

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

THIRD SECTION

DECISION

Application no. 68564/12
Mohammad Rafiq NAIBZAY
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 4 June 2013 as a Committee composed of:
Alvina Gyulumyan, *President,*
Kristina Pardalos,
Johannes Silvis, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*
Having regard to the above application lodged on 22 October 2012,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Mohammad Rafiq Naibzay, is an Afghan national, who was born in 1967 and, until recently, has been staying in the Netherlands. He was represented before the Court by Mr P.B.P.M. Bogaers, a lawyer practising in Nieuwegein.

A. The circumstances of the case

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

3. After having fled Afghanistan, the applicant, his wife and their four children applied for asylum in the Netherlands on 28 May 1998. These requests were rejected by the Deputy Minister of Justice (*staatssecretaris van Justitie*) on 25 October 2000.

4. The applicant's objection (*bezwaar*) against this decision was rejected on 14 February 2003 by the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*), the successor to the Deputy Minister of Justice. The applicant's appeal to the Regional Court (*rechtbank*) of The Hague was accepted on 10 February 2005 and the Minister was ordered to take a fresh decision on the applicant's objection.

5. In a new decision taken on 25 July 2006, the Minister again rejected the applicant's objection. The applicant's appeal was rejected on 18 April 2007 by the Regional Court of The Hague. According to the applicant, no further appeal lay against this judgment.

6. On 20 March 2009 the applicant filed a fresh asylum request. On 31 May 2010, the Minister of Justice (*Minister van Justitie*) rejected this request by holding Article 1F of the 1951 Geneva Convention relating to the Status of Refugees ("the 1951 Refugee Convention") against the applicant. The Minister based this decision on the applicant's statements about his career as an officer in the "KhAD/WAD", the intelligence service during the former communist regime in Afghanistan, and the general official country assessment report (*algemeen ambtsbericht*) on Afghanistan, drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs. 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. The Minister further rejected the applicant's arguments based on Articles 3 and 8 of the Convention. No exclusion order (*ongewenstverklaring*) was imposed on the applicant.

7. By judgment of 15 March 2011, the Regional Court of The Hague sitting in Zwolle rejected the applicant's appeal. It accepted the Minister's decision and rejected the applicant's arguments based on, *inter alia*, Articles 2, 3, 5, 8 and 13 of the Convention.

8. The applicant's further appeal was rejected on 25 April 2012 by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*). No further appeal lay against this ruling.

9. In the meantime, on 19 October 2011, the applicant's spouse and children had been granted a Netherlands residence permit valid as from 25 August 2006. On 30 May 2012, they were granted Netherlands nationality.

10. On 5 April 2013, the applicant informed the Court that, under the terms of Directive 2004/38/EC (see paragraph 13 below), he had been granted a Belgian residence permit for the purpose of stay in Belgium with his oldest daughter who holds both Afghan and Netherlands citizenship. He further submitted that he had been forced to leave his spouse, who is a mental patient, and his two youngest children behind in the Netherlands.

B. Relevant domestic law

11. The relevant domestic law and practice as regards asylum proceedings and enforcement of removals are set out in *K. v. the Netherlands* ((dec.), no. 33403/11, §§ 16-9 and §§ 25-33, 25 September 2012).

C. Relevant international law

12. 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."

13. Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the European Union (EU) to move and reside freely within the territory of the EU Member States. This right also extends to close family members who are not a citizen of one of the EU Member States such as for instance a parent, provided the latter is dependent on the EU citizen concerned. In its relevant part, Article 2 of this Directive reads as follows:

> "(2) 'Family member'' means:
>
> (a) the spouse
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State. ...
>
> (d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b)."

COMPLAINTS

14. The applicant complained that he, if expelled to Afghanistan, will be exposed to a real risk of being subjected to treatment prohibited by Article 2 and/or Article 3 of the Convention on account of the fact that the Netherlands authorities have held Article 1F of the 1951 Refugee Convention against him.

15. The applicant further complained that the Netherlands authorities, in denying him residence on the basis of Article 1F of the 1951 Refugee Convention, subject him to treatment proscribed by Article 3 and disrespect his right under Article 6 § 2 of the Convention to be presumed innocent.

16. The applicant also complained that the refusal to grant him a Netherlands residence permit is contrary to his rights under Article 8 of the Convention.

17. The applicant lastly complained that, in respect of his complaints under Articles 3 and 8, he did not have an effective remedy within the meaning of Article 13 of the Convention.

THE LAW

18. The applicant initially complained that his removal to Afghanistan would expose him to a real risk of being subjected to treatment in breach of Article 2 which guarantees the right to life and/or Article 3 of the Convention which latter provision reads:

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

19. The Court notes that, according to information submitted by the applicant on 5 April 2013, he has been granted a Belgian residence permit. Consequently, the factual and legal circumstances forming the basis of this part of the application no longer obtain, as the applicant is no longer at risk of being expelled to Afghanistan where he fears to be subjected to treatment in breach of Article 2 and/or Article 3 of the Convention.

20. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

21. The applicant further complained that the Netherlands authorities, in denying him residence on the basis of Article 1F of the 1951 Refugee Convention, subject him to degrading treatment proscribed by Article 3 and disrespect his right under Article 6 § 2 of the Convention to be presumed innocent. In its relevant part, Article 6 provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. ..."

22. The Court considers at the outset that, under the terms of Article 19 of the Convention, it cannot entertain complaints about the application and interpretation of the 1951 Refugee Convention. It further reiterates that, for the purposes of Article 3, ill-treatment must attain a minimum level of severity to fall within the scope of this provision. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C; *Enea v. Italy* [GC], no. 74912/01, § 55, ECHR 2009; and *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 196, 13 December 2012).

23. The Court has considered treatment to be "degrading" within the meaning of Article 3 because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, for instance, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). The Court will have regard to whether the object of such treatment is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, for example, *Raninen v. Finland*, 16 December 1997, § 55, *Reports of Judgments and Decisions* 1997-VIII). The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see, for instance, *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).

24. Against this background, the Court cannot find that the application by domestic authorities of the exclusion clause provided in Article 1F of the 1951 Refugee Convention, as such or in the particular circumstances of the instant case, attains the minimum level of severity required for treatment to fall within the scope of Article 3 of the Convention. Accordingly, this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

25. To the extent that, in respect of the application of Article 1F, the applicant alleges a violation of Article 6 § 2 of the Convention, the Court has previously held that proceedings and decisions concerning the entry, stay and removal of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention (see *Maaouia*

v. France [GC], no. 39652/98, § 40, ECHR 2000-X and *Szabó v. Sweden* (dec.), no. 8578/03, ECHR 2006-VIII). Accordingly, the complaint under Article 6 § 2 must be rejected for being incompatible *ratione materiae* with the provisions of the Convention.

26. The applicant further 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, which 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."

27. The Court recalls that Contracting States have the right as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the removal of an alien from a country may, depending on the circumstances of a particular case, give rise to an infringement of an applicant's rights under Article 8 (see, amongst other authorities, *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII, §§ 54 and 59).

28. Noting that, unlike his spouse and their children, the applicant has never been admitted to the Netherlands, the Court 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 refusal to grant the applicant a residence permit 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.

29. 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 or in a third country, and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion (see, *K. v. the Netherlands*, cited above, § 42 with further references).

30. In the present case, the Court notes that the applicant was denied admission to the Netherlands on the basis of the decision to hold Article 1F of the 1951 Refugee Convention against him in the proceedings on his asylum request, while his wife and children were granted residence permits and have since obtained Netherlands nationality. However, the Court does not consider it necessary to examine whether, in deciding in this manner, the Netherlands authorities struck an unfair balance between the competing interests at issue. In this respect the Court observes that the applicant has recently been granted a Belgian residence permit for the purposes of stay with his daughter in Belgium and that it has not appeared that it would be impossible for the applicant's spouse and their other children – all of whom are holding Netherlands citizenship – to join him and their oldest daughter/sister in Belgium. In these circumstances and to the extent that the applicant's relationship with his children continues to attract the protection of Article 8 (see *Konstatinov v. the Netherlands*, no. 16351/03, § 52, 26 April 2007), the Court considers – taking into account the particular features of the instant case – that this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

31. The applicant lastly complained that, in respect of his complaints under Articles 3 and 8, he did not have an effective remedy within the meaning of Article 13 of the Convention. This provision reads as follows:

> "Everyone whose rights and freedoms as set forth in this 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."

32. The Court emphasises that, in so far as the facts of which complaint is made fall within the scope of one or more Convention provision, 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 Convention grievance (see *Ivakhnenko v. Russia* (dec.), no. 12622/04, 21 October 2008, and *Adamczuk v. Poland* (revision), no. 30523/07, § 78, 15 June 2010). The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła*, cited above, § 157).

33. However, the Court has found above that the applicant's complaints concerning the alleged breaches of his rights under Articles 3 and 8 were

manifestly ill-founded. Consequently, the applicant did not have an "arguable claim" for the purposes of Article 13 of the Convention.

34. It follows that the complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Alvina Gyulumyan
Deputy Registrar	President