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

THIRD SECTION

DECISION

Application no. 15439/09
Y.A.
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 Griţco, *judges,*

and Marialena Tsirli, Deputy Section Registrar,

Having regard to the above application lodged on 15 March 2009,

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 regard to the decisions of 25 March 2009 and 14 September 2010,

Having regard to the information submitted by the parties,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Y.A., is an Afghan national, who was born in 1953 and lives in the Netherlands in Dordrecht. 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 Mr J.M. Walls, a lawyer practising in Prinsenbeek.

2. The Dutch Government ("the Government") were represented by their their Agent, Mr R.A.A. Böcker, and Deputy Agent, Ms L. Egmond, both 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 28 December 1997, the applicant applied for asylum in the Netherlands. He stated *inter alia* that he had been a professional military officer and that he had worked for the KhAD/WAD (*Khadimat-e Atal-at-e Dowlati/Wezarat-e Amniyat-e Dowlati*)[1]. He further stated that he had been a member of the communist party (People's Democratic Party of Afghanistan; PDPA). He had fled Afghanistan on 10 December 1997 as the Taliban had been searching for him. He was granted asylum on 27 July 1999. On an unspecified date in 2001, his spouse was given permission to join him in the Netherlands. This permission was equally given to their four children who were born in 1989, 1990, 1994 and 1996, respectively. His wife and the two youngest children have since obtained Dutch nationality; the two oldest children hold residence permits for asylum purposes.

5. On 24 February 2006, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) decided to withdraw the applicant's asylum based residence permit with retroactive effect, Article 1F of the 1951 Geneva Convention relating to the Status of Refugees being held against the applicant. The Minister based this decision on the applicant's statements about his career from 1983 to 1992 as an officer in the KhAD/WAD in which he had last held the rank of lieutenant colonel, 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.

6. In a separate decision taken on 3 April 2006, the Minister further imposed an exclusion order (*ongewenstverklaring*) on the applicant. The

[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.

applicant's objection (*bezwaar*) against this decision was rejected by the Minister on 27 August 2007.

7. As under Dutch law it is not possible to have lawful residence in the Netherlands as long as an exclusion order is in place, the applicant's appeal against the withdrawal of his asylum based residence permit was declared inadmissible on 25 November 2008 by the Regional Court of The Hague sitting in Zutphen.

8. In a separate decision taken on the same day, the Regional Court of The Hague sitting in Zutphen rejected the applicant's appeal against the decision to impose an exclusion order. On 21 December 2008, the applicant filed a further appeal with the Administrative Jurisdiction Division Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*).

B. Developments after the introduction of the application

9. On 25 March 2009, at the request of the applicant, the President of 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 further notice.

10. On 20 May 2008 the Chamber prolonged the measure under Rule 39 of the Rules of Court until further notice.

11. On 26 March 2009, the applicant requested the Deputy Minister of Justice (*Staatssecretaris van Justitie*; "the Deputy Minister"; the successor to the Minister for Immigration and Integration) to lift (temporarily) the exclusion order imposed on him ("*verzoek om het (tijdelijk) opheffen van de ongewenstverklaring*").

12. On 16 September 2009, the Administrative Jurisdiction Division rejected the applicant's further appeal concerning the decision to impose an exclusion order on him.

13. On 24 December 2009, the Deputy Minister withdrew the decision of 27 August 2007, in which the applicant's objection to the decision to impose an exclusion order on him had been rejected.

14. On 27 April 2010, the Government informed the Court that, in the context of the proceedings concerning the applicant's exclusion order and his request have this order lifted, the Deputy Minister had concluded on 7 April 2010 that the applicant would, if returned to Afghanistan in the current circumstances, run a risk of treatment as referred to in Article 3 of the Convention. The Government stated that, therefore, the applicant would not be expelled to Afghanistan as long as Article 3 would constitute grounds for not doing so. The Government requested the Court to consider striking the application out of the list of pending cases.

15. On 14 May 2010, the applicant informed the Court that he did not wish to withdraw the application as he had not only alleged a violation of his rights under Article 3 but also under Article 8 of the Convention.

16. On 14 September 2010, the Court decided against striking the case out. It decided to adjourn its proceedings pending the outcome of the still pending domestic proceedings on the imposition of an exclusion order on the applicant. It further decided to prolong the Rule 39 indication for the duration of the proceedings before the Court.

17. On 11 August 2011, the Regional Court of The Hague sitting in Rotterdam determined the applicant's appeal against the Minister's decision of 7 April 2010 concerning the imposition of the exclusion order. It remitted the case to the Minister. In a separate judgment given on the same day, the Regional Court rejected the applicant's appeal against the Minister's refusal to lift the exclusion order.

18. In a fresh decision taken on 30 November 2011 concerning the imposition of the exclusion order, the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*; the successor to the Deputy Minister of Justice) again accepted that the applicant, if returned to Afghanistan, would run a risk of treatment proscribed by Article 3 of the Convention but rejected the applicant's other arguments based on Articles 3 and 8 of the Convention. The applicant filed an appeal with the Regional Court of The Hague, which is presumably still pending.

19. On 4 March 2012, the applicant informed the Court of the state of proceedings at the domestic level, namely that the proceedings concerning the imposition of the exclusion order were pending before the Regional Court of The Hague sitting in Dordrecht and that the proceedings on his request to lift the exclusion order were pending before the Administrative Jurisdiction Division. He further informed the Court of the consequences of the implementation as from 1 January 2012 of Directive 2008/115/EC of 16 December 2008 (on common standards and procedures in Member States for returning illegally staying third-country nationals) for persons who – like the applicant – are not a national of one of the European Union Member States and on whom an exclusion order has been imposed. According the applicant, the Government intended to lift exclusion orders imposed in the past under their simultaneously replacement by an entry ban within the meaning of Article 11 of the Directive.

20. The Court requested the Government on 12 March 2012 to comment on the information supplied by the applicant, which they did on 7 May 2012. The Government informed the Court, *inter alia*, that the Minister was seeing no reason to lift the applicant's exclusion order and impose an entry ban on him

C. Relevant domestic law and practice

21. 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

22. The applicant complained that his expulsion to Afghanistan would be contrary to his rights under Article 3 of the Convention as this would expose him to a real and personal risk of ill-treatment by the Taliban.

23. 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 minor children have all obtained Netherlands citizenship.

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

THE LAW

25. At the outset, the Court considers that the question arises whether the applicant has exhausted domestic remedies as required by Article 35 § 1 of the Convention, bearing in mind the fact that the proceedings concerning the imposition of an exclusion order are presumably still pending. However, it considers that it is not necessary to determine this question as it finds that the application must in any event be rejected for the reasons set out below.

26. The applicant complained that, if removed to Afghanistan, he would be exposed to a real and personal risk of treatment proscribed by Article 3, which reads as follows:

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

27. 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. 37833/10, § 25, 18 October 2012).

28. 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*, no. 33403/11, §§ 34-36, 18 October 2011; 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.

29. 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.

30. 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 minor 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."

31. 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.

32. 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.

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

34. 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).

35. The Court notes that the applicant could and did avail himself of the possibility to challenge the decision to withdraw his asylum based residence permit as well as the imposition of the exclusion order before the domestic administrative and judicial authorities and that the proceedings concerning the imposition of the exclusion order are, moreover, presumably still pending. Moreover, the Court 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).

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

37. 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	Josep Casadevall
Deputy Registrar	President