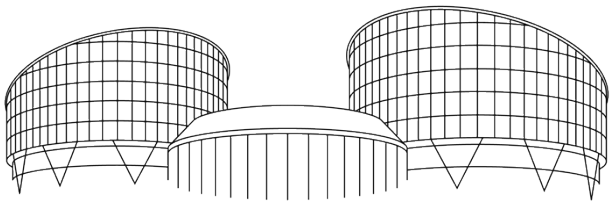

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 24147/11
I.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 10 July 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Nona Tsotsoria,
Kristina Pardalos, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 7 April 2011,

Having regard to the decision of 18 October 2011,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr I., is an Afghan national, who was born in 1963 and lives in the Netherlands. The President decided not to disclose the applicant's identity to the public (Rule 47 § 3). He is represented before the Court by Ms H.E. Visscher, a lawyer practising in Dordrecht.

2. The Netherlands Government ("the Government") are represented by their Deputy Agent, Ms L. Egmond, of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

4. On 25 September 1999, the applicant together with his spouse and their three children, the latter born between 1986 and 1995, applied for asylum in the Netherlands. On unspecified dates, the applicant's spouse and children were granted asylum in the Netherlands. On 3 July 2001, a fourth child was born to the applicant and his wife.

5. On 26 September 2003 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*), rejected the applicant's asylum request by holding Article 1F of the 1951 Geneva Convention relating to the Status of Refugees ("the 1951 Refugee Convention") against him. The Minister further decided, although the decision entailed that the applicant was no longer lawfully staying in the Netherlands and obliged to leave the country, that for the time being the applicant would not be expelled to Afghanistan as it could not be excluded that, if returned to Afghanistan, he would run a real risk of being subjected to treatment contrary to Article 3 of the Convention.

6. On 17 October 2003 the applicant filed an appeal against this decision with the Regional Court (*rechtbank*) of The Hague. In its judgment of 4 February 2005, the Regional Court of The Hague sitting in Leeuwarden accepted the appeal, quashed the Minister's decision of 26 September 2003 and ordered the Minister to take a fresh decision. Although it agreed with the Minister's decision and pertaining reasoning to hold Article 1F of the 1951 Refugee Convention against the applicant, it also found – on the basis of rulings given on 2 June 2004 and 9 July 2004 by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*) and noting that the Minister had acknowledged that in Afghanistan the applicant would be exposed to a risk of treatment proscribed by Article 3 of the Convention – that the Minister should also have examined whether the applicant had established that there was a sustained obstacle based on Article 3 of the Convention for his expulsion to Afghanistan. Consequently, the Minister's examination had been incomplete.

7. The applicant's subsequent appeal to the Administrative Jurisdiction Division was rejected on 20 May 2005. It upheld the impugned judgment of 4 February 2005. No further appeal lay against this ruling.

8. On 5 April 2006, the applicant's spouse and their children were granted Netherlands citizenship.

9. On 5 February 2008, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) – the successor to the Minister for Immigration and Integration – took a fresh decision on the applicant's asylum request. The Deputy Minister again decided to hold Article 1F of the 1951 Refugee Convention

against the applicant. As regards Article 3 of the Convention, the Deputy Minister accepted that the applicant would run a real risk of being subjected to treatment prohibited in that provision if, given the current situation there, he were to be removed to Afghanistan. However, this did not automatically imply that on this basis, the applicant should be granted a residence title as this would be contrary to article 3.107 of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*). This meant in the applicant's case that he was not eligible for admission to the Netherlands whilst no recourse would be had to the power to remove him to Afghanistan. As regards the question whether the Article 3 obstacle for his removal was of a sustained nature, the Deputy Minister held that the term "sustained" was to be interpreted as entailing a situation in which the alien concerned could not for many years be removed for reasons based on Article 3 without there being any prospects of a change in that situation within a not too long delay. If that were the case, and if resettlement in a third country – despite sufficient efforts to comply with the obligation to leave the Netherlands – was not possible and, in addition, the alien found him/herself in an exceptional situation in the Netherlands, there would be reason for the Deputy Minister to consider whether a continued withholding of a residence title was disproportionate. Noting that, at least until that moment, the applicant had been allowed to stay in the Netherlands, the Deputy Minister concluded that the applicant not yet found himself in a situation in which, for a great number of years, he could not be removed from the Netherlands for reasons based on Article 3. In addition, the Deputy Minister decided to impose an exclusion order (*ongewenstverklaring*) on the applicant. As to the applicant's reliance on his right to respect for his family life within the meaning of Article 8 of the Convention in the Netherlands with his spouse and their four children, the Deputy Minister found that the exclusion order entailed an interference with the applicant's rights under this provision but that the general interest outweighed the applicant's personal interests. In this context the Deputy Minister considered, *inter alia*, that there was an objective obstacle standing in the way of family life being enjoyed in Afghanistan, but that no objective obstacles had appeared for the enjoyment of the applicant's family life in a third country and that this was not altered by the fact that the applicant's spouse and children had become Netherlands nationals.

10. On 12 February 2008, the applicant filed an objection (*bezwaar*) with the Deputy Minister against the decision to impose an exclusion order. As this order is immediately enforceable and the objection not having suspensive effect, the applicant also filed a request with the Regional Court of The Hague for the issuance of a provisional measure, i.e. an injunction on his expulsion pending the objection proceedings. On the same date, the applicant also filed an appeal with the Regional Court of The Hague against the decision to reject his asylum request.

11. On 27 May 2008, the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Dordrecht granted the applicant's request for an injunction on his expulsion pending the proceedings on his objection to the decision to impose an exclusion order on him.

12. On 14 November 2008 the Deputy Minister rejected the applicant's objection of 12 February 2008. The Deputy Minister noted that, on the basis of the rulings of 4 February 2005 and 20 May 2005, the decision to hold Article 1F of the 1951 Refugee Convention against the applicant had become final and that for that reason an exclusion order could be imposed. In this connection, the Deputy Minister pointed out that the Netherlands State attached great importance to the premise that the Netherlands does not become a safe haven for persons in respect of whom there are strong suspicions that they have committed crimes referred to in Article 1F of the 1951 Refugee Convention and that, in order to accomplish this, an exclusion order was imposed on persons against whom this provision had been held. As regards the question whether the Article 3 obstacle opposing the applicant's removal to Afghanistan was of a sustained nature, the Deputy Minister held that the applicant did not find himself in a situation in which, for a great number of years, he could not be removed from the Netherlands for reasons based on Article 3 and, in this respect referred to a letter sent on 9 June 2008 by the Minister and Deputy Minister of Justice to the Lower House (*Tweede Kamer*) of Parliament on the application of Article 1F, stating *inter alia* that the notion of "a great number of years" meant in principle a period of at least ten years. The Deputy Minister further considered that it had not been established that there were no prospects of change in the situation where Article 3 opposed the applicant's removal to Afghanistan, which country was undergoing a period of transition, comprising a complex reconciliation process which had the active support of the international community. The Deputy Minister lastly rejected the applicant's arguments based on his rights under Article 8 of the Convention. As regards the question whether the applicant's family life could only be enjoyed in the Netherlands, the Deputy Minister accepted that, in the current circumstances, the applicant could not return to Afghanistan but did not find it established that this family life could not be enjoyed in a third country. The Deputy Minister concluded that the interests of the applicant and those of his family were of insufficient weight to tip the balance in their favour.

13. On 1 December 2008, the applicant filed an appeal against this decision with the Regional Court of The Hague. By judgment of 20 April 2010, that court, sitting in Dordrecht, rejected the appeal. It held that, barring newly emerged facts or changed circumstances, the decision to hold Article 1F of the 1951 Refugee Convention against the applicant had become final with the ruling given on 20 May 2005 by the Administrative Jurisdiction Division. Referring to the Division's case-law, it reiterated that

under "newly emerged facts or changed circumstances" was to be understood facts or circumstances having occurred after the initial decision, i.e. after 26 September 2003, and which could not and therefore should not have been submitted before that decision was taken and that, even if that condition was fulfilled, such facts or circumstances nevertheless did not warrant a revision of the judicial assessment if it was excluded from the outset that such new submissions or arguments could alter the initial decision. The Regional Court did not find such newly emerged facts or changed circumstances in the applicant's submissions. It further noted that it was not in dispute that Article 3 of the Convention had, as from the date of the applicant's asylum request and until the date of the impugned decision, uninterruptedly opposed the applicant's expulsion to Afghanistan. Noting that fewer than ten years had elapsed between the filing of the asylum request and the taking of the impugned decision, it further accepted that the Deputy Minister did not have to determine the question whether the continued withholding of a residence title to the applicant was disproportionate. It agreed that more than ten years had elapsed at the time of its own examination, but held that its scope for review was limited to the impugned decision. If the applicant wished to obtain an examination of the proportionality of the continued withholding of a residence title, he should file a request for a regular residence permit together with a request for the lifting of the exclusion order. As regards the applicant's arguments under Article 8 of the Convention, the Regional Court held:

> "The appellant correctly points out that the existence of serious reasons for considering that he has committed offences as referred to in Article 1F of the 1951 Refugee Convention does not offer the same degree of certitude about his culpability as a criminal conviction of such crimes. This does not alter the fact that the Deputy Minister's assumption, as accepted by the Regional Court, is founded on the [contents of the] official country assessment report which, in the opinion of the Administrative Jurisdiction Division, is carried by the underlying materials. As a general, the appellant has further exercised an important function under Dostam. In these circumstances, there exists a rather high degree of certainty that the appellant has committed the acts held against him which belong to the most serious crimes imaginable. In its ruling of 31 October 2008 (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number – "LJN"] BG3842), the Administrative Jurisdiction Division considered that a person against whom Article 1F has been held by the international community is regarded as a danger to (international) public order and public safety. In the ruling cited the Administrative Jurisdiction Division found that the Deputy Minister, when considering that the aim of the exclusion order is to prevent that an alien against whom Article 1F has been held can obtain protection in the Netherlands – thereby rendering the Netherlands a host state for persons who have committed serious crimes – and to counter residence of that alien in the entire Schengen territory, has on good grounds and with sufficient reasoning adopted the position that interference in the alien's family life is justified in the interest of public safety and security. The Regional Court concludes that the fact that the appellant has not been criminally convicted does not mean that the Article 1F objection gives insufficient cause for interference in his right to family life.

When taking the impugned decision, the Deputy Minister proceeded on the basis of the existence of objective obstacles to family life being exercised in Afghanistan. The Regional Court sees no ground for holding that the Deputy Minister has incorrectly considered the interest of the appellant and his family to be of less weight than the interests served by the imposition of the exclusion order or that on this point the impugned decision lacks adequate reasoning. The appellant is indeed already for a long time involved in [residency] proceedings during which he has been allowed to stay in the Netherlands, but he has never held any residence title enabling him to exercise family life in the Netherlands. When the impugned decision was taken, his oldest child had come of age, whereas no special relationship of dependency between the appellant and this child has appeared. At that time, the other three children were, respectively, seventeen, thirteen and seven years old. It has not appeared that, if need be, these children could not appeal to their mother and the oldest child for aid and assistance. Moreover, it cannot be ignored that, for as long as the Deputy Minister considers that the appellant's expulsion to Afghanistan is in breach of Article 3 of the Convention and the appellant takes no concrete steps to meet the obligation placed on him – irrespective of the exclusion order – to leave the Netherlands by actively attempting to obtain admission to another country, the appellant will in fact remain with his wife and children. [His claim] that not a single other country is willing to admit the appellant does not, without more, have to be accepted by the Deputy Minister, the less so as the appellant's lawyer has stated during the hearing held on 16 February 2010 that persons holding a higher rank than the applicant have been admitted to Germany and that the appellant is examining the possibilities of admission to that country. The Regional Court concludes that the impugned decision does not violate Article 8 of the Convention."

14. On 16 May 2010, the applicant filed an appeal against this judgment with the Administrative Jurisdiction Division.

15. In a separate judgment, also given on 20 April 2010, the Regional Court of The Hague sitting in Dordrecht declared inadmissible the applicant's appeal against the Deputy Minister's decision of 12 February 2008 to reject his asylum request. Referring to a ruling handed down by the Administrative Jurisdiction Division on 6 July 2006 (*Jurisprudentie Vreemdelingenrecht* [Immigration Law Reports – "JV"] 2006/347), the Regional Court held that the applicant did not have an interest in a determination of that appeal for as long as the exclusion order imposed on him had not been definitely lifted, as this order rendered him ineligible for any kind of residence title. Although a further appeal lay with the Administrative Jurisdiction Division, there is no indication in the case file that the applicant has lodged such an appeal.

16. On 12 October 2010, the Administrative Jurisdiction Division rejected the applicant's appeal of 16 May 2010 and confirmed the judgment of the Regional Court of The Hague relating to the imposition of the exclusion order. No further appeal lay against this ruling.

17. To date, the applicant has not been prosecuted for the offence defined in article 197 of the Criminal Code (*Wetboek van Strafrecht*) and he has not made any attempts to resettle in a third country.

B. Relevant domestic law and practice

1. Asylum proceedings

18. Until 1 April 2001, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1965 (*Vreemdelingenwet*). Further rules were laid down in the Aliens Decree (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire*). On 1 April 2001, the Aliens Act 1965 was replaced by the Aliens Act 2000. On the same date, the Aliens Decree, the Regulation on Aliens and the Aliens Act Implementation Guidelines were replaced by new versions based on the Aliens Act 2000. The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applies to proceedings under the Aliens Act 2000, unless indicated otherwise in this Act.

19. Under article 29 of the Aliens Act 2000, an alien is eligible for a residence permit for the purpose of asylum if, *inter alia*,

- he or she is a refugee within the meaning of the 1951 Refugee Convention, or
- he or she has established that he or she has well-founded reasons to assume that he or she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment if expelled to the country of origin.

20. If the exclusion clause under Article 1 F of the 1951 Refugee Convention is held against an asylum seeker, the alien concerned loses any protection which might have been available under this Convention and, consequently, becomes ineligible for a residence permit for asylum under article 29 of the Aliens Act 2000 (article 3.107 of the Aliens Decree 2000 and Chapter C1/4.6.4 of the Aliens Act Implementation Guidelines 2000).

21. Under the Aliens Act 2000, judicial review by the Regional Court and the Administrative Jurisdiction Division in administrative law appeal proceedings only addresses whether the executive authority concerned has exercised its administrative powers in a reasonable manner and, in the light of the interests at stake, could reasonably have taken the impugned decision (*marginale toetsing*). Both before the Regional Court and the Administrative Jurisdiction Division it is possible to apply for a provisional measure (*voorlopige voorziening*) pending the outcome of the appeal proceedings.

2. Exclusion orders

22. Article 67 of the Aliens Act 2000 provides that a foreign national may be declared an undesirable alien, entailing the imposition of an exclusion order, on the ground, *inter alia*, that he or she poses a danger to public safety or national security and/or that it is in the interests of the

international relations of the Netherlands. An exclusion order entails a ban on residing in or visiting the Netherlands.

23. An exclusion order, which is immediately enforceable, can be challenged in administrative law appeal proceedings under the terms of the General Administrative Law Act. Such appeal proceedings do not have automatic suspensive effect.

24. Article 197 of the Criminal Code (*Wetboek van Strafrecht*) provides that an alien who stays in the Netherlands while he or she knows that an exclusion order has been imposed on him or her commits a criminal offence punishable by up to six months' imprisonment or a fine of up to 7,600 euros. In accordance with the discretionary powers held by the public prosecution service (*opportuniteitsbeginsel*), it remains for that service to decide in each individual case and in line with the general policy rules defined by the Board of Procurators General (*College van procureurs-generaal*) whether to prosecute or not.

25. An exclusion order may be revoked, upon request, if the alien concerned has been residing outside the Netherlands for an uninterrupted period of ten years (article 68 of the Aliens Act 2000). Such revocation entitles the alien to seek readmission to Netherlands territory subject to the conditions that are applicable to every alien.

26. The implementation as from 1 January 2012 of EU Directive 2008/115/EC of 16 December 2008 (on common standards and procedures in Member States for returning illegally staying third-country nationals) has no consequences in respect of persons on whom an exclusion order has been imposed which has obtained the force of *res iudicata*. Exclusion orders which are being challenged in administrative appeal proceedings or in respect of which a request for revocation has been filed may be replaced by an entry ban (*inreisverbod*) within the meaning of the Directive and a decision to that effect can be challenged in administrative appeal proceedings.

3. Enforcement of removals

27. Pursuant to article 45 of the Aliens Act 2000, a decision rejecting an alien's request for admission to the Netherlands automatically has, amongst others, the following legal consequences:

- the alien is no longer lawfully residing in the Netherlands;
- he/she is required to leave the Netherlands within four weeks;
- officials entrusted with the supervision of aliens are authorised – if the alien has not voluntarily left the Netherlands within the delay fixed for this purpose – to proceed with his/her effective removal from the Netherlands.

28. Under the preceding Aliens Act 1965, a separate decision was given in respect of each of these legal consequences which could each be challenged in distinct proceedings. This is no longer possible under the

Aliens Act 2000 and a negative decision on an admission request is therefore known as a so called "multi-purpose decision" (*meeromvattende beschikking*).

29. Pursuant to the provisions of the Benefit Entitlement (Residence Status) Act (*Koppelingswet*), in force as from 1 July 1998, and article 10 of the Aliens Act 2000, an alien who does not have lawful residence in the Netherlands is not entitled to any benefits in kind, facilities and social security benefits issued by decision of an administrative authority. Derogation is possible if the benefits relate to education for minors, the provision of essential medical care (i.e. prevention of life-threatening situations or loss of essential functions), the prevention of situations that would jeopardise public health of pose a risk for third parties (for instance prevention of infectious diseases, or care related to pregnancy and childbirth) or the provision of legal assistance to the alien concerned.

30. In a ruling of 3 December 2008 (LJN BG5955), the Administrative Jurisdiction Division considered that the decision to proceed with effective removal does not constitute an independent partial decision within the multi-purpose decision on a request for a residence permit, that the competence to proceed with effective removal is a legal effect *ipso iure* (*rechtsgevolg van rechtswege*) of the refusal of such a request, and that this competence is not of a discretionary nature. Although reiterating that in principle no further remedy lies against a multi-purpose decision as the lawfulness of its consequences has already been judicially determined in the administrative appeal proceedings challenging a refusal to admit the alien concerned, the Administrative Jurisdiction Division also accepted that in certain exceptional circumstances, such as a relevant change of circumstances having occurred during the delay between the refusal of the admission request and an act aimed at effective removal (*daadwerkelijke uitzettingshandeling)*, an objection (*bezwaar*) and subsequent appeal (*beroep*) may be filed against an act aimed at effective removal. Under the terms of article 72 § 3 of the Aliens Act 2000, such an act can be equated with a formal decision within the meaning of the General Administrative Law Act which can be challenged in separate administrative appeal proceedings.

31. A refusal on the basis of Article 1 F of the 1951 Refugee Convention to grant an asylum-related residence permit does not necessarily imply that the alien concerned will be effectively removed to his or her country of origin if that would be in breach of Article 3 of the Convention.

32. In two rulings handed down on, respectively, 2 and 9 June 2004 (nos. 200308871/1 and 200308511/1), the Administrative Jurisdiction Division of the Council of State noted that, according to article 45 § 1 of the Aliens Act 2000, a refusal to grant asylum entailed that the person concerned should leave the Netherlands voluntarily, failing which he or she could be expelled. It accepted that an alien – who was denied entry pursuant

to Article 1 F of the 1951 Convention but who could not be expelled to his or her country of origin on the basis of a risk of being subjected to treatment in breach of Article 3 – can be denied a residence permit. It did however underline the legislator's apparent wish to limit the size of this group as much as possible. Where an asylum seeker is able to demonstrate that Article 3 of the Convention constitutes a sustained obstacle to his or her expulsion to the country of origin, it is for the immigration authorities to assess whether or not a permanent denial of a residence title is disproportionate in the particular circumstances of the case. In the two cases at issue, the immigration authorities had not dealt with the question whether the expulsion of the persons concerned would be in breach of Article 3, as they had first examined whether and concluded that the exclusion clause of Article 1 F applied. The Administrative Jurisdiction Division concluded that, therefore, the immigration authorities' examination of these cases had been incomplete.

33. These rulings resulted in an amendment to the relevant rules. Where it has been established that a person, for reasons based on Article 3 of the Convention, cannot be expelled to his or her country of origin but who, pursuant to Article 1 F of the 1951 Convention, is ineligible for any kind of residence permit, no act aimed at effective removal will be undertaken, at least for as long as these reasons exist. However, no residence title will be issued to the alien concerned who remains under the obligation to leave the Netherlands at his or her own motion. It further remains possible to proceed with his or her effective removal as soon as this no longer entails a risk of treatment contrary to Article 3 in the country of origin or to proceed with removal to a third State willing to accept the person concerned.

34. Eligibility for an eventual temporary regular residence permit may arise when the obstacle based on Article 3 for the alien's return to his/her country of origin is of a sustained nature. In practice, such a situation may arise after a period of unlawful residence in the Netherlands of the alien concerned for at least ten years whilst Article 3 continues to stand in the way of removal to his/her country of origin and without any prospect of change in that situation in the foreseeable future, and where the alien concerned has demonstrated that despite his/her best efforts there is no possibility for him/her to relocate to a third country, and where the continued withholding of a residence permit would be disproportional.

C. Relevant international law

35. Article 1F of the 1951 Geneva Convention Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967 provides as follows:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

COMPLAINT

36. The applicant complained that the Netherlands authorities, by denying him admission to the Netherlands, interfered without justification with his right to respect for his family life within the meaning of Article 8 of the Convention.

THE LAW

37. The applicant alleged a violation of his right to respect for his family life within the meaning of Article 8. This provision reads as follows:

"1. Everyone has the right to respect for his private and family life ...

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

A. Parties' submissions

38. The Government submitted at the outset that no concrete steps have been taken or are intended to expel the applicant. Given the assumed real risk of treatment contrary to Article 3 of the Convention, the applicant's expulsion to Afghanistan is currently not at issue. They further submitted that, to date, no criminal proceedings have been brought against the applicant on a charge based on article 197 of the Criminal Code, and that in practice priority is given to prosecuting aliens who are subject to an exclusion order and who have committed other criminal offences. Furthermore, an alien who cannot return to his country of origin in view of Article 3 of the Convention will be convicted under article 197 only if the court finds that it has not been established that he had no opportunity to

leave the Netherlands and he has nonetheless chosen to remain there. Consequently, as the applicant is in fact able to enjoy family life with his wife and children in the Netherlands, the Government argued that the application is premature and that the applicant cannot be regarded as a victim within the meaning of Article 34 of the Convention.

39. In the alternative, the Government submitted that, in refusing to admit the applicant to the Netherlands, no unfair balance had been struck between the competing interests where it concerns Article 8 of the Convention. In this context, the Government emphasised their recognition of the absolute nature of Article 3 of the Convention as well as their firm conviction that the Netherlands should not be a haven for individuals who have committed serious human rights violations. Notwithstanding the objective obstacle preventing the applicant and his family members to exercise their family life in Afghanistan, the applicant – who is under a legal obligation to leave the Netherlands – has made no effort whatsoever to explore the possibility of resettlement in a third country, such as Russia where he studied, or Pakistan and Canada where relatives are residing. The Government lastly pointed out that the question whether the exclusion order imposed on the applicant was compatible with Article 8 has been examined in three instances, including two courts who found that the applicant's personal interests were outweighed by public policy interests.

40. The applicant submitted that the Government gave an unrealistic representation of his family life in the Netherlands where, from a material point of view, his situation was that of an outlaw. Although he had never been prosecuted for the offence defined in article 197 of the Criminal Code and, should this happen one day, it was admittedly to be expected that he would not be convicted, he was not allowed to work and thus could not earn a living. Furthermore, pursuant to the provisions of the Benefit Entitlement (Residence Status) Act, all subsidies and tax benefits of his spouse had been stopped because she was harbouring an illegal alien, namely her husband. He had not looked into the possibilities of resettling in a third country, this being no real option. He therefore rejected the Government's argument that the application should be rejected for being premature and claimed that he was to be regarded as a victim of an ongoing violation of his rights under Article 8 of the Convention.

B. Court's assessment

41. The Court reiterates that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue (see, inter alia, *Nsona v. the Netherlands*, 28 November 1996, § 106, *Reports of Judgments and Decisions* 1996-V, and *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII). It

is not therefore possible to claim to be a "victim" of an act which is deprived, temporarily or permanently, of any legal effect.

42. As to the specific category of cases involving expulsion measures, the Court has consistently held that an applicant cannot claim to be the "victim" of a measure which is not enforceable. It has adopted the same stance in cases where execution of the deportation or extradition order has been stayed indefinitely or otherwise deprived of legal effect and where any decision by the authorities to proceed with deportation can be appealed against before the relevant courts (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 93 with further references, ECHR 2007-I; and *Karimov v. Russia*, no. 54219/08, § 89 with further references, 29 July 2010).

43. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Nunez v. Norway*, no. 55597/09, § 68 with further references, 28 June 2011). Since the applicable principles are similar, the Court does not find it necessary to determine whether in the present case the exclusion order at issue constitutes an interference with the applicant's exercise of the right to respect for his family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

44. Article 8 does not entail a general obligation for a State to authorise family reunion in its territory. The extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest, including that State's obligations under the 1951 Refugee Convention. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion (see *Nunez*, cited above, § 70 with further references; and *Olgun v. the Netherlands* (dec.), no. 1859/03, 10 May 2012).

45. In the present case, the Court notes that the exclusion order was imposed on the applicant on the basis of the decision to hold Article 1F of the 1951 Refugee Convention against him in the proceedings on his asylum request. It further notes that it is not in dispute that, although the

Netherlands authorities are not prepared to lift the exclusion order unless the applicant demonstrates that no third country is prepared to admit him, the applicant currently does not risk expulsion to Afghanistan as the Netherlands authorities accept that this would expose him to a risk of being subjected to treatment contrary to Article 3 of the Convention. Accordingly, in the present circumstances there are no realistic prospects for the applicant's removal from the Netherlands and thus separation from his family living there.

46. The Court further notes that if an act aimed at the applicant's effective removal were to be taken in the future, the applicant can file a request to lift the exclusion order and/or bring administrative appeal proceedings in accordance with article 72 § 3 of the Aliens Act 2000 in order to obtain a determination of the question whether that act would be compatible with his rights under the Convention.

47. The Court also notes that, so far, no criminal proceedings have been brought against the applicant under article 197 of the Criminal Code and that, according to the applicant, he would in all likelihood be acquitted should such proceedings be brought.

48. As regards the argument that the applicant is not allowed to work and thus earn a living, the Court finds that this does not raise an issue under Article 8 as neither this nor any other Convention provision guarantees a right to work (see *Torri & Others, and Bucciarelli v. Italy* (dec.), nos. 11838/07 and 12302/07, 24 January 2012, with further references). The Court further finds that the claim that, for housing him, the applicant's spouse is subjected to negative financial consequences provided under the Benefit Entitlement (Residence Status) Act has remained unsubstantiated.

49. It thus appears that, as matters now stand and despite the exclusion order imposed on him barring his formal admission to the Netherlands, the applicant is not under a threat of removal from the Netherlands and thus of being separated from his family in the Netherlands. To the extent that the applicant can be regarded as a victim within the meaning of Article 34 of the Convention, the Court cannot find – taking into account the particular features of the instant case – that for the purposes of Article 8 of the Convention the Netherlands authorities have struck an unfair balance between the competing interests at issue. It follows that the remaining complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares inadmissible the remainder of the application.

Santiago Quesada
Registrar

Josep Casadevall
President