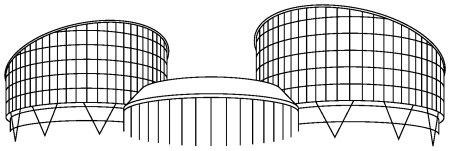

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF A.M. v. THE NETHERLANDS

(Application no. 29094/09)

JUDGMENT

STRASBOURG

5 July 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision

In the case of A.M. v. the Netherlands,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 14 June 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29094/09) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national of Hazara ethnic origin, Mr A.M. ("the applicant"), on 4 June 2009. The President of the Section decided that the applicant's identity should not be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Ms E. Ter Meulen-Mouwen, a lawyer practising in Roermond. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and their Deputy Agent, Ms L. Egmond, both of the Ministry of Foreign Affairs.

3. The applicant alleged that he, if expelled from the Netherlands to Afghanistan, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention and that, on this point, he did not have an effective remedy, as guaranteed by Article 13 of the Convention. He also complained that his expulsion from the Netherlands would be contrary to his rights under Article 8 of the Convention.

4. On 5 June 2009 the President of the Third Section decided to apply Rule 39 of the Rules of Court in the applicant's case, indicating to the Government that he should not be expelled to Afghanistan until further notice.

5. On 9 June 2009 the application was communicated to the Government. The Government submitted written observations on 18 August 2009 and the applicant submitted observations in reply on 2 October 2009. On 1 October 2013, the parties were requested to submit further written

observations on the admissibility and merits. The Government submitted these on 4 November 2013 and the applicant on 10 January 2014.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966 and has been in the Netherlands since 2003.

A. The proceedings on the applicant's asylum request

7. On 25 July 2003 the applicant entered the Netherlands where on 19 August 2003 he applied for asylum, fearing persecution within the meaning of the 1951 Geneva Convention Relating to the Status of Refugees ("the Refugee Convention") and/or treatment in breach of Article 3 of the Convention. On 20 August 2003, he was interviewed about his identity, nationality and travel itinerary (*eerste gehoor*). He stated, *inter alia*, that he was an Afghan national of Hazara origin, that he came from Kabul and that he had travelled to the Netherlands via Pakistan, Iran and Germany.

8. On 21 August 2003 the applicant was interviewed about his reasons for seeking asylum (*nader gehoor*). He stated that he feared persecution and ill-treatment on account of his communist past as a former member of the communist People's Democratic Party of Afghanistan ("the PDPA") and for having served as a volunteer in the Revolutionary Guard (*Sepah Enghelab*). He further claimed that he risked ill-treatment at the hands of mujahideen party Jamiat-e Islami for having been involved between 1992 and 1994 with the rival Hazara-dominated, Hezb-e Wahdat party and, additionally, at the hands of a Mr S., whom he had captured and ill-treated during an interrogation conducted in the context of his work for Hezb-e Wahdat. He also feared problems from the side of Hezb-e Wahdat for having stopped working for them.

9. The applicant stated that he had joined the youth branch of the PDPA in 1978 and that in 1981 he had served as a volunteer for twenty days in the Revolutionary Guard. He had been discharged after he had stepped on a mine during combat. He further stated that in 1984 he had started to work for the Ministry of Trade in Kabul, at the department for government stores, and that in 1989 he had given a television interview in which he had criticised the then Minister of Trade. This interview had not been broadcast in 1989 but only in mid-May 1992, after the mujahideen had seized power in Afghanistan. The day after it had been broadcast, the applicant had been arrested by the mujahideen faction Ittehad-al-Islami (Islamic Union) then

led by Abdul Rasul Sayyaf. In his opinion they had been under the impression, given that he had dared to criticise the Minister of Trade, that he was an important member of the Communist Party. He had been released after ten days in a prisoner exchange operation mediated, at the request of the applicant's parents, by Mr M., an influential person of Hazara origin.

10. In return, the applicant had had to work for Hezb-e Wahdat. He had worked as a representative of the (military) Division 95 of Hezb-e Wahdat at the West Kabul peace commission in which Jamiat-e Islami, Ittehad-al-Islami and Harakat-e-Islami had also been represented. His tasks had included trading prisoners and seized goods, and mediating between parties. He had also been responsible for preventing members of Hezb-e Wahdat's Central Committee from defecting and for preventing members of other factions from infiltrating Hezb-e Wahdat. In the course of carrying out these duties and if circumstances so warranted, he had been under orders to take people secretly into custody. One of the persons taken in custody, Mr S., had been interrogated by the applicant himself, who had ill-treated Mr S. during interrogation. After Burhanuddin Rabbani and Ahmad Shah Massoud had taken over control of the Afshar district in West Kabul, the applicant had been arrested and detained again by Ittehad-al-Islami in December 1992/January 1993. He had been released in a prisoner exchange organised by Hezb-e Wahdat.

11. The applicant had continued his work for the peace committee of Hezb-e Wahdat until December 1994, when this party had been defeated and retreated to Bamyan. The applicant had stayed behind in Kabul and had not been persecuted by "Khalili" (see paragraph 39 below). However, fearing Jamiat-e Islami and the Taliban, the applicant had then gone into hiding – moving around between Kabul and the villages of Siah Khak and Sar Shesmeh in the province of Wardak – until December 2001, when American troops had arrived. He had been arrested on 20 or 21 March 2002 by Jamiat-e Islami, then under the leadership of General Fahim. The applicant had been tortured several times during his incarceration. Mr S. had been present on one of those occasions. The applicant had been told by interrogators that he had been detained because he was a communist or a convert. He also thought that his arrest had something to do with Mr S. The applicant had managed to escape from prison after 45 days with the help of a guard – who like the applicant was a former communist – to whom the applicant had paid three thousand United States dollars. This guard had set up a mock execution outside the prison, which had enabled the applicant to escape. This guard had told the applicant that he should leave Afghanistan forever. After his escape, the applicant had first hidden in his house in Kabul for about 15 days and had subsequently stayed with a distant relative until he had left Afghanistan for Pakistan in May 2002.

12. On 18 September 2003, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) informed the applicant

that his case had been transmitted to the 1F Unit (see *A.A.Q. v. the Netherlands* (dec.), no. 42331/05, §§ 47-49, 30 June 2015) in order for it to examine whether Article 1F of the 1951 Refugee Convention should be applied to the applicant's asylum request.

13. On 5 February 2004 the 1F Unit conducted a supplementary interview (*aanvullend gehoor*) with the applicant. During this interview, he declared, *inter alia*, that in 1981, as a member of the Revolutionary Guard, he had participated in a purge action – ordered by the PDPA Central Committee and the Ministry of Defence – aimed against persons active on behalf of Hezb-e Islami and Jamiat in a specific area and that prisoners of war had been handed over to the former Afghan communist security service, KhAD/WAD (*Khadimat-e Atal'at-e Dowlati/Wezarat-e Amniyat-e Dowlati*). He had become disabled when the tank on which he had been standing had hit a mine. The applicant also stated that, during the wars, Hezb-e Wahdat had plundered houses, seized privately owned cars and physically tortured persons. It was correct that Hezb-e Wahdat had committed many crimes and had shed much blood. He further related how he had interrogated and hit Mr S. at the Hezb-e Wahdat headquarters in Kabul. He also stated that, at present, he had no proof that he was being searched for but that it was clear to him, having been released upon payment of a bribe, that he could not show himself in Afghanistan.

14. On 21 April 2005 the Minister for Immigration and Integration issued notice of her intention (*voornemen*) to reject the first applicant's asylum application and to apply Article 1F of the 1951 Refugee Convention. The Minister found it established, given his consistent and detailed statements, that the applicant had worked for the Revolutionary Guard and Hezb-e Wahdat but also found that, in his account to the Netherlands authorities, he had in part misrepresented the facts, had sought to trivialise his activities for Hezb-e Wahdat and had withheld important information.

15. The nature of the applicant's work, and the contents of an official report (*ambtsbericht*), drawn up on 29 February 2000 by the Netherlands Ministry of Foreign Affairs, entitled "Security Services in Communist Afghanistan (1978-1992), AGSA, KAM, KhAD and WAD" ("*Veiligheidsdiensten in communistisch Afghanistan (1978-1992), AGSA, KAM, KhAD en WAD*"; DPC/AM 663896) and an official report, drawn up on 23 June 2000 by the Ministry of Foreign Affairs, on Hezb-e Wahdat (DPC/AM-681499), had given cause to consider whether Article 1F of the 1951 Convention was applicable to the applicant's asylum claim.

16. In her notice of intention, the Minister analysed, on the basis of elaborate argumentation based on various international materials and on the prescribed and so-called "knowing and personal participation" test, the nature of the acts imputed to the applicant in the framework of Article 1F of the 1951 Refugee Convention, as well as his individual responsibility under

that Convention. The Minister noted, *inter alia*, that the applicant had worked for a part of the PDPA Government, the Revolutionary Guard, which had collaborated with the KhAD and found that it was justified to conclude that the applicant had known or should have known about the criminal character of the KhAD and that its crimes had formed part of a widespread or targeted attack aimed against the civilian population. Having regard to the official report of 29 February 2000 (see paragraph 15 above), the Minister further found that the cruel character of the KhAD had been commonly known. The Minister further did not believe that the applicant had been ignorant of the criminal character of Hezb-e Wahdat when he had started to work for it as this had been widely known at the material time. Relying on the official report of 23 June 2000 (see paragraph 15 above), the Minister underlined that Hezb-e Wahdat had been considered during the Afghan civil war to be one of the most violent groups, not only because of its militia's actions on the battle field and merciless liquidation of its political opponents, but in particular because of its militia's crimes against the civil population of Afghanistan and for having instilled a true climate of terror in the country. The Minister lastly found it established that the applicant himself had committed acts of torture on the person of Mr S.

17. As regards Article 3 of the Convention, the Minister did not find it established that the applicant, if returned to Afghanistan, would be exposed to a real risk of being subjected to treatment prohibited by this provision. In reaching this finding, the Minister took into account, *inter alia*, that the applicant had stayed for about three months in Pakistan and about eight months in Iran without having sought assistance in these countries from, for instance, the United Nations High Commissioner for Refugees ("UNHCR"), that he had not applied for asylum when he had been apprehended by the police in Germany, and that he had not reported immediately to the immigration authorities after his arrival in the Netherlands.

18. On 17 June 2005 the applicant submitted written comments (*zienswijze*) on the Minister's intended decision. On 19 October 2005 the Minister rejected the applicant's asylum application, confirming the reasoning set out in her notice of intention of 21 April 2005 and rebutting the applicant's written comments.

19. The applicant's appeal against this decision was rejected on 25 January 2007 by the Regional Court (*rechtbank*) of The Hague, sitting in Roermond. It held in respect of the applicant's activities as a fifteen-year-old adolescent volunteer for the Revolutionary Guard that, according to the applicable policy in respect of child soldiers, the Minister had not adequately reasoned her decision finding "knowing participation" in respect of this part of the applicant's account. However, on the basis of the other elements of the account, it accepted the decision of the Minister to deny the applicant asylum by applying Article 1F of the Refugee Convention against him. It further held that it had not been established that the applicant – if

expelled to Afghanistan – would be exposed to a risk of being subjected to treatment proscribed by Article 3 of the Convention from the side of Jamiat-e Islami on the basis of the general security situation in Afghanistan, or on the basis of his Hazara ethnic origin.

20. The applicant, who from his first interview was assisted by a lawyer in these asylum proceedings, could have filed a further appeal with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*), but did not do so. Consequently, the ruling of 25 January 2007 became final when the four week time-limit for filing an appeal with the Administrative Jurisdiction Division expired.

B. The proceedings on the decision to impose an exclusion order

21. On 25 May 2007 the applicant was informed by the Deputy Minister of Justice (*Staatssecretaris van Justitie*) of the intention (*voornemen*) to declare him an undesirable alien entailing the imposition of an exclusion order (*ongewenstverklaring)* in accordance with section 67 § 1 (e) of the Aliens Act 2000 (*Vreemdelingenwet 2000*), following the decision to hold Article 1F of the Refugee Convention against him in the asylum procedure.

22. The actual decision to impose this exclusion order on the applicant was taken on 24 September 2007 by the Deputy Minister of Justice. As regards Article 3, the Deputy Minister did not find it established that the applicant would be at risk of being subjected to treatment contrary to this provision in Afghanistan or that there were any obstacles of a medical nature to his removal to Afghanistan. Further noting that the applicant did not have any relatives or other persons in the Netherlands with whom he had a family life within the meaning of Article 8 of the Convention, the Deputy Minister further found that the exclusion order did not constitute an interference with the rights guaranteed by this provision.

23. The applicant challenged this decision in administrative law proceedings. The last (for the applicant negative) decision in these proceedings was taken on 10 February 2009 by the Regional Court of The Hague, sitting in Maastricht. It noted that, in its ruling of 25 January 2007, which had obtained the force of *res iudicata*, the Regional Court of The Hague, sitting in Roermond, had concluded that there existed serious reasons for assuming that the applicant had been involved in acts referred to in Article 1F of the Refugee Convention. As the Deputy Minister had enjoyed a discretionary power in deciding whether or not to impose an exclusion order, it had to be assessed whether in deciding to impose that order, the competing interests involved had been carefully balanced. In view of the reasons given in the impugned decision and the applicant's submissions, the Regional Court of The Hague, sitting in Maastricht, accepted the Deputy Minister's decision that the applicant's personal

interests were outweighed by the general public's interests pursued by the exclusion order.

24. In so far as the applicant had invoked Article 3 of the Convention, the Regional Court noted that in its ruling of 25 January 2007 it had already found that the applicant had not demonstrated that his expulsion to Afghanistan would expose him to a risk of a violation of his rights under that provision. It found that also in the proceedings at hand the applicant had not submitted facts or referred to circumstances on the grounds of which it should be accepted as plausible that he would risk a violation of his rights under Article 3 of the Convention if he were to be expelled to Afghanistan. As regards Article 8, the Regional Court noted that it appeared from the applicant's notice of appeal (*beroepschrift*) that it was not in dispute between the parties that the applicant could not claim a right of residence on the basis of Article 8 of the Convention and that it was thus not necessary to consider this point any further.

25. The applicant, who was represented by a lawyer throughout these proceedings, could have filed a further appeal with the Administrative Jurisdiction Division, but he did not do so. Consequently, the ruling of 10 February 2009 became final after the expiry of the four-week time-limit for filing an appeal with the Administrative Jurisdiction Division.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. A general overview of the relevant domestic law and practice in respect of asylum proceedings, exclusion orders and enforcement of removals has been set out in *K. v. the Netherlands* ((dec.), no. 33403/11, §§ 16-32, 25 September 2012).

27. Pursuant to the strict separation under the provisions of the Aliens Act 2000 between an asylum application and a regular application for a residence permit for another purpose than asylum, arguments based on Article 8 of the Convention cannot be entertained in asylum proceedings but should be raised in, for instance, proceedings on a regular application for a residence permit (see *Mohammed Hassan v. the Netherlands and Italy* and 9 other applications (dec.), no. 40524/10, § 13, 27 August 2013; *J. v. the Netherlands* (dec.), no. 33342/11, § 9, 18 October 2011; and *Joesoebov v. the Netherlands* (dec.), no 44719/06, § 27, 2 November 2010) or in proceedings concerning the imposition of an exclusion order (see *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006‑XII, and *Arvelo Aponte v. the Netherlands*, no. 28770/05, 3 November 2011).

28. Until 20 July 2015, when the Aliens Act 2000 was amended (in order to implement Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection), any judicial review by the Regional Court of The Hague – and subsequently the Administrative Jurisdiction

Division – in administrative law proceedings would only address whether the executive authority concerned had 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*). As from 20 July 2015, the Regional Court of The Hague carries out a full *ex nunc* examination of both facts and law as these stand at the moment the appeal is lodged. The scope of a further appeal to the Administrative Jurisdiction Division has remained unchanged.

29. An appeal against a refusal by the relevant Minister to grant asylum lies with the Regional Court of The Hague. Such an appeal has automatic suspensive effect (section 6:16 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*) and section 82 § 1 of the Aliens Act 2000). However, preparations in order to ensure effective removal may be made. In the event that an appeal concerns one of a number of defined exceptions and that appeal is denied suspensive effect – for instance when the appeal concerns a rejected repeat asylum application (*herhaalde aanvraag*) or when the appeal has been filed out of time – it is possible to apply for a provisional measure (*voorlopige voorziening*) with the Regional Court. Although also a request for a provisional measure does not have suspensive effect, a petitioner is generally allowed to remain in the Netherlands to await its determination.

30. A further appeal can be lodged against a judgment of the Regional Court of The Hague before the Administrative Jurisdiction Division. Unlike an appeal to the Regional Court of The Hague, a further appeal to the Administrative Jurisdiction Division does not have automatic suspensive effect. However, where there is an urgent interest (*spoedeisend belang*), it is possible to request a provisional measure under section 8:81 of the General Administrative Law Act. Such a request does, however, not have automatic suspensive effect.

31. According to the consistent case-law of the Administrative Jurisdiction Division, there is such an urgent interest when a date for an alien's effective removal has been fixed (see, for instance, Administrative Jurisdiction Division, 9 November 2001, *Jurisprudentie Vreemdelingenrecht* [Immigration Law Reports – "JV"] 2002/14; 20 December 2004, JV 2005/72 and 1 April 2009, JV 2009/210). The mere fact that a decision is directly enforceable (*direct uitvoerbaar*) or the possibility that the alien may be placed in aliens' detention for removal purposes does not, in the absence of any concrete measure, constitute an urgent interest (Administrative Jurisdiction Division, 6 June 2008, *Landelijk Jurisprudentie Nummer* [National Jurisprudence Number – "LJN"] BD3910; Administrative Jurisdiction Division, 4 May 2012, 201204255/2/V4; and Administrative Jurisdiction Division, 8 May 2015, 201503130/2/V1). Requests for a provisional measure are rejected by the

Administrative Jurisdiction Division when it finds no urgent interest within the meaning of section 8:81 of the General Administrative Law Act.

32. In its determination of the merits of a further appeal, the Administrative Jurisdiction Division can limit itself to an examination of the grievances raised in the appellant's written grounds of appeal (section 85 §§ 1-2 and section 91 § 1 of the Aliens Act 2000).

33. Under sections 42 and 44 of the Act on the Council of State (*Wet op de Raad van State*), the Administrative Jurisdiction Division may either uphold a judgment of the Regional Court (including the possibility of adapting or improving the reasoning supporting that judgment), quash the impugned judgment in whole or in part and do that which the Regional Court should have done, or remit the case to the Regional Court for a fresh judgment. Where it concludes that the further appeal does not provide grounds for quashing the impugned ruling (*kan niet tot vernietiging van de aangevallen uitspraak leiden*), the Administrative Jurisdiction Division can decide to uphold the impugned judgment without having to give any additional reasons (section 91 § 2 of the Aliens Act 2000).

34. 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.

Domestic policy in respect of Afghan asylum seekers and country assessment report on Afghanistan

35. The relevant domestic policy, law and practice in respect of asylum seekers from Afghanistan in respect of whom Article 1F of the 1951 Refugee Convention has been found to be applicable have been summarised in *A.A.Q. v. the Netherlands* ((dec.), no. 42331/05, §§ 37-52, 30 June 2015).

36. The most recent official country assessment report on Afghanistan was drawn up by the Netherlands Ministry of Foreign Affairs on 17 September 2014. The relevant parts of this report read:

> "*Former communists*
>
> Many former members of the People's Democratic Party of Afghanistan (PDPA) and former employees of the former intelligence services KhAD and WAD are currently working for the Afghan government. They have, for example, been appointed as governors of provinces, occupy high positions in the army [or] the police, or are mayors. Some former PDPA members have founded new parties. So far as is known, ex-communists have nothing to fear from the side of the government. During the reporting period no reports were received regarding risks of human rights violations [in respect of PDPA members who did not] benefit from the protection of influential factions or from tribal protection, irrespective of the question of whether or not they had stayed for a long period in the former Soviet Union.

The most recent UNHCR Eligibility Guidelines do not contain, under 'potential risk profiles', information about persons who now identify with the communist ideology (or who are suspected thereof).

It can therefore not be said that the group of (former) communists as a whole has reasons to fear being in Afghanistan. It depends on each individual person whether or not [he or she] has reason to fear being in Afghanistan, and the same applies to former employees of KhAD/WAD. ...

Hazaras

There are about 2.7 million Hazaras in Afghanistan – about 9% of the total Afghan population. Hazaras live mainly in the central mountainous part of Afghanistan and in the north, in the mountains of Badakhshan.

Hazaras form a Shiite minority in Afghanistan. In the past they have often been victims of discrimination on political, religious and racial grounds. During the Taliban regime abuses against the Hazara population took place in central Afghanistan in particular. This is also the reason that Hazaras are concerned about reconciliation talks with the Taliban. Because Hazaras made an important contribution to the victory over the Taliban, their situation has meanwhile improved. They have made economic and political progress since 2001. The Hazara population is represented in government institutions more than in the past.

... Social discrimination (in the shape of extortion through illegal taxation, forced conscription, forced labour, physical abuse and detention) of Hazaras is widespread, especially in areas where they form a minority. Violent incidents inspired by discrimination can still occur. For example, tensions between Kuchi and Hazaras occasionally surface. No major incidents have occurred during the reporting period."

III. RELEVANT INTERNATIONAL LAW

37. Article 1F of the 1951 Refugee Convention reads:

"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."

IV. RELEVANT INTERNATIONAL MATERIALS

A. Migration Review Tribunal and Refugee Review Tribunal (Australia)

38. On 7 March 2013 Australia's Migration Review Tribunal and Refugee Review Tribunal issued a background paper, *Afghanistan; Political*

Parties and Insurgent Groups 2001-2013. As regards Jamiat-e Islami Afghanistan (leader: Salahuddin Rabbani), it reads:

> "The Jamiat-e-Islami is one of the longest standing political organizations in Afghanistan and draws most of its support from Tajiks in the north. It was long the most effective mujahiddeen force, based in northern Afghanistan, and it engaged in heavy combat with Soviet forces throughout the 1980s, including sporadic invasions of Soviet Tajikistan. The Jamiat was the main political party in the Northern Alliance which eventually defeated the Taliban, and occupied Kabul in November 2001."

39. It states in respect of Hezb-e Wahdat:

> "The formation of Hezb-e Wahdat in 1989 represented an important step in the political development of Afghanistan's Hazaras. It unified all the political groups of a community that has historically been notoriously fragmented and divided. During the period of the civil war in the early 1990s, it emerged as one of the major actors in Kabul and some other parts of the country. Political Islamism was the ideology of most of its key leaders but it gradually tilted towards its Hazara ethnic support base and became the key vehicle of the community's political demands and aspirations. Its ideological background and ethnic support base has continuously shaped its character and political agenda. Through the Anti-Soviet jihad and the civil war, *Wahdat* accumulated significant political capital among Afghanistan's Hazaras, which could have been spent in the establishment of long-lasting political institutions in Afghanistan. By 2009, however, *Wahdat* was so fragmented and divided that the political weight it carried in the country bore little resemblance to what it had once been. It had fragmented into at least four competing organisations, each claiming ownership of the name and legacy of *Wahdat*."

40. The background paper also contains information on, *inter alia*, those four organisations, namely:

- Hezb-e Wahdat-e Islami (leader: Abdol Karim Khalili), the main successor party to the pre-2001 Hezb-e Wahdat;
- Hezb-e Wahdat-e Islami-ye Mardom (leader: Mohammad Mohaqeq), a primarily Shiite offshoot of Hezb-e Wahdat ("Khalili");
- Hezb-e Wahdat Milli Islami (leader: Ustad Mohammad Akbari), formed after a split from Hezb-e Wahdat in 1994; and
- Hezb-e Wahdat-e Islami-ye Millat (leader: Qurban Ali Erfani), the fourth split emerging from Hezb-e Wahdat.

B. United States Bureau of Citizenship and Immigration Services

41. On 27 May 2003 the Resource Information Center ("RIC") of the US Bureau of Citizenship and Immigration Services published "Afghanistan: Information on Hezb-e Wahdat". Under the heading "The current human rights situation for former members of Hezb-e Wahdat who return to Afghanistan", it reads:

> "The RIC was unable to find information on the situation of former members of Hezb-e Wahdat who have returned to Afghanistan since the fall of the Taliban and the subsequent election of Hamid Karzai as President by the Loya Jirga [a grand assembly

of tribal leaders] in June 2002. Hezb-e Wahdat leaders participated in the Loya Jirga that elected Karzai and have publicly thrown their support behind him and the new government."

C. United Nations High Commissioner for Refugees

42. In July 2003, UNHCR issued an Update of the Situation in Afghanistan and International Protection Considerations ("the July 2003 Update"). This document reads:

> "... With regard to agents of persecution, in the present situation of partial fragmentation into zones of influence, power vacuums and tension due to the competition for influence between different actors and the control of the appointed transitional administration not extending to the whole of the Afghan territory, possible risks of persecution by non-state agents continue to require consideration. The record of human rights abuses perpetrated by members of factions who are back in power (including by members of the Jamiat-i-Islami, the Hezb-e Wahdat (Akbari – Pazdar; Khalili – Nasr) and Junbesh-e-Milli-Islami, Ittehad-e-Islami, Harakat-e-Islami Mohseni, Hezb-e-Islami Khalis, Sepah-e-Mohammed) confirm that such risks continue to exist. ..."

43. As regards "persons associated or perceived to have been associated with the communist regime, as well as others who have campaigned for a secular state", it states:

> "Even though the Interim Administration issued a 'Decree on the dignified return of Afghan refugees', valid as of 22 December 2001, the situation is yet unclear with regard to persons affiliated or associated with the former communist regime in Afghanistan, through membership of the People's Democratic Party of Afghanistan (PDPA) or as a result of their previous professional or other functions. Although not targeted by the central authorities, they may continue to face risks of human rights abuses if they do not benefit from the protection of influential factions or tribal protection. The degree of risk depends on a variety of factors, including the following: a) the degree of identification with the communist ideology, b) the rank or position previously held, c) family and extended family links.
>
> In this context, it is noteworthy that the Transitional Authority, as well as regional and local authorities, is dominated by former Mujahideen factions, some royalists from the pre-communist period, and reportedly only five former members of PDPA."

44. Persons who had been involved in the former Hezb-e Wahdat were not included in the potential risk profiles set out in the July 2003 Update.

45. In December 2007 UNHCR issued Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers, setting out categories of Afghans considered to be particularly at risk in Afghanistan in view of the security, political and human rights situation in the country at that time. These categories included former PDPA members and officials of the former communist regime unable to rely on protection through family, tribal or political ties. Persons who had been involved in Hezb-e Wahdat were not included in the categories of persons at risk but were mentioned as a category of persons in respect of whom exclusion

considerations under Article 1F of the Refugee Convention might arise in individual claims for refugee status.

46. In July 2009, UNHCR issued Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, which again set out categories of Afghans considered to be particularly at risk in Afghanistan at that time. Those categories included high-ranking members of the former PDPA associated or perceived to be associated with the human rights violations of the communist regime in Afghanistan between 1979 and 1992 who did not enjoy the protection of influential individuals and/or factions. Persons who had been involved in Hezb-e Wahdat were not included in the categories of persons at risk but were again mentioned as a category of persons in respect of whom exclusion considerations under Article 1F of the Refugee Convention might arise in individual claims for refugee status.

47. On 17 December 2010, UNHCR issued updated Eligibility Guidelines for Assessing the International Protection needs of Asylum-Seekers from Afghanistan ("the December 2010 UNHCR Guidelines"). As in the case of the previous guidelines, persons who had been involved in Hezb-e Wahdat were not included in the categories of persons at risk of persecution, whereas members of Islamic parties with armed factions, such as Hezb-e Wahdat (both branches and all nine parties that formed Hezb-e Wahdat), were mentioned as a category of persons requiring careful scrutiny where it concerned exclusion considerations under Article 1F of the Refugee Convention.

48. The December 2010 UNHCR Guidelines further observed, *inter alia*:

> "[I]ndividuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include ... members of (minority) ethnic groups; ...
>
> It is widely documented that ethnic-based tension and violence have arisen at various points in the history of Afghanistan. Since the fall of the Taliban regime in late 2001, however, ethnically-motivated tension and violence have diminished markedly in comparison to earlier periods. Notwithstanding the foregoing and despite constitutional guarantees of 'equality among all ethnic groups and tribes', certain concerns remain. These include, *inter alia*, ethnic discrimination and clashes, particularly in relation to land use/ownership rights.
>
> Afghanistan is a complex mix of ethnic groups with inter-relationships not easily characterized. For different historical, social, economic and security-related reasons, some members of ethnic groups now reside outside areas where they traditionally represented a majority. This has resulted in a complex ethnic mosaic in some parts of the country, notably the northern and central regions, and in the major cities in the west, north and centre of Afghanistan. Consequently, an ethnic group cannot be classified as a minority by simply referring to national statistics. A person who belongs to a nationally dominant ethnic group – such as Pashtuns and Tajiks – may still face certain challenges relating, at least in part, to his or her ethnic association, in areas where other ethnic groups predominate. Conversely, a member of an ethnic

group constituting a minority at the national level is not likely to be at risk in areas where the ethnic group represents the local majority. The issue of ethnicity may feature more prominently where tensions over access to natural resources (such as grazing land and water) and political/tribal disputes occur, or during periods of armed conflict. ...

Marginalized during the Taliban rule, the Hazara community continues to face some degree of discrimination, despite significant efforts by the Government to address historical ethnic tensions. Notwithstanding the comparatively stable security situations in provinces and districts where the Hazara constitute a majority or a substantial minority, such as Jaghatu, Jaghori and Malistan districts in Ghazni province, the security situation in the remainder of the province, including on access routes to and from these districts, has been worsening. Although not able to launch widespread operations in Jaghori, there are some reports of Taliban attacks in the district. Jaghori district is increasingly isolated given that some access routes to and from the district, including large stretches of the strategic Kabul-Kandahar road, are reportedly under Taliban control. There are regular reports of ambushes, robberies, kidnappings and killings by the Taliban and criminal groups along these roads. The Taliban have also intimidated, threatened and killed individuals, including Hazaras, suspected of working for, or being supportive of, the Government and the international military forces. It has also been reported that in the Kajran District of Daykundi province, armed anti-Government groups engage in propaganda against Hazaras and Shia Muslims allegedly on the ground of religious differences.

Historically, certain scenarios have also given rise to, or exacerbated, ethnic-based tensions in Afghanistan. These include disputes between ethnic groups or tribes which relate to land, water and grazing rights. In May 2010, for example, ethnic clashes over grazing rights broke out between the Hazaras and the Kuchis, mainly ethnic Pashtun nomads, in Wardak Province resulting in four fatalities, destruction of houses and displacement. In August 2010, a land dispute between Hazaras and Kuchis in Kabul resulted in the displacement of over 250 Kuchi families. Furthermore, the various divisions within an ethnic group may, in some instances, lead to intra-ethnic tension or conflict.

Although available evidence suggests that some members of (minority) ethnic groups, including Hazaras, may engage in irregular migration for social, economic and historical reasons, this does not exclude that others are forced to move for protection-related reasons. UNHCR therefore considers that members of ethnic groups, including, but not limited to those affected by ethnic violence or land use and ownership disputes, particularly in areas where they do not constitute an ethnic majority, may be at risk on account of their ethnicity/race and/or (imputed) political opinion, depending on the individual circumstances of the case. However, the mere fact that a person belongs to an ethnic group constituting a minority in a certain area does not automatically trigger concerns related to risks on the ground of ethnicity alone. Other factors including, *inter alia*, the relative social, political, economic and military power of the person and/or his and her ethnic group in the area where fear is alleged may be relevant. Consideration should also be given to whether the person exhibits other risk factors outlined in these Guidelines, which may exacerbate the risk of persecution. In the ever-evolving context of Afghanistan, the potential for increased levels of ethnic-based violence will need to be borne in mind."

49. The most recent update of the UNHCR Eligibility Guidelines for Assessing the International Protection needs of Asylum-Seekers from Afghanistan was released on 6 August 2013 ("the August 2013 UNHCR

Guidelines") and replaced the December 2010 UNHCR Guidelines. The August 2013 UNHCR Guidelines do not include former PDPA members or persons who had been involved in Hezb-e Wahdat in the categories of persons at risk of persecution but do mention members of Islamic parties with armed factions, such as Hezb-e Wahdat (both branches, and all nine parties that formed Hezb-e Wahdat), as a category of persons requiring careful scrutiny where it concerns exclusion considerations under Article 1F of the Refugee Convention.

50. In respect of the Hazaras, cited as one of the (minority) ethnic groups whose members may be at risk of persecution or of falling victim to human rights violations, the August 2013 Guidelines read:

> "Hazaras have also been reported to face continuing societal discrimination, as well as to be targeted for extortion through illegal taxation, forced recruitment and forced labour, and physical abuse. Pashtuns are reportedly increasingly resentful of the Hazara minority, who have historically been marginalized and discriminated against by the Pashtuns, but who have made significant economic and political advances since the 2001 fall of the Taliban regime. Nevertheless, Hazaras have accused the Government of giving preferential treatment to Pashtuns at the expense of minorities in general and Hazaras in particular. Hazaras are also reported to continue to be subject to harassment, intimidation and killings at the hands of the Taliban and other AGE [Anti-Government Elements]. In August 2012, following the murder of two Hazaras in Uruzgan province, allegedly by the Taliban, nine Pashtuns were killed in an attack widely believed to have been carried out by Hazaras. Local government officials expressed concerns about the spectre of a cycle of ethnically motivated violence, and about threats by Pashtuns to turn their weapons against the Government if justice were not done in relation to the murders."

51. The relevant part of the 2015 UNHCR country operations profile on Afghanistan reads:

> "It is anticipated that the newly-formed national unity Government will demonstrate commitment to creating an enabling environment for sustainable returns. The withdrawal of international security forces, as well as a complex economic transition are, however, likely to affect peace, security and development in Afghanistan. Humanitarian needs are not expected to diminish in 2015. Support and assistance from the international community will be essential to ensure a transition towards more stable development.
>
> The Solutions Strategy for Afghan Refugees (SSAR) remains the main policy framework for sustainable reintegration of those returning to Afghanistan. The National Steering Committee established in 2014 aims to facilitate the implementation and monitoring of the SSAR's initiatives.
>
> Many returnees have migrated to towns and cities, contributing to the country's rapid urbanization. As rising poverty and unemployment in urban centres prevent them from reintegrating into society, many will need basic assistance. ...
>
> Insurgency continues to spread from southern Afghanistan to large areas of the north and centre and is likely to remain a threat to stability in 2015. While violence may displace more people, insecurity is likely to continue restricting humanitarian access. Economic insecurity and the Government's limited capacity to provide basic services are also challenges. ...

Since 2002, more than 5.8 million Afghan refugees have returned home, 4.7 million of whom were assisted by UNHCR. Representing 20 per cent of Afghanistan's population, returnees remain a key population of concern to UNHCR. Refugee returns have dwindled during the past five years and owing to insecurity and a difficult socio-economic situation, only around 10,000 refugees returned during the first seven months of 2014.

In June 2014, following military operations in North Waziristan Agency, Pakistan, more than 13,000 families (some 100,000 people) crossed into Khost and Paktika provinces in south-eastern Afghanistan. Many of them settled within host communities, however approximately 3,300 families reside in Gulan camp, Khost province. A substantial number could remain in Afghanistan, despite expectations that an early return may be possible.

By mid-2014, 683,000 people were internally displaced by the conflict affecting 30 of the 34 Afghan provinces. More than half of Afghanistan's internally displaced people (IDPs) live in urban areas."

D. European Asylum Support Office (EASO)

52. In January 2016, EASO published a country of origin information report entitled "Afghanistan Update Security Situation". This report, covering the period between 1 November 2014 and 31 October 2015, is an update of a previous report released by EASO in January 2015. It provides, *inter alia*, a general description of the security situation in Afghanistan, as well as a description of the security situation for each of the 34 provinces and Kabul.

53. The report states in its relevant parts:

"The general security situation in Afghanistan is mainly determined by the following four factors: The main factor is the conflict between the Afghan National Security Forces (ANSF), supported by the International Military Forces (IMF), and Anti-Government Elements (AGEs), or insurgents. This conflict is often described as an 'insurgency'. The other factors are: criminality, warlordism and tribal tensions. These factors are often inter-linked and hard to distinguish. ...

The city of Kabul is a separate district in the province of Kabul, alongside 14 other districts. In this report, Kabul city is highlighted because of its prominent position as Afghanistan's capital. Because of its high concentration of government buildings, international organisations, diplomatic compounds and international and national security forces, the city has a different security outlook than most of Afghanistan's other districts and provinces.

Kabul is by far the biggest city in Afghanistan and certainly the fastest growing. Massive returnee populations, IDPs [Internally Displaced Persons] and economic migrants have spurred rapid growth in Kabul. Currently, the population of Kabul is estimated to be 3,678,034 inhabitants. Other estimates run as high as 7 million. More than three quarters of Kabul province's population lives in the city of Kabul. ...

Kabul is an ethnically diverse city, with communities of almost all ethnicities present in the country. Pashtuns, Tajiks, Hazaras, Uzbeks, Turkmen, Baluchs, Sikhs and Hindus all reside there with no group clearly dominating. As people tend to move to areas where they already have family or into particular districts as part of a larger

group with the same ethnicity, different neighbourhoods have become associated with different ethnic groups. ....

Organisations monitoring the security situation in Kabul noticed a spike in insurgent attacks in the city in October 2014 and again in May 2015 and August 2015. ...

From 1 January to 13 September 2015, Kabul city saw 217 security incidents, including 68 explosions (roughly two-thirds IEDs [Improvised Explosive Devices] and one-third suicide attacks). There were between one and four suicide attacks every month from January to July, and six in August. ...

According to the analysis of Edinburgh International:

> 'attacks in the capital Kabul have traditionally served two purposes. In the first case, militant activity has aimed to physically weaken the power of the Government of the Islamic Republic of Afghanistan (GIRoA) traditionally achieved through the assassination of state officials and supply routes. More commonly however, extremist networks have sought to use the publicity generated by attacks in Kabul to win symbolic propaganda victories ... While the security services continue to improve and develop their capability to counter such tactics (a recent attack on a foreign guesthouse in the Wazir Akbar Khan neighbourhood was put down without military or civilian casualties by the country's Quick Reaction Force on 26 May 2015), the sheer scale and ingenuity of militant aggression within Kabul's central districts has meant that an underlying threat is unlikely to be entirely removed at any point in the near future.' ...

In 2015 from January to August, 126 Kabul civilians were killed and 717 injured. A large part of these civilian casualties resulted from the string of attacks in August 2015, most notably the one in the Shah Shahid neighbourhood. According to an assessment of several sources by the UK's Home Office the surge of terrorist attacks in Kabul in mid-May 2015 alone led to at least 26 deaths and more than 80 injuries.

In the UNHCR Monthly Updates on Conflict Induced Displacement, Kabul is in this reporting period not mentioned as a province of origin for conflict-induced IDPs, only as a province of arrival of certain IDP movements from other provinces. ...

In May 2015, UNHCR stated:

> 'Although the province experienced a significant number of incidents, Kabul remained a main destination for the displaced families from the Central Region, largely due to the perception of a better security situation and the hope to find better coping mechanisms. ...'

Apart from internal displacement due to the conflict in Afghanistan, Kabul city saw large flows of Afghan refugees returning to Afghanistan after fleeing Pakistani military operations in FATA [Federally Administered Tribal Areas], and unregistered Afghans being expelled by Pakistan since December 2014, when a military school in Peshawar was attacked by the Taliban. The Washington Post reported in August 2015 that more than 82,000 unregistered Afghans had been 'pushed out' of Pakistan since January 2015, along with about 150,000 Afghans deported from Iran over the same period. Many of them arrive in Kabul and try to survive doing daily labour."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 AND ARTICLE 13 OF THE CONVENTION

54. The applicant complained that his removal to Afghanistan would expose him to a risk of being subjected to treatment contrary to Article 3 of the Convention, which provides as follows:

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

55. He further complained of a violation of Article 13 of the Convention taken together with Article 3. This provision reads:

> "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."

A. Admissibility

56. The Government submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, as he had not lodged a further appeal with the Administrative Jurisdiction Division against either the judgment of 25 January 2007 or the judgment of 10 February 2009. In addition, the Government noted that the judgment of 25 January 2007 apparently had not led the applicant to submit an application to the Court, as the present case was only introduced on 4 June 2009.

57. The applicant argued that a further appeal to the Administrative Jurisdiction Division in the asylum proceedings would not have stood any chance of success as the Division would not have reviewed the findings of fact made by the Regional Court of The Hague and that therefore, this did not constitute a domestic remedy which he was required to exhaust. As regards the proceedings on the decision to impose an exclusion order, he had decided not to lodge a further appeal with the Administrative Jurisdiction Division, as the judgment of 10 February 2009 concerning this exclusion order had been based mainly on the judgment of 25 January 2007 concerning his asylum request, which had become final.

58. The Court considers that there is a close connection between the Government's argument as to the exhaustion of domestic remedies and the merits of the complaints made by the applicant under Article 13 of the Convention in conjunction with Article 3. It therefore finds it necessary to join this objection to the merits. The Court further finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that no other reasons for declaring

the complaints under Articles 3 and 13 inadmissible have been established. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 13 of the Convention

(a) The parties' submissions

59. The applicant argued that a further appeal to the Administrative Jurisdiction Division in the asylum proceedings, as well as in the proceedings on the exclusion order, was not an "effective" remedy as the Division would not have reviewed the facts on the basis of which the Regional Court had found that the applicant's removal would not be contrary to Article 3. In this connection, he relied on three rulings given by the Administrative Jurisdiction Division on 27 April 2005 (no. 200409315/1), 17 June 2005 (no. 200501236/1) and 7 July 2005 (no. 200500948/1) respectively. In these three rulings the Administrative Jurisdiction Division reiterated its well-established case-law at that time that an individual member of a group against which organised, large-scale human rights violations are committed must establish that specific facts and circumstances exist relating to him or her personally in order to qualify for the protection offered by Article 3 of the Convention.

60. The Government reiterated that in their opinion the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, as he had not lodged a further appeal with the Administrative Jurisdiction Division against either the judgment of 25 January 2007 or the judgment of 10 February 2009. As to the question of whether an appeal to the Administrative Jurisdiction Division was an effective remedy for the purposes of Article 35 § 1, the Government pointed out, relying on rulings given by the Division on, respectively, 9 June 2004 (see *K. v. the Netherlands*, (dec.), no. 33403/11, §§ 30, 25 September 2012), and 2 August 2004, the Administrative Jurisdiction Division – like the Regional Court of The Hague – assessed fully whether expelling an alien to his or her country of origin would expose him or her to a real risk of treatment contrary to Article 3. The Division based its considerations on an alien's account in so far as it was accepted as true. If it concluded in a particular case that the competent Minister or Deputy Minister had failed to carry out an adequate appraisal of an alien's claims under Article 3 of the Convention, the Administrative Jurisdiction Division – like the Regional Court of The Hague – could quash the decision regarding that alien. The applicant could and should therefore have raised his claims under Article 3 before the Administrative Jurisdiction Division in the context of both his asylum request and the decision to impose an exclusion order.

(b) General principles

61. Article 13 guarantees the availability at a national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable" complaint under the Convention and to grant appropriate relief (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 54, Series A no. 131, and *Tselovalnik v. Russia*, no. 28333/13, § 63, 8 October 2015). The existence of an actual breach of another provision is not a prerequisite for the application of Article 13 (see *Sergey Denisov v. Russia*, no. 21566/13, § 88 with further references, 8 October 2015).

62. The Court reiterates that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. The Court also reiterates that, where a complaint concerns allegations that a person's expulsion would expose him or her to a real risk of suffering treatment contrary to Article 3 of the Convention, the effectiveness of the remedy for the purposes of Article 13 requires imperatively – in view of the importance the Court attaches to Article 3 and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised – that that complaint be subject to independent and rigorous scrutiny by a national authority and that this remedy has automatic suspensive effect (see the Grand Chamber's statement of the law on Articles 13 and 3 in *De Souza Ribeiro v. France* [GC], no. 22689/07, § 82 with further references, ECHR 2012; *Mohammed v. Austria*, no. 2283/12, § 72 with further references, 6 June 2013; and *A.D. and Others v. Turkey*, no. 22681/09, § 95 with further references, 22 July 2014).

63. The Court moreover reiterates that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. This is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention. The Court has, therefore, rejected similar arguments put before it in other cases concerning deportation advocating the sufficiency of a suspensive effect in "practice". It has further pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis (see *M.A. v. Cyprus*, no. 41872/10, § 137 with further references, 23 July 2013).

(c) Application of those principles to the present case

64. The Court accepts at the outset that the applicant's complaint under Article 3 is "arguable" (see paragraphs 4 and 58 above). It has further considered, in light of the distribution of the burden of proof in cases where

the respondent Government claims non-exhaustion (see *Sher and Others v. the United Kingdom*, no. 5201/11, § 132 with further references, ECHR 2015 (extracts)), whether – on the basis of the Government's submissions regarding the further appeal to the Administrative Jurisdiction Division, which have not been disputed by the applicant – the Government's objection should be allowed.

65. The Court has also considered the question of whether the applicant in the instant case can be regarded as being exempted from the obligation to lodge an appeal with the Administrative Jurisdiction Division because it would be bound to fail on the basis of domestic case-law (see *Strzelecka v. Poland* (dec.), no. 14217/10, § 41 with further references, 2 December 2014).

66. However, the Court does not find it necessary to determine these questions in the instant case for the following reason. In cases concerning expulsion or extradition it is a firmly embedded principle in the Court's case-law under Article 13, taken together with Article 3 of the Convention, that the notion of an effective remedy under Article 13 in such cases requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there is a real risk of treatment contrary to Article 3, and (ii) a remedy with automatic suspensive effect (see *De Souza Ribeiro*, cited above). The same applies when considering the question of effectiveness of remedies for the purposes of Article 35 § 1 of the Convention in asylum cases.

67. As a further appeal to the Administrative Jurisdiction Division does not have an automatic suspensive effect, the Court cannot but find that this remedy falls short of the second effectiveness requirement. This finding is not altered by the fact that it is possible to seek a provisional measure from the Administrative Jurisdiction Division, as such a request does not itself have an automatic suspensive effect either.

68. Consequently, the Court dismisses the Government's objection as to the applicant's failure to exhaust domestic remedies in respect of his complaints under Article 3 as, having no automatic suspensive effect, a further appeal to the Administrative Jurisdiction Division in asylum proceedings cannot be regarded as an effective remedy which must be exhausted for the purposes of Article 35 § 1 of the Convention.

69. This does not mean, however, that a further appeal to the Administrative Jurisdiction Division in asylum cases should be regarded as irrelevant. Such an approach would overlook the important role played by the Administrative Jurisdiction Division as a supervisory tribunal that seeks to ensure legal consistency in, *inter alia*, asylum law. In addition, it is quite feasible that – whilst an asylum case is pending before the Court – the Administrative Jurisdiction Division in continued proceedings could decide to accept the further appeal against the impugned ruling of the Regional Court, quash it and remit the case to the Regional Court for a fresh ruling.

Such a development at the domestic level could affect an applicant's status as "victim" in the context of Article 34 of the Convention.

70. As regards the question whether the applicant's rights under Article 13 of the Convention have been respected, the Court has noted the automatic suspensive effect of an appeal filed with the Regional Court of the Hague in asylum cases, as well as the powers of this appeal court in asylum cases. Given that Article 13 does not compel Contracting States to set up a second level of appeal, the Court is satisfied that being able to appeal to the Regional Court of The Hague the applicant had at his disposal a remedy complying with the above two requirements (see § 66 above) for challenging the Minister's decision to deny him asylum. The Regional Court is empowered to examine the Article 3 risks in full and indeed evaluated these on different occasions (see §§ 19 and 24 above). It is true that the appeal to the Regional Court of the Hague in the exclusion order proceedings did not have suspensive effect (as it was imposed after the decision not to grant the applicant asylum had become final). However, the character of those proceedings does not affect the Court's conclusion that Article 13 was complied with by virtue of the suspensive effect in the asylum proceedings.

71. The Court therefore concludes that there has been no violation of Article 13 in conjunction with Article 3 of the Convention.

2. Alleged violation of Article 3 of the Convention

(a) The parties' submissions

72. The applicant submitted that, if returned to Afghanistan, he feared he would be subjected to treatment prohibited under Article 3 from (i) the civilian population on account of his membership of the former PDPA and his activities on behalf of the former communist regime, (ii) Hezb-e Wahdat, for whom he had been forced to work, (iii) Jamiat-e Islami, by whom he had been captured and detained, (iv) the current Afghan governmental authorities of which numerous persons who had once belonged to Jamiat-e Islami and the Taliban now formed part, and (v) Mr S., who had recognised him as a former member of Hezb-e Wahdat. He further submitted that the general security situation in Afghanistan had worsened in recent years, in particular in the south, south-west and south-east of the country.

73. The Government accepted as credible the applicant's statements that he was a former member of the PDPA and had served in the Revolutionary Guard. However, given that according to several public sources, including country assessment reports and UNHCR guidelines, former communists were no longer considered as a group running an enhanced risk in Afghanistan of persecution or treatment proscribed by Article 3, the

Government held that the applicant had not demonstrated that he faced a genuine risk of being subjected to such treatment in Afghanistan on the basis of his activities for the former communist regime. The Government emphasised that former communists were leading normal lives, that many were currently employed by the Afghan authorities and that some had set up political parties.

74. The Government further did not find that the applicant had established the existence of such a risk emanating from the Afghan authorities currently in power, the Afghan civilian population, the mujahideen, the Taliban, Hezb-e Wahdat, Jamiat-e Islami or Mr S. They pointed out that neither the broadcast of the interview (see paragraph 9 above) nor his subsequent detention by Ittehad-al-Islami had prompted the applicant to leave Afghanistan and that, after Hezb-e Wahdat had left Kabul in 1994, the applicant had stayed in Afghanistan until 2002. Although he had stated that he had been in hiding during that period, he had – according to his statements to the Netherlands authorities – been able to move about freely during his stay in the villages of Siah Khak and Sar Shesmeh and had not mentioned that he had encountered any problems with members of the general population during that period. As regards the alleged risk from the side of Hezb-e Wahdat, the Government noted that, according to his statements to the Netherlands authorities, the applicant had stopped working for this group in 1994 when, defeated, it had left Kabul for the north (while the applicant had remained in Kabul). The applicant had further stated to the Netherlands authorities that he had had no problems with this group between 1994 and 2001.

75. As to the alleged risk from the side of Jamiat-e Islami, the applicant had lived in his house in Kabul for two weeks after his escape from detention by this group; in the Government's opinion, this suggests that Jamiat-e Islami had no specific interest in him at that time. The Government further submitted that, in a statement given on 5 February 2004, the applicant had said that he had no reason to believe that Jamiat-e Islami was looking for him. To the extent that the applicant's fears were based on Mr S., the Government submitted that they knew nothing about this person from general sources, that the applicant had not specified with which group Mr S. was currently affiliated, and that in any event the applicant had not provided concrete evidence suggesting that Mr S. was currently looking for him. To the extent that the applicant feared ill-treatment at the hands of the Taliban, the Government submitted that this group had not been in power since 2001 but continued to be responsible for a great many violent incidents and human rights violations on a large scale. However, the applicant had not demonstrated satisfactorily that he would be singled out and targeted by the Taliban.

76. In respect of the current general security situation in Afghanistan, the Government submitted that although the security situation in

Afghanistan still gave cause for great concern, it was not so poor that returning the applicant to Afghanistan would in itself amount to a violation of the Convention. On this point, they referred, *inter alia*, to the Court's findings in the cases of *N. v. Sweden* (no. 23505/09, § 52, 20 July 2010); *Husseini v. Sweden* (no. 10611/09, § 84, 13 October 2011); *J.H. v. the United Kingdom J.H. v. the United Kingdom*, no. 48839/09, § 55, 20 December 2011; *S.H.H. v. the United Kingdom* (no. 60367/10, 29 January 2013); and *H. and B. v. the United Kingdom* (nos. 70073/10 and 44539/11, §§ 92-93, 9 April 2013). Further pointing out that both the International Organisation for Migration and UNHCR were assisting Afghans who wished to return voluntarily to Afghanistan, the Government considered that the general security situation in Afghanistan was not such that for this reason the applicant's removal to Afghanistan should be regarded as contravening Article 3.

(b) The Court's assessment

(i) General principles

77. The Court reiterates at the outset that the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Marguš v. Croatia* [GC], no. 4455/10, § 129 with further references, ECHR 2014 (extracts)).

78. It also reaffirms that a right to political asylum and a right to a residence permit are not, as such, guaranteed by the Convention and that, under the terms of Articles 19 and 32 § 1 of the Convention, the Court cannot review whether the provisions of the 1951 Refugee Convention have been correctly applied by the Netherlands authorities (see, for instance, *I. v. the Netherlands* (dec.), no. 24147/11, § 43, 18 October 2011).

79. The Court further observes that the Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.

In such a case, Article 3 implies an obligation not to deport the person in question to that country. The mere possibility of ill-treatment on account of an unsettled situation in the requesting country does not in itself give rise to

a breach of Article 3. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence, except in the most extreme cases where the general situation of violence in the country of destination is of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3.

The standards of Article 3 imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

Finally, in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the 1951 Refugee Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *F.G. v. Sweden* [GC], no. 43611/11, § 117, ECHR 2016; and *M.E. v. Denmark*, no. 58363/10, §§ 47-51 with further references, 8 July 2014).

80. As regards the material date, the existence of such risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012). However, since the applicant has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996‑V).

(ii) Application of the general principles to the present case

81. As regards the individual features of the risk of ill-treatment claimed by the applicant, the Court notes that after the communist regime in Afghanistan was overthrown by mujahideen forces in 1992 he did not flee the country but remained in Afghanistan where – after having been held for ten days by the mujahideen faction Ittehad-al-Islami, who apparently were

under the erroneous impression that he was an important communist – he had started to work in Kabul for another mujahideen faction, Hezb-e Wadat, until 1994, without encountering any problem from the authorities, any group or private persons on account of his past activities for the former communist regime.

82. The Court further notes that, when Hezb-e Wahdat retreated from Kabul to Bamyan in 1994 (see paragraph 11 above), the applicant remained in Kabul and that, in his own words, he was not persecuted by "Khalili" (see paragraph 11 above), whom the Court understands to be its leader, Abdol Karim Khalili (see paragraph 39 above).

83. The Court also notes that, according to the applicant, he had been living in hiding in different places between 1994 and the arrival of American troops in December 2001. There is no indication in the case file that, when travelling between different hiding places in Kabul and in Wardak province during that period, the applicant met with any problem from the side of the Taliban, any other group or private persons. The Court also notes that, in March 2002, the applicant was arrested and incarcerated by Jamiat-e Islami and that, after he had managed to abscond after 45 days by bribing a prison guard, he first stayed in hiding in his own home for about 15 days and subsequently in the home of a relative until he left Afghanistan in May 2002. It has not been argued that Jamiat-e Islami conducted a search for the applicant or otherwise showed a concrete interest in finding him after his escape from detention.

84. The Court further finds no indication that the applicant, since his departure from Afghanistan in May 2002, has attracted negative attention from any governmental or non-governmental body or any private individual in Afghanistan on account of his communist past, his activities for Hezb-e Wahdat or any other personal element cited by him. The Court further notes that UNHCR does not include persons involved in the former communist regime and/or Hezb-e Wahdat in their potential risk profiles in respect of Afghanistan.

85. In view of the above, the Court does not find that it has been demonstrated that, on individual grounds, the applicant will be exposed to a real risk of being subjected to treatment contrary to Article 3.

86. Although this argument has only been raised in the domestic proceedings but not in the present application, the Court has examined the question whether the applicant runs a risk of being subjected to ill-treatment on account of his Hazara origin. On this point, the materials before the Court contain no elements indicating that the applicant's personal position would be any worse than most other persons of Hazara origin who are currently living in Afghanistan. Although the Court accepts that the general situation in Afghanistan for this minority may be far from ideal, it cannot find that it must be regarded as being so harrowing that there would already

be a real risk of treatment prohibited by Article 3 in the event that a person of Hazara origin were to be removed to Afghanistan.

87. Regarding the question of whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention, in its judgment in the case of *H. and B. v. the United Kingdom* (cited above, §§ 92-93), it did not find that in Afghanistan there was a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there. In view of the evidence now before it, the Court finds no reason to hold otherwise in the instant case.

88. The Court is therefore of the opinion that the applicant has failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that he would be exposed to a real and personal risk of being subjected to treatment contrary to Article 3 of the Convention if removed to Afghanistan.

89. Accordingly, the applicant's expulsion to Afghanistan would not give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

90. The applicant further complained that his removal from the Netherlands would be contrary to his rights under Article 8 of the Convention. This provision reads in its relevant part as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence. ..."

91. The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention as he had not lodged a further appeal with the Administrative Jurisdiction Division against either the judgment of 25 January 2007 or the judgment of 10 February 2009.

92. The applicant contested this argument.

93. The Court reiterates the applicable general principles (see *Gherghina v. Romania* [GC] (dec.), no. 42219/07, §§ 83-89, 9 July 2015). It further reiterates its above finding under Article 13 taken together with Article 3 that, in cases concerning removal from the Netherlands raising issues under Article 3 of the Convention, a further appeal to the Administrative Jurisdiction Division cannot be regarded as an "effective remedy" as it does not have automatic suspensive effect (see paragraph 66 above). However, the Court also reiterates that by contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the

alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *De Souza Ribeiro*, cited above, § 83; and *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09, § 56, 15 November 2011).

94. Having regard to the nature of the review carried out by the Administrative Jurisdiction Division in administrative law proceedings (see paragraphs 32-33 above), the Court is satisfied that, in respect of a grievance that a removal from the Netherlands is contrary to Article 8, a further appeal is in principle an "effective" remedy for the purposes of Article 35 § 1 of the Convention.

95. The Court therefore finds that the applicant did not provide the national judicial authorities with the opportunity which is in principle intended to be afforded to Contracting States under Article 35 of the Convention, namely the opportunity to prevent or put right Convention violations through their own legal system (see *Gherghina*, cited above, § 115).

96. Accordingly, the Government's objection of failure to exhaust domestic remedies must be upheld and this part of the application must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 *in fine* of the Convention.

III. RULE 39 OF THE RULES OF COURT

97. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

98. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies and to reject it in respect of the applicant's complaints under Article 3 and Article 13 of the Convention;

2. *Declares* the complaints under Article 3 and Article 13 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 13 of the Convention taken together with Article 3;

4. *Holds* that there would be no violation of Article 3 of the Convention in the event of the applicant's removal to Afghanistan; and

5. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 5 July 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President