

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

THIRD SECTION

DECISION

Application no. 33403/11
K.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 25 September 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Egbert Myjer,
Corneliu Bîrsan
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 28 May 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 K, is an Afghan national who was born in 1953 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. The applicant fled his native Afghanistan on 17 September 1998 and travelled to the Netherlands where he arrived on 14 October 1998 and applied for asylum. He was subsequently joined in the Netherlands by his spouse and four of their six children, the latter born between 1984 and 1989. On unspecified dates, the applicant's spouse and four daughters were all granted Netherlands residence permits.

5. On 16 February 2004 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 based this decision on the applicant's statements about his career from 1982 to 1992 as an officer in the *Khadimat-e Atal'at-e Dowlati/Wezarat-e Amniyat-e Dowlati* ("KhAD/WAD"); the intelligence service during the former communist regime in Afghanistan in which he had last held the rank of colonel, and the general official country assessment report (*algemeen ambtsbericht*) on Afghanistan, drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs. According to this official report, 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. Although this decision entailed that the applicant was no longer lawfully staying in the Netherlands and was obliged to leave the country, the Minister further decided 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 15 March 2004 the applicant filed an appeal against this decision with the Regional Court (*rechtbank*) of The Hague. In its judgment of 24 January 2005, the Regional Court accepted the appeal and quashed the impugned 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 held – referring to a ruling given on 2 June 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 Article 3 of the Convention constituted a sustained obstacle to his expulsion to Afghanistan. Consequently, the Minister's examination had been incomplete.

7. On 8 August 2006, the Minister took a fresh decision on the applicant's asylum request, holding that it could not be concluded from the applicant's account – viewed against the background of the current political and social situation in Afghanistan – that there existed a real and foreseeable risk that the applicant, if returned to Afghanistan, would be subjected to treatment in breach of Article 3 of the Convention. The Minister decided again to hold Article 1F of the 1951 Refugee Convention against the applicant and, furthermore, 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, their children and one grandchild born in the Netherlands in the meantime, the 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.

8. On 13 September 2006, the applicant filed an objection (*bezwaar*) with the Minister against the decision to impose an exclusion order. As this order was immediately enforceable and the objection did not have suspensive effect, he also filed a request with the Regional Court of The Hague for 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.

9. On 28 June 2007, the Regional Court of The Hague sitting in Haarlem accepted the applicant's appeal and quashed the impugned decision. It noted at the outset that, since no appeal had been filed against the judgment of 24 January 2005, the decision to hold Article 1F of the 1951 Refugee Convention against the applicant had become final, and that the subject of the present appeal was the question whether the applicant had established that he would run a real risk of being subjected to treatment prohibited by Article 3 of the Convention if returned to Afghanistan, and, if so, whether that risk constituted a sustained obstacle. Noting that, in contrast to the decision of 16 February 2004, it had been concluded in the impugned decision at issue that the applicant had not established the existence of a real risk of treatment in violation of Article 3 in case of his return to Afghanistan, the Regional Court found that this changed opinion had not been duly reasoned. Accordingly, it remitted the case to the Deputy Minister of Justice (*Staatssecretaris van Justitie*; the successor to the Minister for Immigration and Integration) for a fresh decision.

10. On 3 July 2007, apparently at the applicant's request, the Afghan mission in the Netherlands issued a written statement, confirming that the applicant "is an Afghan national and has not committed any crime against humanity during his duty in Afghanistan".

11. On 24 July 2007, the Deputy Minister filed an appeal against the judgment of 28 June 2007 with the Administrative Jurisdiction Division. On 19 December 2007, the Administrative Jurisdiction Division accepted this appeal, quashed the judgment of 28 June 2007 and declared inadmissible the applicant's appeal of 13 September 2006 against the decision to reject his asylum request. Referring to a ruling it had given on 6 July 2006 (*Jurisprudentie Vreemdelingenrecht* [Immigration Law Reports – "JV"] 2006/347), the Administrative Jurisdiction Division found that the applicant did not have an interest in a determination of his appeal since as long as the exclusion order which had also been imposed on him remained in force, the appeal in issue could never lead to lawful stay.

12. On 3 March 2008, the provisional-measures judge (*voorzieningen-rechter*) of the Regional Court of The Hague sitting in Haarlem 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.

13. On 16 January 2009, the Deputy Minister rejected the applicant's objection of 13 September 2006. The Deputy Minister noted that 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. The Deputy Minister held that the statement of the Afghan mission in the Netherlands did not alter the decision, which had already become final, that Article 1F was applicable, as this statement did not provide any concrete elements to cast doubts on the correctness and completeness of the information contained in the official report of 29 February 2000. As regards Article 3 of the Convention, the Deputy Minister found that the applicant, noting his asylum account and his activities in Afghanistan, had established that he had well-founded fears for assuming that, if returned to Afghanistan in the present day situation, he would run a real risk to be subjected to treatment proscribed by this provision. However, this did not entail that the applicant was eligible for a residence title. This was dependent on the question whether this risk constituted a sustained obstacle. On this point, the Deputy Minister concluded that it had not been established that this was the case and that there was no reason to hold that withholding a residence permit from the applicant was disproportionate. As regards Article 8 of the Convention, the Deputy Minister reiterated that the decision to impose an exclusion order entailed an interference with the applicant's right to respect for his family life but, taking into account the guiding principles set out in the Court's judgment in the cases of *Boultif v. Switzerland*, (no. 54273/00, § 48, ECHR 2001-IX) and *Üner v. the Netherlands* ([GC], no. 46410/99, § 58, ECHR 2006-XII), considered – with extensive reasoning – that the interest of public safety and national security, as well as the prevention of crime and the protection of the rights and freedoms of others weighed more heavily

than the applicant's interest in an undisturbed family life. The Deputy Minister concluded that the interference was justified and not in breach of Article 8.

14. The applicant's appeal against this decision was rejected on 29 April 2010 by the Regional Court of The Hague sitting in Middelburg. It agreed with the Deputy Minister that the decision taken on 16 February 2004 to hold Article 1F of the 1951 Refugee Convention against the applicant had become final and that the applicant had not demonstrated that Article 3 of the Convention constituted a sustained obstacle to his expulsion to Afghanistan. As regard Article 8 of the Convention, it held:

> "It is not in dispute that the exclusion order entails interference in the appellant's family life. In assessing whether such interference is justified, the guiding principles as set out in the ruling of the European Court of Human Rights of 2 August 2001, JV 2001/254 (Boultif v. Switzerland) and supplemented in the ruling of 18 October 2006, JV 2006/417 (Üner v. the Netherlands) must explicitly be taken into consideration. In weighing the general interest of the State against the appellant's personal life not only the separate principles must be addressed but these must also be considered in their correlation. And it must also be examined whether the imposition of an exclusion order, having regard also to its consequences, is proportionate. There must be a fair balance between the interests involved.
>
> It is noted that the Deputy Minister, in reaching the decision, has taken into account the above principles, also referred to as "the Boultif criteria". On appeal, the appellant has merely submitted that in the impugned decision the Deputy Minister has not made an assessment based on the guiding principles but only considered that the interest of public safety and national security ought to outweigh the appellant's interest in an undisturbed family life. The Regional Court considers that, in his criticism of the extensive assessment by the Deputy Minister, the appellant has not sufficiently focussed on (parts of) that assessment. In the opinion of the Regional Court, the Deputy Minister could conclude that the exclusion order does not violate Article 8 of the Convention."

15. The applicant's subsequent appeal to the Administrative Jurisdiction Division was dismissed on 30 November 2010. It upheld the judgment of 29 April 2010. In so far as the applicant relied on Article 8 of the Convention, the Division held:

> "In the decision of 16 January 2009, the Deputy Minister has balanced the general interest – which is served by the protection of public safety as well as the prevention of crime and the protection of the rights and freedoms of others – against the alien's personal interest in exercising his family life in the Netherlands with his wife and children and in this has attributed decisive weight to the general interest. In so doing, the Deputy Minister has had regard to the "guiding principles" formulated by the European Court of Human Rights in the judgment of ... Boultif v. Switzerland and the additional criteria cited in ... Üner v. the Netherlands. The Deputy Minister has attached substantial weight to the fact that Article 1F of the 1951 Refugee Convention has been held against the alien. The Deputy Minister has further taken into account that the alien has lived outside of the Netherlands for the greatest part of his life and can therefore be considered capable of independently fending for himself in another

country. The Deputy Minister has further adopted the position that, although a considerable period of time has elapsed since the facts occurred for which the alien is being held responsible, in view of their gravity the interest of public order weighs more heavily. As regards the alien's family members, the Deputy Minister has taken the view that, although at the time the decision was taken there was an objective obstacle to the family life at issue being exercised in Afghanistan, this did not alter the fact that it had not appeared that there was an objective obstacle to family life being exercised in another country. According to the Deputy Minister, it could be expected of the alien's family members to follow him to another country. The Deputy Minister has found it to be of relevance that – at the time of the decision – three children of the alien had reached adulthood whereas it had not appeared that there existed "more than normal emotional ties" between them and the alien. Also, one of the children was – at the time of the decision – sixteen and thus, according to the Deputy Minister, did not require daily care by the parents. According to the Deputy Minister, it could also not be excluded that this child, in her parents' company, could adjust in a country other than the Netherlands. The Deputy Minister has lastly considered that the family members could also maintain contact with the alien without the latter staying in the Netherlands.

Having noted the decision of 16 January 2009, the Regional Court has correctly not accepted the alien's argument that the Deputy Minister had given insufficient reasons for the finding that the exclusion order does not violate Article 8 of the Convention. The fact that the alien has not been criminally convicted does not mean that the holding against him of Article 1F of the 1951 Refugee Convention is an insufficient basis for interference with his right to respect for this family life.

The grievance fails."

No further appeal lay against this ruling.

B. Relevant domestic law and practice

1. Asylum proceedings

16. 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.

17. 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.

18. 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).

19. 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

20. 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.

21. 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.

22. 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.

23. 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.

24. 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 and 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

25. 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.

26. 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*).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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

33. 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

34. The applicant complained 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 private and family life as guaranteed by Article 8 of the Convention as his spouse and their daughters

have been admitted to and are living in the Netherlands and as it cannot be expected from them, as western educated and westernised women, to return to Afghanistan.

THE LAW

35. The applicant alleged a violation of his right to respect for his private and 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

36. The Government submitted that from August 2006 to June 2007 concrete steps had been taken to remove the applicant. However, since June 2007 no such further steps had been taken. Given the assumed real risk of treatment contrary to Article 3 of the Convention in case of his expulsion to Afghanistan, the applicant's expulsion to this country was as from June 2007 and to date no longer 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.

37. In the alternative, the Government submitted that, in refusing to admit the applicant to the Netherlands, no unfair balance is struck between the competing interests where it concerns Article 8 of the Convention. In this context, the Government emphasized 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 – amongst other countries – Pakistan and the USA where relatives are residing. The Government lastly pointed out that the question whether the exclusion order imposed on the applicant is 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.

38. The applicant submitted that the Government give an unrealistic representation of his family life in the Netherlands where, from a material point of view, his situation is that of an outlaw. Although he has never been prosecuted for the offence defined in article 197 of the Criminal Code and, should this happen one day, it is admittedly to be expected that he will not be convicted, he is not allowed to work and thus cannot earn a living. Furthermore, pursuant to the provisions of the Benefit Entitlement (Residence Status) Act, all subsidies and tax benefits of his spouse are stopped because she is 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 is to be regarded as a victim of an ongoing violation of his rights under Article 8 of the Convention.

B. Court's assessment

39. 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.

40. 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).

41. 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.

42. 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).

43. 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.

44. 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.

45. 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.

46. 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.

47. 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