whom you are in touch?*

No. Nobody at all.

Do you have any friends in Afghanistan with whom you are in touch?

No.

Are there any Sikhs in Afghanistan who you do perhaps not consider as friends but with whom you are in touch?

No. We do not have anybody."

The report of the interview with the grandmother contains, *inter alia*, the following:

"*Suppose that you return to Afghanistan. What will happen to you?*

I used to live in my brother's house. My brother has sold the house. I have no money and no accommodation. I also do not have anybody who can protect me.

...

Are there any other reasons why you are applying for asylum again?

My health is not good. I have been well taken care of in the Netherlands. I have had surgery and I get medication. This would not be possible in Afghanistan. Every hospital in Afghanistan refuses us. Nobody there is interested if you die. I am also happy that my grandchild is able to go to school here in the Netherlands. That is not possible there."

46. On 20 September 2017 the applicants were notified that the Acting Deputy Minister intended to reject the renewed applications for asylum. In

these notifications the Deputy Minister identified as relevant elements of the fresh asylum applications, *inter alia*, the allegedly deteriorated situation of Sikhs in Afghanistan and the applicants' claim that upon return they would be subjected to discriminatory and aggressive treatment. In relation to the first element, the Deputy Minister considered that to the extent the applicants argued that they were eligible for an asylum residence permit because they were Sikhs and belonged to an "at-risk group" as well as to a "vulnerable minority group" (see paragraph 58 below), their asylum accounts had been found to lack credibility, and their submissions in support of their repeat asylum requests included neither "specific individual characteristics" nor circumstances experienced by others as Sikhs in their "immediate circle". No plausible case had thus been made out for the existence of "limited indications" on the basis of which it ought to be accepted that the applicants, upon return to their country of origin, would run a real risk of serious harm. It could, accordingly, not be concluded that there were "limited indications" rendering the applicants eligible for an asylum residence permit within the framework of Article 3 of the Convention.

In addressing the second relevant element named above, that is the individual circumstances submitted by the applicants, the notification to each adult member of the family contained the following, almost identically worded, paragraph:

> "The person concerned has further submitted that upon return to his country of origin he will be subjected to discrimination and aggression. The person concerned has not plausibly demonstrated that he runs a real risk of serious harm upon return. In that context it is considered that it cannot be concluded that the person concerned runs a real risk of serious harm solely for the reason that he is a Sikh. As already noted, both the asylum account and the alleged recent departure of the person concerned have been found not to be credible in the previous asylum request. It can therefore not be concluded that there would be a real risk in this context. It appears from the decision of the Council of State of 29 August 2016 in the proceedings on the previous asylum request that the arguments relating to this relevant element do not succeed." (See paragraph 43 above for the Council of State's decision of 29 August 2016.)

47. The applicants were given the opportunity to respond in writing to the notification, which their lawyer did on their behalf by letter of 20 September 2017. On the same day the lawyer also made written substantive changes and/or additions to the reports of the interviews.

48. The second asylum application was rejected by the Acting Deputy Minister on 22 September 2017. As regards the reasons for these decisions, the Acting Deputy Minister referred to the notifications in which the most relevant aspects of the cases had been extensively addressed (see paragraph 46 above). The considerations set out in the notifications were to be seen as an integral part of the decisions. The Acting Deputy Minister considered that the response to the notification as submitted by the applicants gave no cause to reach a different conclusion than the one set out

in the notifications and concluded that the applicants had still not substantiated their alleged fear of persecution and of treatment contrary to Article 3 of the Convention by submitting "specific individual characteristics".

49. The applicants' lawyer lodged an appeal against this decision, which was rejected by the Regional Court of The Hague, sitting in Middelburg, on 23 October 2017. The Regional Court held, *inter alia*:

> "12. ... the respondent is entitled to require the appellants to make plausible with limited indications that they fear persecution in Afghanistan. Since it has been settled in law [in the proceedings on the applicants' first asylum application] that the appellants' asylum account lacks credibility, no limited indications pertain.
>
> ...
>
> 14. At the hearing the appellants once more referred to ... a report from the US Department of State entitled '2016 Report on International Religious Freedom, Afghanistan 15 August 2017'. This report states that the number of Sikhs in Afghanistan is decreasing. According to the appellants this also entails a deterioration of the situation for them upon return. They will no longer have a network to fall back on.
>
> In the impugned decision the respondent ... correctly took the view that this document and the other documents [submitted] cannot be considered as the required specific individual characteristics which would lead to the appellants being eligible for asylum for the reason that they belong to an at-risk group or a vulnerable minority. These documents do not concern the appellants' individual situation."

50. The final decision was taken by the Administrative Jurisdiction Division of the Council of State, which rejected the further appeal, lodged by the applicants' lawyer, on 23 November 2017 with summary reasoning in accordance with section 91(2) of the Aliens Act 2000 (see paragraph 24 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum procedure and policy

1. Asylum procedure

51. The admission, residence and expulsion of aliens are governed by the Aliens Act 2000 (*Vreemdelingenwet 2000*), the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), the Aliens Regulation 2000 (*Voorschrift Vreemdelingen 2000*) and the Aliens Act 2000 Implementation Guidelines (*Vreemdelingencirculaire 2000*). The General Administrative Law Act (*Algemene wet bestuursrecht*) is also applicable, except where otherwise stipulated.

52. Under section 29 paragraph 1 of the Aliens Act 2000, a temporary residence permit for the purpose of asylum, may be issued to an alien:

(a) who is a refugee within the meaning of the 1951 Convention;

(b) who makes a plausible case that he or she has good grounds for believing that, if expelled, he or she will face a real risk of being subjected to serious harm, consisting of:

1. death penalty or execution;
2. torture or inhuman or degrading treatment or punishment;
3. a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

53. Under section 31 paragraph 1 of the Aliens Act 2000, an application for a temporary asylum residence permit is denied if the alien has not satisfactorily established that his or her application is based on circumstances that in themselves or in combination with other facts constitute legal grounds for such a permit to be granted. The assessment as to whether the alien's account makes him or her eligible for a residence permit takes place only after it has been determined that his or her statements are credible; the assessment is based only on those statements that are considered to be credible. In the asylum procedure, the alien is given an opportunity to demonstrate the veracity of his or her account by means of statements if he or she is unable to produce documents for this purpose. The statutory framework thus imposes on the asylum-seeker the burden of proof to establish the veracity of his or her account.

2. Country-specific asylum policies

54. The Deputy Minister responsible for immigration may establish country-specific asylum policies (section 42 paragraph 2 of the Aliens Act 2000). These policies are based on country-of-origin information set out in country reports (*ambtsberichten*), regularly issued by the Dutch Ministry of Foreign Affairs (see, for instance, paragraphs 67-72 below). When compiling country reports, the Ministry of Foreign Affairs uses publicly available sources, including NGO reports and reports by Dutch diplomatic missions. The Government also base their assessment of the situation in a country and its implications for a specific case on information from various general sources, such as the European Asylum Support Office (EASO), UN agencies, the United Kingdom Home Office and the United States State Department, in so far as the relevant country reports do no already include the information from these sources.

55. In a country-specific asylum policy, the Deputy Minister may determine whether an exceptional situation exists in which any individual is at risk of being exposed to treatment contrary to Article 3 of the Convention or to Article 15(c) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ("the EU

Qualification Directive), purely due to the overall situation with regard to violence and human rights (section C2/3.3 of the Aliens Act 2000 Implementation Guidelines).

56. The Deputy Minister may also determine whether there are specific groups in the country in question whose members are systematically exposed to persecution on one of the grounds specified in Article 1A of the 1951 Convention (*groepsvervolging*; section C2/3.2 of the Aliens Act 2000 Implementation Guidelines). A person claiming he or she will be subjected to such persecution upon return to the country of origin will need to make a plausible case for believing that he or she belongs to a group so designated in the country-specific policy.

(a) "At-risk groups"

57. The Deputy Minister may further designate so-called "at-risk groups" (*risicogroepen*) when it appears that persecution of individuals belonging to the population group at issue occurs in the country of origin. For such designation, it is not required that the persecution is systematic – it may also be of a more occasional nature. Section C2/3.2 of the Aliens Act 2000 Implementation Guidelines provides, in so far as relevant as follows:

> "For an alien who belongs to a population group designated as an at-risk group in country-specific asylum policy ... and who can give a credible account that is specific to his or her situation, limited indications suffice to make a plausible case that problems connected with one of the grounds for persecution give rise to a well-founded fear of persecution.
>
> (*De vreemdeling die behoort tot een bevolkingsgroep die in het landgebonden beleid ... is aangewezen als een risicogroep, kan indien er sprake is van geloofwaardige en individualiseerbare verklaringen, met geringe indicaties aannemelijk maken dat zijn problemen die verband houden met één van de vervolgingsgronden leiden tot een gegronde vrees voor vervolging.*)"

The requirement of individualisation will continue to apply to the alien belonging to an "at-risk group".

(b) "Vulnerable minority groups"

58. In addition, a population group can also be designated as a "vulnerable minority group" (*kwetsbare minderheidsgroep*). The elements which are always taken into account in such designation are whether arbitrary violence or arbitrary human rights violations, such as murder, rape and ill-treatment, are occurring in the country or in a particular area of the country, and the extent to which individuals belonging to that population group are able either to avail themselves of effective protection against risks of violence or human rights violations or to evade those risks by settling elsewhere.

Section C2/3.3 of the Aliens Act 2000 Implementation Guidelines provides, in so far as relevant as follows:

> "For an alien who belongs to a population group designated as a vulnerable minority in country-specific asylum policy and who can give a credible account that is specific to his or her situation, limited indications suffice to make a plausible case that he or she fears serious harm [within the meaning of section 29 paragraph 1 sub (b) of the Aliens Act 2000; see paragraph 52 above]."
>
> (*De vreemdeling die behoort tot een bevolkingsgroep die in het landgebonden beleid is aangewezen als een kwetsbare minderheidsgroep, kan indien er sprake is van geloofwaardige en individualiseerbare verklaringen, met beperkte indicaties aannemelijk maken dat hij vreest voor ernstige schade daden als hier bedoeld.*)

In such a case, the individualisation requirement is not limited to the alien's personal experiences. On the basis of the alien's statements, the IND takes into consideration human rights violations committed against other members of the "vulnerable minority group" in the individual's "immediate circle". The alien is then not required to demonstrate that the human rights violations were inspired by the victim's belonging to the "vulnerable minority group". These human rights violations may also have taken place in the alien's "immediate circle" in the country of origin after they left the country (section C2/3.3 of the Aliens Act 2000 Implementation Guidelines). However, no asylum residence permit is granted to a person belonging to a "vulnerable minority group" if a considerable period of time has elapsed between the human rights violations and the departure from the country of origin (ibid.).

59. In Working Instruction (*werkinstructie*) no. 2013/14 (AUA) of 26 June 2013, the IND's general director set out what the policy rules on "vulnerable minority groups" as contained in the Aliens Act 2000 Implementation Guidelines mean in practice, including what the "limited indications", which suffice to make a plausible case that an individual's fear of serious harm is credible (see paragraph 58 above), entail. It states, *inter alia*, that the "limited indications" test will already lead to the conclusion that the alleged fear is well-founded in the case of human rights violations committed against the individual himself or herself that are of a lesser degree of seriousness. Such a violation may not in itself be sufficiently serious to amount to treatment in breach of Article 3 of the Convention, but may constitute a violation of that provision if it is repeated or is seen in conjunction with other human rights violations. Examples of such types of treatment are given as physical violence, kidnapping, (light) prison sentences and intimidations. Treatments not considered as "limited indications" are, for example, incidental threats and comments, and spitting.

Human rights violations committed against members of the "vulnerable minority group" in the individual's "immediate circle" must attain a minimum level of severity and amount to treatment in breach of Article 3 in order to be considered as "limited indications".

B. Country-specific asylum policy concerning Afghanistan

60. In the country-specific asylum policy concerning Afghanistan no group has been identified as being systematically exposed to persecution, either at the time the applicants lodged their first applications for asylum or since. However, in the policy in force at the time the applicants first applied for asylum, Afghans who hailed from an area where they belonged to a religious minority had been designated both as an "at-risk group" and a "vulnerable minority group". Moreover, Afghans who adhered to another religion than Islam were also considered a "vulnerable minority group", regardless of the area of Afghanistan where they came from.

61. In a letter to the Lower House (*Tweede Kamer*) of Parliament of 23 February 2017, the Deputy Minister of Security and Justice set out the consequences which the new country report, issued by the Ministry of Foreign Affairs on 15 November 2016 (see paragraphs 67-69 below), had for the country-specific asylum policy on Afghanistan. The Deputy Minister held that although the report showed that the general security situation in Afghanistan was worrisome, the existing security structures had not undergone such changes, and the number of civilian casualties caused by the armed conflict was – relatively speaking and also having regard to the number of inhabitants of the country – not so high that there could be said to exist an exceptional situation, in which any individual was at risk of being exposed to treatment contrary to Article 3 of the Convention or to Article 15(c) of the EU Qualification Directive. Neither did the country report lead the Deputy Minister to conclude that any group in Afghanistan was systematically exposed to persecution.

62. As regards non-Muslim religious minorities, the Deputy Minister stated the following in his letter:

> "The Afghan Constitution stipulates that religions other than Islam are free. In practice, however, it remains extremely difficult for religious minorities to practice their faith openly. Non-Muslims, in particular converts, apostates, (converted) Christians, Baha'i, Hindus and Sikhs may encounter societal discrimination, restrictions in their educational and economic opportunities and (violent) confrontations. These groups also do not enjoy much legal protection as regards their religion.
>
> Non-Muslims, in particular converts (to Christianity), apostates, Christians, Baha'i and Sikhs/Hindus in any event belong to a marginalised minority and experience serious problems as a result. For this reason I have decided to designate these groups separately as at-risk groups in the policy."

The Deputy Minister further announced that the policy on "vulnerable minority groups" would be adjusted by analogy with the adjustment of the policy on "at-risk group"; Sikhs were thus also designated a "vulnerable minority group" (see paragraphs 57-58 above).

63. In a letter of 11 July 2018, the Deputy Minister of Justice and Security (*staatssecretaris van Justitie en Veiligheid*; the successor to the

Deputy Minister of Security and Justice) informed the Lower House of Parliament that, apart from on one point not relevant to the present case, neither the thematic country report (*thematisch ambtsbericht*) on the security situation in Afghanistan, issued by the Ministry of Foreign Affairs on 15 June 2018, nor the country guidance note on Afghanistan published by the European Asylum Support Office (EASO) in June 2018 (see paragraph 78 below) gave reason to adjust the country-specific policy on asylum-seekers from Afghanistan.

64. The most recent country report on Afghanistan drawn up by the Ministry of Foreign Affairs is dated 1 March 2019 (see paragraphs 70-72 below). It transpires from a letter of 1 July 2019 from the Deputy Minister of Justice and Security to the Lower House of Parliament that the latest country report gave her no cause to amend the country-specific asylum policy for Sikhs from Afghanistan.

III. RELEVANT EUROPEAN UNION LAW

65. In addition to regulating refugee status within the European Union legal order, the Qualification Directive makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection status as someone who would face a real risk of suffering serious harm if returned to his or her country of origin and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.

66. "Serious harm" is defined in Article 15 as consisting of:

> "a) death penalty or execution; or
>
> b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

IV. RELEVANT INFORMATION ABOUT SIKHS IN AFGHANISTAN

A. Country reports on Afghanistan drawn up by the Dutch Ministry of Foreign Affairs

1. Report of 15 November 2016

67. This report states that, in practice, it remains difficult for religious minorities to practice their faith openly. Non-Muslims, in particular converts, apostates, (converted) Christians, Hindus and Sikhs may encounter societal discrimination, restrictions in their educational and economic opportunities and (violent) confrontations. Those groups also have little legal protection as regards their religion.

68. In a subsection entitled "Hindus and Sikhs", the report indicates that no reliable figures exist on the number of Sikhs and Hindus in Afghanistan, with estimates ranging from 2,500 persons to 1,000 families. In Kabul at least one of the eight *Gurdwaras* was still active, but according to information from the British embassy in Kabul, there were still seven *Gurdwaras* in Kabul. Sikhs and Hindus were in principle free to practice their faith and one seat was reserved for them in the Senate. A request for a reserved seat in the Lower House for the 2015 parliamentary elections had been refused.

69. According to the report, Sikhs and Hindus suffered – like other minorities – from discrimination and intimidation, on the part of the State (in political representation and in State employment) as well as in the social field. Hindu, and especially Sikh, children were often harassed by other children. They had their own schools, but because many Hindus and Sikhs had left Afghanistan in the past years and their economic situation was poor, many of those schools had been closed. Reportedly, there were still separate Sikh schools in Kabul, Helmand and Ghazni, which were also attended by Hindu children. The Afghan Government contributed financially to those schools. Both groups experienced problems finding places to conduct their funeral ceremonies (cremation). In the Islamic religion, cremation of the dead is not allowed. The administration had provided Hindu and Sikh communities with police protection during funerals. As regards disputes about land, when they fell victim to illegal occupation and the taking of land, members of the community did not feel protected by the administration. They were also unsuccessful in securing the return of land that had been taken during the Mujahedeen era. Out of fear for revenge, they renounced repayments provided by law.

2. Report of 1 March 2019

70. According to this report, freedom of religion is hindered by violence against and discrimination of religious minorities. Persons deviating from religious or social norms run the risk of ill-treatment due to conservative attitudes, intolerance and the inability or unwillingness of law-enforcement officials to intervene.

71. In a subsection entitled "Hindus and Sikhs", the report states that no reliable data are available as to the current size of the Hindu and Sikh communities in Afghanistan. In the "Afghanistan 2017 International Religious Freedom Report" of the United States Department of State, Sikh and Hindu leaders estimated that there are currently 245 Sikh and Hindu families, comprising a total of 1,300 persons, in Afghanistan. Hindus and Sikhs indicated that they were able to practise their religion in public. It was reported that Hindus and Sikhs suffer discrimination on the part of the State, including when seeking access to the legal system, in the field of political participation and government employment. They are also confronted with

societal discrimination and intimidation. Hindus and Sikhs fell victim to illegal occupation and taking of their land, but they refrained from legal steps out of fear of retaliation.

72. According to the report, children from the Hindu and Sikh communities are often exposed to harassment by other children at ordinary Afghan schools. The communities used to have their own schools, but since in recent years many Hindus and Sikhs left Afghanistan – many of whom went to India – and their economic situation was bad, many of these schools were closed. The United High Commissioner for Refugees reported that in the entire country there was only one State school for Sikh children left.

B. Guidelines drawn up by the Office of the United Nations High Commissioner for Refugees (UNHCR)

1. Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, April 2016

73. In April 2016, UNHCR published an update of its Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the April 2016 Guidelines"). According to UNHCR, persons fleeing Afghanistan might be at risk of persecution within the meaning of the 1951 Convention for reasons that were related to the ongoing armed conflict in Afghanistan, or on the basis of serious human rights violations that were not directly related to the conflict, or a combination of the two. UNHCR considered that in relation to individuals with the profiles as set out in the Guidelines, a particularly careful examination of possible risks was required.

74. One of the profiles identified was that of "members of minority religious groups". Even though the Afghan Criminal Code lays down that a person who attacks a follower of any religion shall receive a short-term prison sentence of not less than three months and a fine, non-Muslim minority groups reportedly continued to suffer societal harassment and in some cases violence. UNHCR considered that members of minority religious groups might be in need of international refugee protection on the grounds of religion or other relevant grounds, depending on the individual circumstances of the case. As regards Sikhs and Hindus, the Guidelines stated as follows (footnotes omitted):

> "Although reliable data about the current size of the Sikh and Hindu communities in Afghanistan are not available, large numbers of Sikhs and Hindus are believed to have left Afghanistan as a result of the severe difficulties they faced. The small number of Sikhs and Hindus who are reported to remain in Afghanistan have reportedly been left even more vulnerable to abuse, particularly by the police and by extremist elements of the Muslim community. Although the Sikh and Hindu communities are allowed to practise their religion publicly, they reportedly continue to face discrimination at the hands of the State, including when seeking political participation and government jobs, despite public statements by President Ghani to promote tolerance and increase

their political representation. They reportedly also continue to face societal discrimination and intimidation. Both communities report difficulties in carrying out funerals in accordance with their customs, due to harassment and discrimination. While the police are reported to provide protection to Hindu and Sikh communities during burial rituals, members of the two communities report feeling unprotected by State authorities in other contexts, including in relation to land disputes. Sikhs and Hindus have reportedly been victims of illegal occupation and seizure of their land, and have been unable to regain access to property that was seized during the Mujahideen era. Members of the Sikh and Hindu communities reportedly refrain from pursuing restitution through the courts, for fear of retaliation. A small number of schools for Hindu and Sikh children have reportedly been established, but Hindu and Sikh children attending government schools in Kabul are reported to be subjected to harassment and bullying by other students."

75. The Guidelines also contained the following (footnotes omitted):

"Afghans who seek international protection in Member States of the European Union (EU) and who are found not to be refugees under the 1951 Convention may qualify for subsidiary protection under Article 15 of EU Directive 2011/95/EU (Qualification Directive), if there are substantial grounds for believing that they would face a real risk of serious harm in Afghanistan. In light of the information presented in Section II.C [Humanitarian Situation] of these Guidelines, applicants may, depending on the individual circumstances of the case, be in need of subsidiary protection under Article 15(a) or Article 15(b) on the grounds that they would face a real risk of the relevant forms of serious harm (death penalty or execution; or torture or inhuman or degrading treatment or punishment), either at the hands of the State or its agents, or at the hands of AGEs [Anti-Government Elements]. Equally, in light of the fact that Afghanistan continues to be affected by a non-international armed conflict and in light of the information presented in Sections II.B [Human Rights Situation], II.C, II.D [Humanitarian Situation] and II.E [Conflict-Induced Displacement] of these Guidelines, applicants originating from or previously residing in conflict-affected areas may, depending on the individual circumstances of the case, be in need of subsidiary protection under Article 15(c) on the grounds that they would face a serious and individual threat to their life or person by reason of indiscriminate violence."

2. Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, August 2018

76. A new update of the Eligibility Guidelines was published on 30 August 2018 ("the August 2018 Guidelines"). UNHCR considered that, *inter alia*, individuals falling into the risk profile of members of religious minority groups might be in need of international refugee protection, depending on the individual circumstances of the case. The section on Hindus and Sikhs quoted in paragraph 74 above had undergone a few changes, most notably the following:

- the following text was added (footnotes omitted):

"On 1 July 2018, a suicide bombing in Jalalabad claimed by Islamic State reportedly killed 19 people and injured 20 others; 17 of the individuals killed were Sikhs and Hindus. High-ranking government officials are reported to have told Sikhs that they

were 'not from Afghanistan', that they were 'Indians', and that they 'did not belong here.'"

- the last sentence of the section was changed to read (footnote omitted):

"There is reportedly only one State school remaining for Sikh children, and many of the private schools for Sikhs are reported to have closed; as there is not a separate school for Hindus, some Hindu children are reportedly sent to Sikh schools. Hindu and Sikh children attending government schools in Kabul are reported to be subjected to harassment and bullying by other students."

The paragraph quoted in paragraph 75 above had not been changed in the August 2018 Guidelines.

C. Reports by the European Asylum Support Office (EASO)

1. "Afghanistan – Individuals targeted under societal and legal norms", Country of Origin Information Report, December 2017

77. In December 2017 EASO published its Country of Origin Information Report "Afghanistan, Individuals targeted under societal and legal norms". The report's chapter entitled "Treatment of people perceived to transgress Islam" contains a section on the situation of Hindus and Sikhs, which reads as follows (footnotes omitted):

"There are estimated to be about 900 individual Hindus and Sikhs in Afghanistan. According to Reuters, there are less than 220 Hindu and Sikh families in Afghanistan, after many left Afghanistan or have become concentrated in Kabul city, Ghazni and Nangarhar. Members of minority communities such as Hindus and Sikhs sometimes serve in government and under the Constitution are recognised and protected as equal citizens with Muslims. They are allotted one seat in the 249-seat Wolesi Jirga Lower House. However, sources also report that Hindus and Sikhs have encountered societal discrimination, harassment and some reported instances of societal violence, and public harassment of school children and of mourners in cremation ceremonies, which require police protection. In 2012, a mob of Muslims reportedly attacked a Hindu funeral procession. According to a 2017 article by the Emirati newspaper, the National, in which an Afghan Sikh family were interviewed inside the country, the family explained that they must celebrate Diwali discreetly because 'grand celebrations' of their faith could be dangerous."

2. "Country Guidance: Afghanistan", June 2019

78. In June 2019, EASO published the latest version – updating and replacing the first version from June 2018 – of its Country Guidance document on Afghanistan, representing the common assessment of the situation in Afghanistan by EU Member States. This document, which comprises a guidance note and a common analysis, is to be taken into account by EU Member States when examining applications for international protection lodged by Afghans, without prejudice to their competence for deciding on individual applications. The common analysis and guidance note are based on the provisions of the Qualification Directive

and the 1951 Convention, as well as jurisprudence of the Court of Justice of the European Union and, where appropriate, the European Court of Human Rights. The Country Guidance document is not meant for use as a source of country-of-origin information; the information contained within it about the situation in Afghanistan is based on EASO Country of Origin reports on specific aspects of that situation, including "Afghanistan – Individuals targeted under societal and legal norms" (see paragraph 77 above), and, in some instances, on other sources.

79. With regard to qualification for refugee status, the guidance note provides general conclusions on the profiles of Afghan asylum-seekers, encountered in the caseload of EU Member States, and guidance regarding additional circumstances to be taken into account in the individual assessment. It distinguishes between three categories, based on the likelihood of an asylum-seeker qualifying for refugee status:

1. individuals who would, in general, have a well-founded fear of persecution;
2. individuals who may have a well-founded fear of persecution in relation to certain risk-enhancing circumstances; and
3. individuals who would not, in general, have a well-founded fear of persecution for reason of race, religion, nationality, membership of a particular social group, solely due to their belonging to the profile or sub-profile at issue.

Sikhs are placed in the second category (in the previous version of the Country Guidance they were listed in the third category).

80. For each of the profiles and sub-profiles listed under the second category, the Country Guidance provides examples of circumstances which may be relevant to take into account in the individual risk assessment, and indicates a potential nexus to a reason for persecution (religion, in the case of Sikhs). As examples of circumstances to take into account in the risk assessment of Sikhs, the Country Guidance states:

> "The individual assessment of whether or not discrimination could amount to persecution should take into account the severity and/or repetitiveness of the acts or whether they occur as an accumulation of various measures."

81. With regard to Article 15(c) of the Qualification Directive (see paragraph 66 above), EASO considered that in all but one of Afghanistan's provinces (namely Panjshir) a situation of "internal armed conflict" within the meaning of that provision pertained. It further found that in the province of Nangarhar (except for its provincial capital, Jalalabad) the degree of indiscriminate violence had reached such an exceptionally high level that substantial grounds had been shown for believing that a civilian, returned to that province, would, solely on account of his or her presence on the territory of that province, face a real risk of being subject to the serious threat referred to in Article 15(c) of the Qualification Directive. As regards Kabul province, including Kabul City, EASO stated that indiscriminate

violence was taking place there, but not at such a high level that a returning civilian would, solely on account of his or her presence there, face a real risk of serious harm within the meaning of Article 15(c) of the Qualification Directive.

D. Other reports on Afghanistan

1. United States Department of State

82. The section on Afghanistan of the United States Department of State's Country Report on Human Rights Practices for 2018, released on 13 March 2019, states that Sikhs and Hindus faced discrimination, reporting unequal access to government jobs and harassment in school, as well as verbal and physical abuse in public places. On 1 July 2018, ISIS-K[2] killed 19 people in a Jalalabad suicide bombing targeting the Sikh community. The attack killed the only Sikh candidate for the October parliamentary elections. Ultimately, the Sikh candidate's son ran in his place.

83. The Department of State's 2018 Report on International Religious Freedom – Afghanistan, which was published on 21 June 2019, states, *inter alia*, the following:

> "Hindu and Sikh groups again reported they remained free to build places of worship and to train other Hindus and Sikhs to become clergy, but per the law against conversion of Muslims, the government continued not to allow them to proselytize. Hindu and Sikh community members said they continued to avoid pursuing land disputes through the courts due to fear of retaliation, especially if powerful local leaders occupied their property.
>
> Although the government had provided land to use as cremation sites, Sikh leaders stated the distance from any major urban area and the lack of security in the region continued to make the land unusable. Hindus and Sikhs reported continued interference in their efforts to cremate the remains of their dead from individuals who lived near the cremation sites. In response, the government continued to provide police support to protect the Sikh and Hindu communities while they performed their cremation rituals. The government promised to construct modern crematories for the Sikh and Hindu populations. Sikh and Hindu community leaders said President Ghani reaffirmed this promise in an August 2017 meeting, but as of the end of the year, the government had not taken action. Despite these challenges, community leaders acknowledged new efforts by MOHRA [Ministry of Hajj and Religious Affairs] to provide free water, electricity, and repair services for a few Sikh and Hindu temples, as well as facilitate visas for religious trips to India.
>
> ...
>
> Sikhs, Hindus, Christians, and other non-Muslim minorities reported continued harassment from Muslims, although Hindus and Sikhs stated they continued to be able to publicly practice their religions.
>
> ...

2. A branch of the militant Islamist group Islamic State of Iraq and the Levant, active in Afghanistan and Pakistan.

According to members of the Sikh and Hindu communities, they continued to refuse to send their children to public schools due to harassment from other students, although there were only a few private school options available to them due to the decreasing sizes of the two communities and their members' declining economic circumstances. The Sikh and Hindu Council reported one school in Nangarhar and one school in Kabul remained operational. Sikh and Hindu representatives, however, said these schools were still underequipped to teach students.

Sikh leaders continued to state the main cause of Hindu and Sikh emigration was a lack of employment opportunities; they said one factor impeding their access to employment was illiteracy. Sikh leaders said many families in Kabul lived at community temples (gurdwaras and mandirs) because they could not afford permanent housing. Both communities stated emigration would continue to increase as economic conditions worsened and security concerns increased. Community leaders estimated between 500 and 600 Sikhs and Hindus had fled the country during the year to either India or Western countries."

2. United Kingdom Home Office

84. The United Kingdom Home Office's Country Policy and Information Note "Afghanistan: Hindus and Sikhs", which was most recently updated in May 2019, provides country-of-origin information compiled from a range of external information sources as well as an analysis and assessment of the country-of-origin information, refugee/human rights laws and policies, and applicable case-law for the use of Home Office decision-makers. A part of the latter section, in so far as relevant, reads as follows (references to other parts of the Information Note omitted):

"2.3 Assessment of risk

2.3.1 Although the exact number of the Sikh and Hindu population in Afghanistan is not known, it is a small minority, estimated to be between 1,000 to a few thousand. Various sources agree there are between 200 - 300 Sikh and Hindu families. Sikhs and Hindus live primarily in urban areas, particularly Kabul and Nangarhar. It is reported that Sikhs and Hindus identify closely with one another as non-Muslim minorities.

a. Treatment by the state

2.3.2 The constitution expressly protects freedom of religion for non-Muslims within the limits of the law, though these freedoms are limited in practice. The Penal Code provides punishments for anyone who prevents a person conducting their religious rituals or rites; damages places of worship; and for attacking followers of any religion. ...

2.3.3 Leaders of both Hindu and Sikh communities reported discrimination in the judicial system, with the illegal appropriation of Sikh properties being the most common issue arising.

2.3.4 Hindus and Sikhs are permitted to build places of worship and train members of their community to become clergy, and the government has allocated land to Sikhs and Hindus for cremation sites. Police support is provided to protect these communities while they perform their cremation rituals.

2.3.5 The Afghan government has provided a large area for Sikhs and Hindus at Police District 21 area of Kabul city where they can build residential units and a

Shamshan (cremation ground). However District 21 has not been developed yet and members of the Sikh and Hindu communities have raised concerns about living there, citing security issues.

2.3.6 There have been reports of government officials stating that Sikhs and Hindus do not belong in Afghanistan. However, following a 2016 presidential decree, the law requires the reservation of a seat for Sikhs and Hindus in the Afghan parliament. In June 2017, the president invited leaders of the Sikh and Hindu communities to the palace for talks about what he termed their valuable role in the country. The Ministry of Hajj and Religious Affairs facilitates pilgrimages for Hindus and Sikhs to India. Following a Daesh suicide bomb attack on members of the Sikh and Hindu communities in July 2018, the president visited a Gurdwara in Kabul to offer his condolences and confirm his support for Sikh and Hindu communities.

2.3.7 In general, Sikhs and Hindus are not at risk of persecution or serious harm from the state, but each case should be considered on its individual merits.

b. Societal treatment

2.3.8 Narinder Singh Khalsa, a Sikh elected to the Wolesi Jirga (the lower house of the Afghan national assembly), stated that the majority of the Muslim population is very supportive of the Sikh community, and that they have a positive relationship, with Sikhs able to practise their religion publicly. However, there are also reports that the Sikh and Hindu communities face societal intolerance, which some commentators have attributed to 'extremist elements' who have moved from the provinces to Kabul and other cities. There are claims of non-Muslims facing pressure to convert to Islam from Muslim members of society. The Hindu population face fewer difficulties than the more visibly distinguishable Sikh population (whose men wear a distinctive headdress), with some Sikhs reportedly dressing as Muslims in order to avoid harassment. ... It is reported that some Sikhs have left for India due to economic difficulties and societal harassment, but others have no plans to leave, as they see Afghanistan as their home.

2.3.9 Some Sikh families live in Gurdwaras as they lack housing.

2.3.10 Some Sikhs and Hindus are reported to face discrimination in the labour market, and illiteracy can cause difficulties in obtaining work. Members of the Sikh and Hindu communities avoid sending their children to public schools, reportedly because of harassment by other students. There is a school for Sikh children in Kabul which is funded by the government. Some Sikh children attend private schools, although not all can afford it. Non-Muslims are not required to study Islam in state schools. There is evidence that some Sikhs suffer societal harassment when cremating their dead, although police protection is provided.

...

2.3.12 In the country guidance case of TG and others (Afghan Sikhs persecuted) (CG) [2015] UKUT 595 (IAC) (3 November 2015), heard on 31 March 2014 and 17 August 2015, the Upper Tribunal found (at paragraph 119) that:

'(i) Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.

(ii) Members of the Sikh and Hindu communities in Afghanistan do not face a real risk of persecution or ill-treatment such as to entitle them to a grant of international protection on the basis of their ethnic or religious identity, per se. Neither can it be said that the cumulative impact of discrimination suffered by the Sikh and Hindu communities in general reaches the threshold of persecution.

(iii) A consideration of whether an individual member of the Sikh and Hindu communities is at real risk of persecution upon return to Afghanistan is fact-sensitive. All the relevant circumstances must be considered but careful attention should be paid to the following:

a. women are particularly vulnerable in the absence of appropriate protection from a male member of the family;

b. likely financial circumstances and ability to access basic accommodation bearing in mind

- Muslims are generally unlikely to employ a member of the Sikh and Hindu communities

- such individuals may face difficulties (including threats, extortion, seizure of land and acts of violence) in retaining property and/or pursuing their remaining traditional pursuit, that of a shopkeeper / trader;

- the traditional source of support for such individuals, the Gurdwara is much less able to provide adequate support;

c. the level of religious devotion and the practical accessibility to a suitable place of religious worship in light of declining numbers and the evidence that some have been subjected to harm and threats to harm whilst accessing the Gurdwara;

d. access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them.'

...

2.3.13 There are not very strong grounds supported by cogent evidence to justify a departure from the conclusions of TG and others. Whilst there have been attacks on Sikhs and Hindus, notably the July 2018 suicide bomb attack in Jalalabad, they do not appear to have escalated to the point that the conclusion at (ii) [in TG and others] should change. Similarly, whilst Sikhs and Hindus do continue to experience discrimination, it has not escalated or changed to the extent that the conclusion at (ii) above should change.

...

2.4 Protection

...

2.4.4 In the country guidance case of TG and others, the Upper Tribunal found that 'Although it appears there is a willingness at governmental level to provide protection, it is not established on the evidence that at a local level the police are willing, even if able, to provide the necessary level of protection required in Refugee Convention/Qualification Directive terms, to those members of the Sikh and Hindu communities who experience serious harm or harassment amounting to persecution'.

2.4.5 The Afghan government has taken measures to improve its law enforcement and justice system since TG and others, and its presence and control are generally stronger in the cities. However, these systems are still weak and there have been reports of abuse of Sikhs and Hindus by the police. As such, in general, there are not currently very strong grounds supported by cogent evidence to depart from the conclusion above. In areas controlled by AGEs [anti-Government elements], the state will be unable and unwilling to provide effective protection. Each case must, however, be considered on its facts."

THE LAW

I. JOINDER OF THE APPLICATIONS

85. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

86. The applicants complained that their removal to Afghanistan would expose them to a real risk of being subjected to treatment in breach of Article 3 of the Convention and/or a violation of Article 2 of the Convention. Articles 2 and 3 provide, so far as relevant, as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3

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

87. The Government contested that argument.

A. Admissibility

88. The Court finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the applicants' related complaint under Article 3 and will proceed on this basis (see *NA. v. the United Kingdom*, no. 25904/07, § 95, 17 July 2008). The Court notes that the applicants' complaints under Article 3 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

89. The applicants contended that their expulsion to Afghanistan would expose them to a real risk of ill-treatment.

90. They argued that they had been subjected to ill-treatment prior to their departure from Afghanistan for the Netherlands. However, the Dutch immigration authorities examining their asylum applications had started from the presumption that most Afghan Sikhs had been living outside of Afghanistan for some time already and that Sikhs who claimed that they had recently left that country and required protection were not to be believed. The applicants stated that although they had adduced arguments to counter that presumption and to help establish the veracity of their accounts as regards their past ill-treatment, which accounts were completely in line with the country-of-origin information about the situation of Sikhs in Afghanistan relied on by the Government in their asylum policy, those arguments had been dismissed. They had not been given the benefit of the doubt.

91. The applicants further submitted that, even if it were to be assumed that they had left Afghanistan earlier than they had claimed in their asylum applications and that they had spent time in another country before going to the Netherlands, the fact remained that the Government nevertheless intended to return them to Afghanistan.

As a foreseeable consequence of their return, they would fall victim to a situation incompatible with Article 3 of the Convention, having regard to the well-documented difficult situation facing Sikhs in that country as well as to their individual circumstances which they had put forward in the course of the national proceedings (see paragraphs 27 and 44-45 above). They emphasised in particular that it would not be possible for them to find housing or to reopen their shops, and Sikhs faced discrimination in the labour market as well as a lack of access to it. Without an economic base, it was not possible for Afghan Sikhs to return safely. The situation in Kabul had only deteriorated and, given that Sikhs were easily recognisable, the applicants expected the harassment in the streets of Kabul to resume immediately upon their return, while they would have no safe place to hide. Nor would it be safe to send their children to school. They would be unable to obtain protection from the Afghan authorities against acts of third parties, and nor would they be able to protect themselves, in view of their drastically decreased number in Kabul.

92. Moreover, the competent authorities had concluded that the applicants were not eligible for international protection under the country-specific asylum policy on Afghans for the sole reason that their asylum accounts regarding past ill-treatment had been found to lack credibility. The applicants contended that the assessment of their claim that they would fall victim to a situation incompatible with Article 3 of the Convention had thus precluded a full examination of the foreseeable consequences of their removal to Afghanistan, as set out in the previous paragraph.

(b) The Government

93. The Government did not accept that there were substantial grounds for believing that the applicants would be at real risk of treatment contrary to Articles 2 and/or 3 if their expulsion to Afghanistan were enforced.

94. While acknowledging that the security situation in Afghanistan in general and in Kabul in particular gave cause for great concern, in view of information drawn from various public sources (including the United Nations Assistance Mission in Afghanistan ("UNAMA"), EASO, Amnesty International and Human Rights Watch) the Government considered that the human rights situation in Afghanistan did not amount to a most extreme case of generalised violence, in which there was a real risk of treatment contrary to Article 3 of the Convention simply by virtue of an individual being exposed to this violence on return. They pointed out that the Court had also reached that conclusion in a number of judgments and decisions (for example *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013; *A.W.Q. and D.H. v. the Netherlands*, no. 25077/06, § 71, 12 January 2016; and *G.R.S. v. the Netherlands* (dec.), no. 77691/11, § 39, 11 July 2017) and – relying on the information from the abovementioned public sources, in particular UNAMA –, that there was no reason to believe that since these rulings of the Court the situation in Afghanistan in general and in Kabul in particular had worsened to such an extent that it had come to amount to an exceptional situation.

95. Moreover, in their opinion, it could not be concluded that the general situation of Sikhs in Afghanistan was such that the persons in question would, solely by virtue of belonging to this religious/ethnic group, be at risk of treatment contrary to Article 3 of the Convention were they to return to Afghanistan. It was for this reason that the Government disagreed with the analysis of the officer in charge of the UNHCR office in the Netherlands as set out in the letters of 13 and 19 April 2017 (see paragraphs 26 and 44 above), which they moreover found unclear and contradictory. In this context they noted that UNHCR stated on the one hand that, depending on the individual circumstances of the case, members of the Sikh community may be in need of international protection – which was in line with the Government's opinion. Nevertheless, UNHCR had then, on the other hand, gone on to say that it was sufficient for an applicant to establish that he or she belonged to the group in question because the risk of harm for members of that group had already been objectively established. Since the information available on Sikhs in Afghanistan did not give the Government cause to conclude that merely belonging to this group entailed a real and foreseeable risk of treatment contrary to Article 3 of the Convention, and since UNHCR did not explain on what information it based its conclusion, the Government saw no reason to agree with UNHCR's opinion.

96. The fact that Sikhs did find themselves in a vulnerable position had been acknowledged by the Deputy Minister for Security and Justice, who

had designated Afghan Sikhs as both an "at-risk group" and a "vulnerable minority group" in the Netherlands' country-specific asylum policy on Afghanistan, which meant that "limited indications" sufficed to make a case that a Sikh's fear of persecution and treatment contrary to Article 3 of the Convention was credible. As a result, if the problems which a Sikh claimed in his or her asylum account to have experienced were considered credible, he or she might be eligible for asylum on that basis alone. Problems experienced in the "immediate circle" of the person concerned could also give cause to assume there was a risk of treatment contrary to Article 3.

97. As regards the existence of a real and personal risk by virtue of the applicants' alleged past ill-treatment**,** the Government submitted that the asylum proceedings as conducted had offered the applicants sufficient opportunities to establish satisfactorily the veracity of their accounts. Those accounts had been carefully assessed by the IND and reviewed by an independent court of first instance, as well as on appeal by the Administrative Jurisdiction Division of the Council of State. Since it was implausible that the applicants had left Afghanistan recently, it was considered equally implausible that they had been harassed in the way they had described prior to their departure. The applicants had therefore not made a plausible case, with "limited indications", that their fear of treatment contrary to Article 3 of the Convention was credible.

98. In reply to questions put by the Court and in the light of the United Kingdom Upper Tribunal's decision of 3 December 2015 (see paragraph 84 above), the Government argued that the difficulties faced by Sikhs on their return to Afghanistan, such as problems with supporting themselves financially and finding suitable accommodation, did not justify the assumption that Article 3 would be breached, given that a lack of social and economic provisions in the country of origin did not, generally speaking, constitute treatment attaining the minimum level of severity required to fall within the scope of that provision. The Government noted in this context that there was no indication from sources in the public domain that the Afghan authorities deliberately excluded Sikhs from certain public provisions or government positions. The Afghan Government provided the same funding for staff salaries, books and maintenance for the Sikh school as it did for other schools. The Government argued that apart from the general problems experienced by returnees, no particular individual circumstances had been submitted by the applicants. Moreover, it was open to the applicants to apply for support to the International Organization for Migration or other projects that help returnees.

2. The third-party interveners in application no. 68377/17

(a) UNHCR

99. Having regard to its 2016 Eligibility Guidelines (see paragraphs 73-75 above), UNHCR considered that members of minority religious groups in Afghanistan may be in need of international protection on the ground of religion or other relevant grounds, depending on the individual circumstances of the case. In that regard, UNHCR noted that Afghan Sikhs had been designated an "at-risk group" as well as a "vulnerable minority group" in Dutch asylum policy on account of the fact that they face societal discrimination, limitations in education and economic opportunities and are exposed to violent harm and that national law does not provide sufficient protection to their religion. However, in practice, this policy did not sufficiently meet Afghan Sikhs' protection needs as, *inter alia*, it still required an individualised fear of persecution. For that reason, UNHCR had drawn the attention of the Dutch authorities to the vulnerable situation of Sikhs in Afghanistan on several occasions, including in the letter of 13 April 2017 (see paragraph 26 above).

100. In the view of UNHCR, recent residence in the country of origin was not required for the establishment of a well-founded fear of persecution. While the existence of past persecution was a relevant element in the consideration of an application for asylum, given the forward-looking nature of the refugee definition, past persecution was not of itself determinative of a well-founded fear of persecution. Furthermore, whether or not a person belonged to a minority group, there was no requirement of individual targeting upon return to the country of origin for the establishment of a well-founded fear of persecution.

(b) Defence for Children - the Netherlands

101. Defence for Children – the Netherlands considered that the assessment of a violation of Article 3 of the Convention in cases concerning the removal of children to Afghanistan should be conducted in the light of the UN Convention on the Rights of the Child ("CRC"), and in particular of Article 3 of that Convention, according to which the best interests of the child should be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Considerations relating to general migration control should not override best-interests considerations. Moreover, specific attention should be given to the multiple vulnerabilities of children belonging to a very small religious minority such as the Sikhs, who were reported to be at risk of discrimination, ill-treatment, arbitrary detention or death in Afghanistan.

3. The Court's assessment

(a) General principles

102. An overview of the relevant general principles concerning the application of Article 3 in the context of cases concerning expulsions, as established in the Court's case-law, is set out in *J.K. and Others v. Sweden* ([GC], no. 59166/12, §§ 77-105, ECHR 2016).

(b) Application of those principles to the present case

103. The issue before the Court is whether the applicants, on returning to their country of origin, would face a real risk of being tortured or subjected to inhuman or degrading treatment or punishment as prohibited by Article 3 of the Convention.

104. Since the applicants in the instant case have not been deported, the material point in time for the assessment of the claimed Article 3 risk is that of the Court's consideration of the case. The Court will make a full and *ex nunc* evaluation where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see *J.K. and Others v. Sweden*, cited above, §§ 106-107, and *F.G. v. Sweden* [GC], no. 43611/11, § 115, 23 March 2016).

(i) The general situation in Afghanistan

105. The Court notes at the outset that, as regards the question whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention, it has previously found this not to be the case (see *H. and B. v. the United Kingdom*, cited above, §§ 92-93). More recently it confirmed this finding in, *inter alia,* the judgments and the decision cited in paragraph 94 above. The Government, who agreed with these findings, submitted that also subsequent to these rulings it appeared from publicly available information that the general situation in Afghanistan had not worsened to such an extent that there would be a real risk of ill-treatment simply by virtue of an individual's being returned there (see paragraph 94 above). These submissions have not been disputed by the applicants, who have in any event not argued that it is the general situation in Afghanistan which stands in the way of their return.

106. The Court considers, in the light of the evidence that has been placed before it by the parties and having regard also to EASO's recent assessment (see paragraph 81 above), that there is no reason to come to a different conclusion in the case at hand in relation to the general situation in Afghanistan, at least in so far as Kabul is concerned.

(ii) The situation of Sikhs in Afghanistan

107. The applicants do contend that the general situation of Sikhs in Afghanistan is such that their removal to that country would expose them to a real risk of being subjected to treatment contrary to Article 3 of the Convention. The Court understands this to mean that the applicants consider that Sikhs in Afghanistan are a group systematically exposed to a practice of ill-treatment (see *J.K. and Others v. Sweden*, cited above, §§ 103-105).

The Court reiterates that in cases where an applicant alleges that he or she is a member of such a group, it has accepted that the protection of Article 3 of the Convention may come into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see *Saadi v. Italy* [GC], no. 37201/06, § 132, ECHR 2008, and *NA. v. the United Kingdom*, cited above, § 116, 17 July 2008). In those circumstances, the requirement, established in the Court's case-law, that an asylum-seeker is capable of distinguishing his or her situation from the general perils in the country of destination is relaxed, in order not to render illusory the protection offered by Article 3 (see *J.K. and Others v. Sweden*, cited above, §§ 94 and 103). This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 148, 11 January 2007).

In determining whether it should or should not insist on further special distinguishing features, the Court may take account of the general situation of violence in a country. It will be appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question (see *NA. v. the United Kingdom*, cited above, § 117, with further references).

108. In this context, the Court observes firstly that it is not in dispute between the parties that the applicants are Sikhs and that they originally hail from Afghanistan. It further notes that in their policy on asylum-seekers from Afghanistan, the Government do not consider that Sikhs from that country are a group whose members are systematically exposed to persecution (see paragraph 60 above). While it is therefore not sufficient for an asylum-seeker in the Netherlands merely to make a plausible case for believing that he or she is an Afghan Sikh in order to qualify for asylum, the Court notes that, according to that policy, Sikhs in Afghanistan are nevertheless a marginalised minority who experience serious problems, for which reason they have been designated both as an "at-risk group" and a "vulnerable minority group" (see paragraph 62 above).

109. The Court also notes that the policy at issue is established on the basis of country reports which are drawn up by the Dutch Ministry of Foreign Affairs, using both domestic material and materials originating

from other sources such as other States, agencies of the United Nations and the European Union and non-governmental organisations (see paragraph 54 above; see *J.K. and Others v. Sweden*, cited above, § 90). The applicants have not alleged that the material used by the Government lacks accuracy, that it originates from insufficiently independent or objective sources or that other, relevant, material has been overlooked.

110. It appears from the country material at the disposal of the Court, as submitted by the parties and as obtained *proprio motu*, that certain aspects of the situation of Sikhs in Afghanistan undoubtedly give cause for real concern. The Court thus notes that Sikhs suffer discrimination from the State in matters relating to employment and political representation (see paragraphs 69, 71, 74 and 84 above), and that cases are reported of Sikhs suffering abuse at the hands of the police and of the authorities being unable or unwilling to provide them with protection against harm or harassment amounting to persecution (see paragraphs 74 and 84 above). Moreover, whilst Sikhs are in principle able to practice their religion publicly, in practice it is difficult to do so (see paragraphs 67, 74, 77 and 83-84 above). In this context the Court takes note in particular of the societal discrimination, harassment, intimidation and intolerance that Sikhs are sometimes reported to encounter (see paragraphs 67, 69, 71-72, 74, 77 and 82-84 above), which some sources attribute to extremist elements within the Muslim population (see paragraphs 74 and 84 above). Sikh families are reported not to send their children to State-run schools due to the harassment to which those children are subjected (see paragraphs 74, 76-77 and 83-84 above). Nevertheless, it is also reported that the Afghan authorities provide the Sikh community with police protection during funeral ceremonies (see paragraphs 69, 74 and 83-84 above), that that community is free to build places of worship, that land for a cremation site has been made available (see paragraphs 83-84 above), and that the Afghan Ministry of Hajj and Religious Affairs is making efforts to provide free water, electricity, and repair services for a few Sikh temples (see paragraph 83 above). Also, at least one school for Sikh children, partially funded by the State, is open in Kabul (see paragraphs 69, 72, 74, 76 and 83-84 above). Moreover, according to the Sikh member of the lower house of the Afghan national assembly, the majority of the Muslim population is very supportive of the Sikh community, they have a positive relationship, and Sikhs are able to practise their religion publicly (see paragraph 84 above).

111. Having regard to the above, the Court is, on balance, not persuaded that the situation of Sikhs in Afghanistan is such that they can be said to be members of a group that is systematically exposed to a practice of ill-treatment. In reaching that finding, it further attaches relevance to the fact that, whilst both UNHCR's 2016 Guidelines and the version of that document as updated in 2018 say that Afghan Sikhs may have international protection needs, the question whether that is indeed so for a particular

person is explicitly stated to be dependent on the individual circumstances of the case (see paragraphs 74-76 above). The letters written by the officer in charge of UNHCR's office in the Netherlands also indicate that the issue of whether members of the Sikh community are in need of international protection depends on the circumstances of the particular case (see paragraphs 26 and 44 above), and the Court cannot clearly discern from that organisation's third party observations that it now takes a different view. Similarly, in its "Country Guidance: Afghanistan", EASO takes the view that Sikhs may have a well-founded fear of persecution in relation to certain risk-enhancing circumstances, but that organisation has not listed Sikhs in the category of individuals who would, in general, have a well-founded fear of persecution (see paragraph 79 above).

112. Accordingly, the Court is satisfied that it would not render the protection offered by Article 3 of the Convention illusory to require Sikhs challenging their removal to Afghanistan to demonstrate the existence of further special distinguishing features which would place them at real risk of ill-treatment contrary to that Article (see *NA. v. the United Kingdom*, cited above, § 128, and, *a contrario*, *Salah Sheekh*, cited above, § 148).

(iii) Existence of further special distinguishing features of the applicants

113. In this context the Court observes that the applicants claimed, firstly, that they had been subjected to ill-treatment prior to their departure from Afghanistan for the Netherlands. Secondly, they contended that**,** even if it were assumed that they had left Afghanistan earlier than they claimed and that they had spent time in another country before going on to the Netherlands, the domestic authorities had failed to assess their claim that, as a foreseeable consequence of their return, they would fall victim to a situation incompatible with Article 3 of the Convention, having regard to the well-documented difficulties facing Sikhs in that country as well as to their individual circumstances, which they had described in the course of the national proceedings (see paragraphs 91-92 above). The Court will address these elements in turn.

(α) Assessment of risk by domestic authorities based on alleged past ill-treatment

114. The Court notes that the applicants submitted, in support of their requests for asylum in the Netherlands as well as of their applications to the Court, that they had experienced a number of particular events, amounting to ill-treatment, which had led them to decide to leave Afghanistan and to travel to the Netherlands. The Court has held that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the

country at issue (see *J.K. and Others v. Sweden*, cited above, § 102). It notes, however, that the Deputy Minister of Security and Justice found that the applicants had not provided a credible account. In particular, he did not believe that the applicants had left Afghanistan as recently as they claimed and, this being the case, the events which had allegedly led to their departure from that country were not believed either. Moreover, the Deputy Minister further set out the reasons why in any event no credibility could be attached to the accounts given by the applicants of the events which they claimed to have experienced prior to their departure for the Netherlands.

115. Subsequently, on appeal and further appeal, no fault was found with the Deputy Minister's assessment of the credibility of the alleged past ill-treatment. It is true that the appeal lodged by the applicants in application no. 530/18 was upheld by the Regional Court (see paragraph 42 above). However, this was not because that court disagreed with the Deputy Minister's assessment that the applicants had not satisfactorily established that they had left Afghanistan recently, but because in some other cases, where the Deputy Minister had similarly found that the asylum-seekers concerned must have left Afghanistan a considerable time previously, asylum had nevertheless been granted.

116. The Court reiterates that it is often difficult to establish, precisely, the pertinent facts in cases such as the present one and it has accepted that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of asylum claimants since it is they who have had an opportunity to see, hear and assess the demeanour of the individuals concerned (see *F.G. v. Sweden*, cited above, § 118, and *A.G. and M.M. v. the Netherlands* (dec.), no. 43092/16, § 28, 26 June 2018). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts (see *F.G. v. Sweden*, cited above, § 118).

117. In the present case, the Court observes that, prior to the Deputy Minister taking his decisions, the applicants were interviewed by officers of the IND several times and were allowed to correct and add to the reports drawn up of those interviews, as well as to submit their views on the notification of the Deputy Minister's intention to refuse their asylum applications. The assessment conducted by the Deputy Minister was subsequently examined by a Regional Court in appeal proceedings, which held an oral hearing, as well as by the Administrative Jurisdiction Division of the Council of State. The Court also notes that the applicants were assisted by a lawyer throughout the proceedings. The Court – reiterating that it is not its task to substitute its own assessment for that of the domestic courts (see paragraph 116 above) – sees no grounds to depart from the conclusions drawn by the domestic authorities as to the lack of credibility of the applicants' accounts relating to their flight and the events preceding it, which conclusions were reached following a thorough examination and set

out in decisions containing rational grounds that the Court has no reason to doubt.

(β) Assessment by domestic authorities of foreseeable consequences of removal of the applicants to Afghanistan

118. The Court will next turn to the applicants' claim that, even if their allegations of past ill-treatment were considered not credible, their removal to Afghanistan would nevertheless deliver them to a situation incompatible with Article 3 of the Convention and that the competent authorities had failed to make a full examination of the risks to which they would be exposed (see paragraphs 91-92 above).

119. Whilst, as noted above (see paragraph 114), past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, the Court is of the view that the absence of past ill-treatment does not, by and of itself, rule out the existence of such a risk (see *J.K. and Others v. Sweden*, cited above, § 101; and see also UNHCR in its third-party intervention (see paragraph 100 above)).

120. However, for the reasons set out below, the Court cannot find in the present case that the applicants have succeeded in establishing substantial grounds for believing that, if returned to Afghanistan, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention.

121. The Court observes that in support of their second applications for asylum – which led to the "final decisions" within the meaning of Article 35 § 1 of the Convention – the applicants firstly referred to the deteriorating security situation of Sikhs in Afghanistan (see paragraphs 25-26 and 44 above). As set out above (see paragraph 111), the Court has already found that the situation of Sikhs in Afghanistan is not such that they can be said to be members of a group that is systematically exposed to a practice of ill-treatment.

122. Secondly, the applicants raised a number of circumstances specific to their individual situation: they were no longer in touch with anybody in Afghanistan; their children would not be able to go to school; they would have no accommodation and be confined to the *Gurdwara*; and they would be without employment (see paragraphs 27, 44-45 and 91 above). Moreover, in application no. 530/18 it was further submitted that the grandmother required medical care she would be unable to receive in Afghanistan, and that the family would experience even greater difficulties finding a safe place to stay given that it included an elderly female and a baby (see paragraph 44 above).

123. The Court further observes that the assessment of the applicants' claims at the domestic level – in both sets of proceedings – was in essence confined to the question whether the criteria set out in the country-specific asylum policy in relation to "vulnerable minority groups" had been fulfilled

(see paragraphs 58 and 62 above). When applying this policy in the case at hand, the competent authorities concluded that the applicants had not complied with the relevant requirements since their accounts as regards past ill-treatment were found not to be credible and no human rights violations committed against other Sikhs in their "immediate circle" had been established; they had thus not succeeded in establishing the required "limited indications" (see paragraphs 21, 23, 40, 46 and 48 above).

124. Accordingly, due to the manner in which the country-specific policy was applied in the present case, there was no room for a full examination of the applicants' claim that their return to Afghanistan would nevertheless expose them to a situation incompatible with Article 3 of the Convention, as the individual circumstances submitted by the applicants (set out in paragraph 122 above), although noted by the competent authorities, were not included in the latter's risk assessment. As a result, these individual circumstances could have no impact on the outcome thereof.

125. Be that as it may, the Court considers that these individual circumstances, advanced by the applicant as grounds militating against their removal to Afghanistan, cannot, even if they were proved to pertain, disclose an issue under Article 3 of the Convention.

126. In this context, the Court reiterates that the ill-treatment which an applicant alleges he or she will face if returned to his or her country of origin must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention (see, amongst many authorities, *F.G. v. Sweden*, cited above, § 112). In addition, and to the extent that the applicants in the present case should be understood as claiming that the humanitarian conditions to which they will be exposed if removed to Afghanistan would be incompatible with Article 3, the Court has held that humanitarian conditions in a country of return could give rise to a breach of that provision only in a very exceptional case where the humanitarian grounds against removal are "compelling" (see *S.H.H. v. the United Kingdom*, no. 60367/10, §§ 88-92, 29 January 2013, and *H. and B. v. the United Kingdom*, cited above, § 114).

127. The Court notes that both sets of spouses in the present applications consist of apparently healthy adults who have previously resided in Kabul, where the men – who are still of working age – were able to provide for their families. Furthermore, even if numbers have dwindled, the applicants will not be the only Sikhs in Kabul and it has also not been established that either the authorities or the entire Muslim population of that city will be nothing but hostile to them (see paragraphs 83-84 above). Furthermore, and as already noted above (see paragraph 110), it appears from the country material at the disposal of the Court that at least one school for Sikh children is open in Kabul.

128. The Court therefore finds that the severity threshold has not been met in the present case. Moreover, it has also not been established that the

case is so very exceptional that the humanitarian grounds against removal are compelling.

129. Whilst the removal of a seriously ill person who would face a real risk of being exposed, in the receiving country, to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy is in principle capable of raising an issue under Article 3 (see *Paposhvili v. Belgium* [GC], no. 41738/10, § 183, 13 December 2016), the Court considers that the final ground advanced by the applicants – namely the allegedly poor state of health of the third applicant in application no. 530/18 – has remained unsubstantiated.

(iv) Conclusion

130. Having regard to all of the above, the Court concludes that the removal of the applicants to Afghanistan would not be in breach of Article 3 of the Convention.

III. RULE 39 OF THE RULES OF COURT

131. 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 referral 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.

132. It considers that the indication made to the Government under Rule 39 of the Rules of Court in application no. 530/18 (see paragraph 7 above) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection (see point 4 of the operative part – see also, *mutatis mutandis*, *A.M. v. France*, no. 12148/18, § 136, 29 April 2019).

FOR THESE REASONS, THE COURT

1. *Decides*, by a majority, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by four votes to three, that there would be no violation of Article 3 of the Convention in the event of the applicants' removal to Afghanistan;

4. *Decides*, unanimously, 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 applicants in application no. 530/18 until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 25 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Jon Fridrik Kjølbro
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Lemmens, Vehabović and Schukking is annexed to this judgment.

J.F.K.
A.N.T.

JOINT PARTLY DISSENTING OPINION OF JUDGES LEMMENS, VEHABOVIĆ AND SCHUKKING

1. We agree with the majority's conclusions that the general situation in Afghanistan cannot be deemed such that any removal there would necessarily breach Article 3 of the Convention (see paragraphs 105-106 of the judgment), and that the situation of Sikhs in Afghanistan cannot be deemed such that they belong to a group that is systematically exposed to a practice of ill-treatment (see paragraphs 107-112 of the judgment). We fully support the reasoning of the judgment leading to these conclusions. We are also in agreement with the majority's view that the conclusions drawn by the competent domestic authorities as regards the lack of credibility of the applicants' accounts of their flight and of the events preceding it were reached following a thorough examination and set out in decisions containing rational grounds that the Court has no reason to doubt (see paragraphs 114-117 of the judgment).

2. As regards the assessment by the domestic authorities of the foreseeable consequences of the removal of the applicants to Afghanistan (see paragraphs 118-128 of the judgment), we would like to make the following remarks.

3. The applicants' complaint relating to this issue consists of a substantive component and a procedural component: they claim that, having regard to the well-documented difficult situation faced by Sikhs in Afghanistan, as well as to their individual circumstances, they would fall victim to a situation incompatible with Article 3 of the Convention, if removed, and they claim that the competent authorities failed to make a full examination of the risks to which they would be exposed on returning to that country (see paragraphs 91-92 of the judgment).

4. As regards the procedural component of the applicants' complaint, it is recalled that according to the Court's case-law a claim that the expulsion of an individual would expose him or her to a real risk of being subjected to treatment contrary to Article 3 of the Convention must, owing to the absolute nature of the prohibition enshrined in that provision, necessarily be subjected to a rigorous scrutiny (see *Jabari v. Turkey*, no. 40035/98, § 39, ECHR 2000-VIII). That scrutiny should entail a thorough assessment – in which account is taken of all the information brought to the authorities' attention (see *F.G. v. Sweden* [GC], no. 43611/11, § 156, 23 March 2016) – of the situation in which the individual is likely to find him- or herself on returning. Regarding the burden of proof in expulsion cases, it is the Court's well-established case-law that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government

to dispel any doubts about it (see *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008; *NA. v. the United Kingdom*, no. 25904/07, § 111, 17 July 2008; *F.G. v. Sweden*, cited above, § 120, and *J.K. and Others v. Sweden* [GC], no. 59166/12, § 91, 23 August 2016). Moreover, although a number of individual factors may not, when considered separately, constitute a real risk, the same factors may give rise to a real risk when taken cumulatively and when considered in a context of general violence and heightened insecurity. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case (see *NA. v. the United Kingdom*, cited above, § 130, and, more recently, *N.A. v. Finland*, no. 25244/18, § 81, 14 November 2019, not yet final).

5. Turning to the case at hand, it is firstly noted that in the Dutch country-specific asylum policy concerning Afghanistan, Sikhs have been designated both as an "at-risk group" and a "vulnerable minority group". For a person belonging to a group so designated, limited indications suffice to make a plausible case that he or she fears "serious harm" within the meaning of section 29(1)(b) of the Aliens Act 2000 (see also C2/3.2 and 3.3 of the Aliens Act 2000 Implementation Guidelines). Serious harm within the meaning of that section includes treatment contrary to Article 3 of the Convention (see paragraphs 54-64 of the judgment). We consider that this Dutch country-specific asylum policy is a nuanced one; it acknowledges the difficulties that religious minority groups, in particular Sikhs, encounter in Afghanistan and accepts that members belonging to such a group might be in need of international protection, depending on their individual circumstances, which is, in our view, in line with the UNHCR Guidelines and EASO reports (see paragraphs 73-81 of the judgment). The policy is further regularly reviewed on the basis of updated country reports prepared by the Dutch Ministry of Foreign Affairs and information from various other international sources.

6. Secondly, as stated in paragraph 123 of the judgment, the assessment of the applicants' claims at the domestic level – in both sets of asylum proceedings – was in essence confined to the question whether the criteria set out in the above-mentioned country-specific asylum policy had been fulfilled. When applying this policy to the case at hand, the competent authorities concluded that the applicants had not complied with the relevant requirements since their accounts as regards any past ill-treatment suffered by themselves were found not to be credible and no human rights violations committed against other Sikhs in their "immediate circle" had been established; the authorities concluded that they had therefore not succeeded in establishing the required "limited indications". We fully accept that in terms of the Dutch asylum policy in force, the required "limited indications"

indeed cannot be considered established on the basis of those parts of the applicants' asylum accounts.

7. However, while past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, the absence of past ill-treatment does not, by and of itself, rule out the existence of such a risk (see paragraph 119 of the judgment). In other words: if no credence can be given to allegations of past ill-treatment of a person, this does not always and automatically lead to the conclusion that there is no evidence of a real risk of that person being subjected to treatment contrary to Article 3 of the Convention upon return to his or her country of origin. Fact-specific factors that are not related to past ill-treatment but which have been put forward by the individual in support of his or her claim of future ill-treatment should also be taken into consideration, as the rigorous scrutiny referred to in the case-law of the Court entails a thorough assessment taking account of all the information brought to the authorities' attention and relating to the situation in which the individual is likely to find him- or herself upon return.

8. On the basis of the foregoing, we are in full agreement with paragraph 124 of the judgment, which points out that owing to the manner in which the country-specific policy was applied in the present case, there was no room for a full examination of the applicants' claim that their return to Afghanistan would nevertheless expose them to a situation incompatible with Article 3 of the Convention, as the individual circumstances submitted by the applicants – summarised in paragraph 122 of the judgment –, although noted by the competent authorities, were not included in the latter's risk assessment. As a result, these individual circumstances were thus unable to have any impact on the outcome of that assessment. The above considerations lead us to the conclusion that the risk assessment conducted by the competent authorities in the present case did not satisfy the procedural requirement under Article 3 of the Convention (see case-law referred to in paragraph 4, above).

9. In reaching this conclusion we have not overlooked the fact that at the domestic level the final decisions were taken in the context of repeat asylum applications. In both cases the applicants – who were represented by the same lawyer – relied on, *inter alia*, the worsening security situation of Sikhs in Afghanistan and referred to the hardships that they would face upon return (see paragraphs 25, 26 and 44 of the judgment). While the new asylum request of the applicants in application no. 68377/17 was declared inadmissible for the reason that their claim was found not to amount to new elements or findings that were relevant for the assessment of their request, the applicants' new asylum request under application no. 530/18 was rejected as being manifestly ill-founded for the reason that the new elements identified could not lead to a different outcome. In the reasoning of both final decisions it was held that the applicants had still not made plausible the

existence of "limited indications" as required by the asylum policy in force (see paragraphs 28 and 46 of the judgment).[1]

10. It is true that the Court has accepted that States may confine the assessment of a repeat asylum application to an examination of the question whether relevant new facts have been brought forward, and that when no such facts are found they are not required to conduct their assessment with the same thoroughness. However, this applies only when the original asylum application has been examined with the requisite thorough scrutiny (see *Sultani v. France*, no. 45223/05, § 65, ECHR 2007-IV (extracts), and *Sow v. Belgium*, no. 27081/13, § 79, 19 January 2016). As regards the case at hand, it is noted that the manner in which the country-specific asylum policy was applied precluded some of the arguments which the applicants had put forward in support of their Article 3 claim from being examined, both in the first and the second set of asylum proceedings.

11. Further, it is true that the Government, in their observations before this Court, did address some of the individual circumstances which the applicants had raised in this connection (see paragraph 98 of the judgment). In our view, however, this does not detract from the fact that those circumstances received insufficient scrutiny at the domestic level.

12. As said above, it is the manner in which the country-specific asylum policy was applied in the present case that was problematic, not the policy itself. A slight amendment of the IND Working Instruction might be a possible way to solve that problem. This Working Instruction, setting out what the policy rules on "vulnerable minority groups" mean in practice, including what "limited indications" entail, exclusively refers to examples of past ill-treatment (see paragraph 59 of the judgment). It seems to us that it might be useful to modify the Working Instruction so as to recall that all relevant circumstances should be taken into consideration in the risk assessment, including those relating to foreseeable hardships which the individual has alleged he or she will face on returning. However, there might be other, more suitable ways to address this procedural issue; it is for the domestic authorities to evaluate those possibilities. The United Kingdom Home Office's Country Policy and Information Note "Afghanistan: Hindus and Sikhs", points 2.3.12 - 2.3.13 (see paragraph 84 of the judgment) may serve as a source of inspiration.

13. Unlike the majority, we see no grounds for also addressing the substantive component of this part of the applicants' complaint, for the following reasons.

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[1] The somewhat different approach to the issue of new elements or findings in both cases was, for one of us, a reason to disagree with the joinder of both applications (see paragraph 85 of the judgment). However, we all agree, including in respect of the first case (application no. 68377/17), that the authorities did in fact pay attention to the merits of the applicants' claims.

14. Firstly, it is recalled that the machinery of complaint to the Court is subsidiary to the national systems safeguarding human rights, and that the Court does not itself examine asylum applications. Its main concern is whether effective guarantees exist that protect an asylum-seeker against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faces from the standpoint of Article 3 of the Convention (see, among many other authorities, *F.G. v. Sweden*, cited above, §§ 117-18). Since the national authorities have not yet carried out a *full* examination of the applicants' claim that their return to Afghanistan would expose them to a situation incompatible with Article 3 of the Convention – neither in the first, nor in the second set of asylum proceedings – it is, at this stage, for them to do so.

15. Secondly, it is also recalled in this respect that the national authorities are, as a general principle, best placed to assess the facts and the credibility of asylum claimants since it is they who have an opportunity to see, hear and assess the demeanour of the individuals concerned (see *F.G. v. Sweden*, cited above, § 118). Taking account of the fact that the assessment of the alleged Article 3 risk entails a full and *ex nunc* evaluation and that some time has elapsed since the final decisions were taken on the applicants' second asylum applications, we take the view that the competent domestic authorities are in a much better position to carry out this examination, to draw all the relevant threads together and to assess whether or not the applicants' individual circumstances – which are fact-sensitive – will, considered cumulatively and in the context of the general situation in Afghanistan and the specific situation of Sikhs in that country, amount to such serious discrimination and/or other forms of inhuman or degrading treatment as to overstep the severity threshold of Article 3 of the Convention.

16. By dissenting on this point, we are not expressing a view on the outcome of that risk assessment. However, we cannot support the view that the applicants' contention should be discarded as untenable from the outset.