



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

THIRD SECTION

DECISION

Application no. 21563/08

N.F.

against the Netherlands

The European Court of Human Rights (Third Section), sitting on 14 January 2014 as a Chamber composed of:

Josep Casadevall, *President*,

Alvina Gyulumyan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria,

Johannes Silvis,

Valeriu Grițco, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 6 May 2008,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr N.F., is an Afghan national, who was born in 1961 and lives in the Netherlands. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 3). He was represented before the Court by Ms A.M. van Eik, a lawyer practising in Amsterdam.

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

A. The circumstances of the case

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

4. On 19 January 2001 the applicant applied for asylum in the Netherlands. On the same date he was interviewed about his identity, nationality and travel route.

5. On 28 February 2001 and 1 May 2003 the applicant was interviewed about his asylum account (*nader gehoor*). He claimed *inter alia* that he had not seen his wife and their two children since 1998 and that he had been a professional military officer. Between 1984 and 1992 – when the Mujahideen came to power – he had worked for the KhAD/WAD (*Khadimat-e Atal-at-e Dowlati/Wezarat-e Amniyat-e Dowlati*)¹. In 1987 he had also become a member of the communist party (People’s Democratic Party of Afghanistan; PDPA). In 1994, in order to flee the unstable situation in Kabul and the Mujahideen, the applicant and his family had moved to Mazar-i-Sharif. After the second Taliban invasion of Mazar-i-Sharif on 8 August 1998, his problems had started. He had been arrested by three armed Taliban, he had been kicked, beaten and taken to a house. Suddenly the Taliban had left. As the door of the house had been unlocked, the applicant had simply walked off. He had then fled to an uncle with whom he had stayed. On 22 November 2000 the Taliban had raided his uncle’s house. The applicant had been taken by them and held at a control post where he had been ill-treated under questioning. He had been released on 25 November 2000 after his uncle had managed to bribe some Taliban. Fearing that he would be killed in Afghanistan on account of his work for KhAD/WAD, his PDPA membership and his Tajik ethnic origins, the applicant had fled to the Netherlands where he arrived on 15 January 2001.

6. In December 2001 the applicant converted to Christianity and was baptised.

7. On an unspecified date the applicant’s wife and their two eldest children travelled to the Netherlands and applied for asylum. They were granted asylum and on an unspecified subsequent date were granted Dutch citizenship. A third child has been born to the applicant and his wife in the Netherlands.

8. On 14 August 2003 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*; “the Minister”) issued an intention (*voornemen*) to reject the applicant’s asylum application and to hold Article 1F of the 1951 Refugee Convention against him. The Minister based this decision on the applicant’s statements about his career from 1981

¹ Afghan security services under the former Communist regime (the *Khadimat-e Atal’at-e Dowlati* (KhAD) / *Wazarat-e Amaniat-e Dowlati* (WAD)). The KhAD was set up in 1980 and transformed into a ministry in 1986. This ministry, called ‘WAD’, remained in existence until the Communist regime fell in 1992.

to 1992 as an officer in the KhAD/WAD in which he had last held the rank of major, and on a general official report (*algemeen ambtsbericht*), drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*) on “Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD” (*“Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD”*) On the basis of this report, the Netherlands immigration authorities adopted the position that Article 1F of the 1951 Refugee Convention could be held against virtually every Afghan asylum seeker who, holding the rank of third lieutenant or higher, had worked during the communist regime for the KhAD/WAD.

9. On 11 September 2003 the applicant submitted his written comments on the intention (*zienswijze*), arguing that it would be unjust to hold Article 1F against him as he did not have personal knowledge of the crimes committed by the KhAD/WAD and he had never participated in such crimes.

10. On 2 May 2006 an additional interview (*aanvullend gehoor*) was held with the applicant, mainly about his conversion to Christianity and whether his expulsion to Afghanistan would expose him to a real and personal risk of being subjected to treatment contrary to Article 3 of the Convention.

11. By letter of 28 June 2007, following the additional interview of 2 May 2006, the Deputy Minister of Justice (*Staatssecretaris van Justitie*; “the Deputy Minister”; the successor to the Minister for Immigration and Integration) notified the applicant of her intention to reject his asylum application by holding Article 1F of the 1951 Refugee Convention against him. The Deputy Minister held that the applicant had failed to demonstrate that he, if expelled to Afghanistan, would be exposed to a real and personal risk of being subjected to treatment contrary to Article 3 of the Convention. According to the official report of the Ministry of Foreign Affairs of 31 January 2007 not all former members of the KhAD/WAD ran such a risk. The applicant had failed to establish that specific groups were looking for him. Furthermore, it could not be said that his conversion to Christianity would give rise to such a risk. The Deputy Minister further notified the applicant of her intention to impose an exclusion order (*ongewenstverklaring*) on him.

12. On 26 July 2007 the applicant submitted his written comments on the intention. He argued that he had a real and personal risk of being subjected to treatment contrary to Article 3 upon return to Afghanistan as the Taliban were looking for him, because of his involvement in the KhAD/WAD as well as because of his conversion to Christianity which was known in Afghanistan.

13. By decision of 21 August 2007 the applicant’s asylum application was refused by the Deputy Minister, Article 1F of the 1951 Refugee

Convention being held against him on account of his involvement with the KhAD/WAD. In addition, an exclusion order was imposed on him. As regards Article 3 of the Convention, the Deputy Minister concluded that the applicant had not established that he had a well-founded fear of being exposed to a real risk of treatment prohibited by this provision.

14. On 13 September 2007 the applicant filed an appeal with the Regional Court (*rechtbank*) of The Hague against the rejection of his asylum request and, on 3 October 2007, he lodged an objection (*bezwaar*) with the Deputy Minister against the imposition of the exclusion order.

15. The Deputy Minister rejected this objection on 14 March 2008 and, on 19 March 2008, the applicant filed an appeal against this decision with the Regional Court of The Hague.

16. By judgment of 24 April 2008 the Regional Court of The Hague sitting in Assen declared inadmissible the applicant's appeal against the rejection of his asylum application. As under domestic law an alien cannot have legal residence if an exclusion order has been imposed, the Regional Court found that the applicant had no legal interest in a determination of his appeal. On 23 May 2008, the applicant filed a further appeal with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*).

17. In its judgment of 6 May 2008, the Regional Court of The Hague sitting in Assen rejected the applicant's appeal against the exclusion order. On 29 May 2008, the applicant filed a further appeal with the Administrative Jurisdiction Division.

B. Developments after the introduction of the application

18. On 6 May 2008, at the request of the applicant, the Chamber decided to indicate to the Government of the Netherlands that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to remove the applicant to Afghanistan (Rule 39 of the Rules of Court) until 21 May 2008.

19. On 20 May 2008 the Chamber prolonged the measure under Rule 39 of the Rules of Court until further notice. On that same date the Government were invited to submit observations on the admissibility and merits of the case.

20. On 17 September 2008 the Administrative Jurisdiction Division rejected the applicant's appeal against the judgment of 24 April 2008. In this ruling, the Division held that the alleged violation of the applicant's rights under Articles 3 and 8 of the Convention on account of his expulsion from the Netherlands were to be determined in the still pending proceedings concerning the imposition of the exclusion order. No further appeal lay against this ruling.

21. On 23 October 2008, the Deputy Minister withdrew her decision of 14 March 2008 in which she had rejected the applicant's objection of 3 October 2007 against the imposition of the exclusion order. As the object of the administrative appeal proceedings had thus ceased to exist, the Administrative Jurisdiction Division decided on 5 December 2008 to declare inadmissible the applicant's further appeal of 23 May 2008.

22. In a fresh decision taken on 12 March 2009 and a pertaining addendum of 17 March 2009, the Deputy Minister again rejected the applicant's objection of 3 October 2007. The Deputy Minister considered that, as Article 1F of the Refugee Convention was being held against him, the applicant could be considered as constituting a danger to national security. However, the Deputy Minister did accept that the applicant, if removed to Afghanistan, would be exposed to a real and personal risk of being subjected to treatment in breach of Article 3 of the Convention upon return to Afghanistan. However, this could not lead to the applicant being granted a residence permit.

23. The applicant filed an appeal against this decision with the Regional Court of The Hague. On 7 June 2012, this appeal was heard before the Regional Court of The Hague sitting in Amsterdam. It decided to adjourn the appeal to allow the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*; the successor to the Deputy Minister of Justice) to replace the exclusion order by an entry ban within the meaning of Directive 2008/115/EC of 16 December 2008 (on common standards and procedures in Member States for returning illegally staying third-country nationals). The appeal before the Regional Court is presumably still pending as no further information about these proceedings has been submitted.

24. On 5 September 2012 the Court of Justice of the European Union ("ECJ") gave judgment in Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*. In this judgment the ECJ held that for the purpose of determining which acts of interference with freedom of religion may be regarded as constituting persecution, it is unnecessary to distinguish acts that interfere with the 'core areas' (*forum internum*) of the basic right to freedom of religion, which do not include religious activities in public, from acts which do not affect those purported 'core areas'. According to the ECJ, acts which may constitute a 'severe violation' within the meaning of Article 9 (1)(a) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection guaranteed ("the Qualification Directive") include serious acts which interfere with one's freedom not only to practice one's faith in private circles but also to live that faith publicly.

25. On 30 November 2012 the Administrative Jurisdiction Division handed down a ruling, in proceedings unconnected to the applicant, in which it applied the ECJ judgment of 5 September 2012.

26. By letter of 13 December 2012 the Netherlands Government were requested to inform the Court what, if any, practical consequences they drew from the rulings of 5 September 2012 and 30 November 2012 in relation to the pending case.

27. In its reply of 6 March 2013 the Government requested the Court to strike the application out of the list of pending cases, submitting the following:

“By decision of 11 March 2009 it was established that the applicant runs a real risk of treatment contrary to Article 3 of the Convention upon returning to Afghanistan. Consequently, the applicant will not be removed to Afghanistan. Since Article 1F of the Refugee Convention applies to him, the applicant is not eligible for an asylum permit. This conclusion is unaffected by the judgment delivered by the Court of Justice of the European Union on 5 September 2012.”

28. In his comments of 15 April 2013, the applicant objected to the Government’s request to strike the application out of the list of cases.

C. Relevant domestic law and practice

29. The relevant domestic law and practice as regards asylum proceedings, exclusion orders and enforcement of removals are set out in *K. v. the Netherlands* ((dec.), no. 33403/11, §§ 16-32, 25 September 2012).

COMPLAINTS

30. The applicant complained that, if returned to Afghanistan, he would be subjected to treatment in breach of Article 3 of the Convention on account of his activities for the KhAD/WAD and his conversion from Islam to Christianity.

31. The applicant further complained that his rights under Article 8 of the Convention would be violated if he were expelled to Afghanistan as his wife and children had all been granted residence permits in the Netherlands.

32. The applicant lastly complained under Article 13 of the Convention that he did not have an effective remedy in respect of his complaint under Article 3.

THE LAW

33. At the outset, the Court considers that there may be some doubt over the question whether or not the applicant can be regarded as having exhausted effective domestic remedies for the purposes of Article 35 § 1 of the Convention, bearing in mind the fact that the proceedings concerning the imposition of an entry ban are currently still pending. However, it considers that it is not necessary to determine either this question or the Government's request to strike the case out of the list of pending cases as it finds that the application must in any event be rejected for the reasons set out below.

34. The applicant complained that, if removed to Afghanistan, he would be exposed to a real and personal risk of treatment proscribed by Article 3. He further complained that, in this respect, he did not have an effective remedy within the meaning of Article 13 of the Convention.

Article 3 reads as follows:

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

Article 13 provides:

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

35. The Court notes that for reasons based on Article 3 of the Convention the Netherlands authorities do not, at least not for the time being, intend to proceed effectively with the applicant's removal to Afghanistan. It further notes that, should such steps be taken, the applicant can challenge this (see *K. v. the Netherlands*, no. 33403/11, § 25, 18 October 2011).

36. In these circumstances and recalling its findings in comparable cases (see *I. v. the Netherlands* (dec.), no. 24147/11, §§ 37-39, 18 October 2011; *K. v. the Netherlands*, cited above, §§ 34-36; and *H. v. the Netherlands* (dec.), no. 37833/10, §§ 39-41, 18 October 2011), the Court considers that, in the absence of any realistic prospects for his expulsion to Afghanistan, the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention as regards his complaint that his return to Afghanistan would be in violation of his rights under Article 3 of the Convention.

37. It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

38. As regards the applicant's complaint that, in respect of his above complaint under Article 3, he did not have an effective remedy as guaranteed by Article 13 of the Convention, the Court reiterates that the word “remedy” within the meaning of Article 13 does not mean a remedy

bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint (see (see, for instance, *N.B. v. Slovakia*, no. 29518/10, § 108, 12 June 2012; and *Adamczuk v. Poland* (revision), no. 30523/07, § 78, 15 June 2010).

39. The Court notes that the applicant could and did avail himself of the possibility to challenge the refusal of his request for asylum as well as the imposition of the exclusion order before the domestic administrative and judicial authorities and that the proceedings on a possible imposition of an entry ban are currently pending. It further notes that, in the eventuality of a future act of the Netherlands authorities aimed at the applicant's removal from the Netherlands, it is open to the applicant to 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 Article 3 of the Convention (see *I. v. the Netherlands*, cited above, § 27; *K. v. the Netherlands*, cited above, § 25; and *H. v. the Netherlands*, cited above, § 31).

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

41. The applicant further complains that the Netherlands authorities, in denying him residence on the basis of Article 1F of the 1951 Refugee Convention, violate his right to respect for his family life with his wife and their children as guaranteed by Article 8 of the Convention. This provision reads in its relevant part:

“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 ... 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.”

42. The Court notes that, as matters now stand, the applicant is not under a threat of removal from the Netherlands and thus of being separated from his family in the Netherlands. Recalling its findings in comparable cases (see *I. v. the Netherlands* (dec.), no. 24147/11, §§ 41-49, 10 July 2012; and *K. v. the Netherlands*, no. 33403/11, §§ 39-47, 25 September 2012), the Court considers that, to the extent that the applicant can be regarded as a victim within the meaning of Article 34 of the Convention, it cannot find – taking into account the particular features of the instant case – that the applicant's situation should be regarded as contrary to Article 8 of the Convention.

43. It follows that also this part of application is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President