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Country of Applicant:

Afghanistan

Date of Decision:

25-02-2020

Citation:

European Court of Human Rights, A.S.N. and others v. the Netherlands, Application nos. 68377/17 and 530/18, 25 February 2020.

Additional Citation:

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Court Name:

European Court of Human Rights (Fourth Section)

Keywords:

[Credibility assessment](#) [1]

[Inhuman or degrading treatment or punishment](#) [2]

[Safe country of origin](#) [3]

[Internal armed conflict](#) [4]

[Well-founded fear](#) [5]

[Serious harm](#) [6]

Relevant Legislative Provisions:

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7]

Council of Europe Instruments

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 3](#) [8]

European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [9] > [Article 4](#) [10]

European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [9] > [Article 9](#) [11]

Headnote:

The European Court of Human Rights ruled that the removal of families belonging to the Sikh religious minority to Afghanistan would not constitute a violation of Article 3 ECHR, as the applicants' situation failed to reach the severity threshold required by this Article. Despite the fact that the Sikh community suffers from intimidation and intolerance within the Afghan society, the Court did not find that this group is the target of a practice of a systematic practice of ill-treatment, despite any difficulties they may be facing in the country.

Facts:

The case concerns joint applications no. 68377/17 & no. 530/18 wherein the applicants invoked that their removal from the Netherlands to Afghanistan would violate their right to life under Article 2 ECHR and expose them to a real risk of ill-treatment contrary to Article 3 ECHR.

- **Application no. 68377/17** concerns an Afghan family of four, namely A.S.N., his wife T.K.M. and their two children, who requested asylum in the Netherlands in October 2015. They claimed that they had left Afghanistan (through an intermediary) after T.K.M.'s sister had been abducted and ransom was requested by the Taliban. Her brother was also subsequently abducted. One day, the applicants started receiving letters demanding them to reveal the brother's location on the threat of kidnap and murder. On top of this, the applicants claimed that the entire family in general had suffered from aggression and threats (children getting bullied at school etc.) because of their Sikh religion.

The Dutch authorities, however, rejected both their initial and renewed asylum applications on the ground that the applicants' account lacked credibility (regarding *inter alia* recently leaving Afghanistan), therefore failing to make a plausible case for believing that they feared persecution. Furthermore, concerning the risk of ill-treatment contrary to Article 3 ECHR, the Dutch authorities found that there could not be a real risk of ill-treatment simply by virtue of an individual returning to the situation in Kabul (this being the specific Afghan city where the applicants used to live). Although the applicants belong to a 'vulnerable minority group' under the Netherlands' asylum policy, their fear of Article 3 treatment had not been made plausible. These decisions were upheld by the national Dutch courts later on.

- **Application no. 530/18** also concerns an Afghan family, consisting of a father, a mother, two (minor) children and the children's maternal grandmother. The family applied for asylum in the Netherlands claiming that they had fled the country (through an intermediary) eight months after three people had forced their way into their home demanding the family's possessions and killing the grandfather. The family additionally claimed to have suffered constant abuse and harassment because of their Sikh religion. Similar to application no. 68377/17, the Dutch authorities rejected both the initial and the renewed asylum application expressing the same doubts regarding the credibility of the applicants and considering that they failed to establish risk of ill-treatment. The courts ultimately upheld the Dutch authorities' decisions.

Decision & Reasoning:

The Court analysed the case on three different levels: (1) the general situation in Afghanistan; more specifically (2) the situation of Sikhs in Afghanistan and (3) the existence of further special distinguishing features of the applicants.

Firstly, with regard to the general situation in Afghanistan, the Court confirmed its earlier case law on the removal of Afghans (referring to *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11, 9 April 2013), which was also raised by the Dutch government. The Court noted that the general security situation in Afghanistan is not such that any removal there would necessarily breach Article 3 ECHR. Even though Afghanistan is still affected by an internal armed conflict, the situation is not alarming to such an extent that there would be a real risk of ill-treatment simply by virtue of an individual being returned there. [105-106]

Secondly, concerning the situation of Sikhs in Afghanistan, the applicants contended that their removal would expose them to a real risk of being subjected to treatment contrary to Article 3 ECHR. Regarding this argument, the Court noted that Sikhs suffer discrimination from the State in many different ways, relating *inter alia* to employment and political representation, police/authority protection, public religion practice, etc. The Court also took further note of the societal discrimination, harassment, intimidation and intolerance for the Sikhs which is sometimes attributed to extremist elements within the Muslim population.

However, having set forth these elements, it is also reported that the Afghan authorities provide the Sikh community with a certain amount of support, such as police protection during funeral ceremonies, the possibility to build places of worship, land for a cremation site, water/electricity and repair services for Sikh temples, a partially state-funded school for Sikh children. Furthermore, some sources claim that the majority of the Muslim population is very supportive of the Sikh community. Having regard to all of this, the Court was, on balance, not persuaded that the situation of Sikhs in Afghanistan is such that they can be said to be members of a group that is systematically exposed to a practice of ill-treatment.

Thirdly, on the existence of further special distinguishing features, the Court first looked at the assessment of risk by the Dutch authorities based on alleged past ill-treatment. On the one hand, the Court underlined that past ill-treatment is a strong indication of future risks of treatment contrary to Article 3 ECHR when there is a generally coherent and credible account of events based on reliable and objective sources (reference was made to *J.K. and Others v. Sweden* [GC], no. 59166/12, 23 August 2016). On the other hand, it noted that the Deputy Minister of Security and Justice found that the applicants had not provided such a credible account. In this regard, the Court emphasised that the national authorities are best placed to assess not just the facts but, more particularly, the credibility of asylum claimants since they have had an opportunity to see, hear and assess the demeanour of the individuals concerned (reference was again made to *J.K. and Others v Sweden*). The Court acknowledged that the applicant's case had been thoroughly examined by the different domestic institutions and sees no grounds to depart from the conclusions drawn by them as to the lack of credibility.

In addition, the Court looked at the assessment by the Dutch authorities of foreseeable consequences of removal of the applicants to Afghanistan. It started by specifying that the absence of past ill-treatment does not, by and of itself, rule out the existence of such a risk. However, the Strasbourg judges could not find that the applicants *in concreto* had succeeded in establishing substantial grounds for believing that, if returned to Afghanistan, they would be exposed to a real risk of ill-treatment contrary to Article 3 ECHR. The Court reiterated that the Sikhs in Afghanistan could not be considered a group systematically exposed to an ill-treatment practice (cfr. *supra*). Even when assessing the applicants' individual situation, the Court held that the minimum level of severity that is required to fall within the scope of Article 3 ECHR had not been met. The arguments raised by the applicants (absence of a contact person in Afghanistan, inability for the children to go to school, lack of accommodation, employment and suitable healthcare), which were not taken into account by the Dutch authorities, were deemed insufficient by the Court. Moreover, it had also not been established that the case is so very exceptional that

the humanitarian grounds against removal were 'compelling' enough.

Outcome:

No violation of Article 3.

Observations/Comments:

Context and prior decisions: different solutions possible?

As many reports and documents (mentioned in this case) have clearly indicated, the situation regarding the Sikh community in Afghanistan is problematic to say the least. They currently find themselves in a war-torn country where they have to undergo grave economic and social difficulties with regard to education, practising their religion, access to justice, political representation, adequate housing, (government) employment, and so on. Moreover, the situation keeps deteriorating and the Sikh population keeps decreasing drastically. So, even though there is no state persecution (as of this moment), the future of the Sikhs does not look bright.

The Netherlands was aware of this very fact. The country-specific asylum policy on Afghanistan recognizes that any Afghan person who adheres to another religion than Islam – such as Sikhs – will find him-/herself in a vulnerable position. This person will then be placed under the category of the 'vulnerable minority group', regardless of the specific area he/she came from. Nevertheless, in the present case, the Sikh applicants failed to establish 'specific individual characteristics' and human rights violations that would have occurred to them or in their immediate circle. Therefore, they did not pass the required 'limited indications' test and the Dutch authorities determined that the applicants could be returned to Afghanistan. This case then went to the European Court of Human Rights.

In the *A.S.N.*-judgement, the Court quite often refers to the '*F.G. v. Sweden*' ([F.G. v. Sweden \[GC\], no. 43611/11, 23 March 201 \[12\]6](#)). Therefore, a brief analysis of that particular case might prove useful. In *F.G. v. Sweden*, the Grand Chamber of the Court had decided (with regard to Article 3 ECHR) on the situation of an Iranian who applied for asylum in Sweden and claimed that return to his country of origin would subject him to a risk of ill-treatment. The Iranian backed this claim by referring to his political past and his conversion to Christianity. The Court held that Contracting States must perform a rigorous assessment of the foreseeable consequences when removing the applicant to the country of destination, in light of the general situation in that country of destination and the applicant's personal circumstances. Because the Swedish authorities had not carried out such an *ex nunc* assessment, the expulsion of the Iranian would constitute a violation of Articles 2 and 3 of the ECHR.

However, in this present case, the Court found that the Dutch authorities have correctly carried out such an *ex nunc* assessment regarding the risk of being tortured or subjected to inhuman or degrading treatment or punishment, contrary to Article 3 ECHR (unlike the Swedish case *supra*).

But one might ask, if the Article 3-route fails, is there perhaps an opportunity for the Sikh community to opt for Article 9 ECHR instead? Given that this Article is specifically designed for religion? The answer to this question can be found in case *Z. & T. v. the United Kingdom*, no. 27034/05, 28 February 2006. The Court held that Article 9 cannot be interpreted 'as imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world.'

This summary was written by Tim Meynen.

Case Law Cited:

ECtHR - A.M. v. France, no. 12148/18, 29 April 2019

[ECtHR - Paposhvili v. Belgium, Application no. 41738/10, 13 December 2016](#) [13]

[ECtHR ? Saadi v. Italy, Application No. 37201/06, 28 February 2008](#) [14]

[ECtHR ? J.K. v. and Others v. Sweden, Application No. 59166/12, 23 August 2016](#) [15]

[ECtHR - F.G. v. Sweden \(no. 43611/11\) \(Grand Chamber\), 23 March 2016](#) [12]

ECtHR - S.H.H. v. UK, no 60367/10

[ECtHR - Salah Sheekh v The Netherlands, Application No. 1948/04,](#) [16]

[ECtHR - H. and B. v. the United Kingdom, Application No. 70073/10 and 44539/11](#) [17]

[ECtHR - NA v UK, Application No. 25904/07](#) [18]

Attachment(s):



[CASE OF A.S.N. AND OTHERS v. THE NETHERLANDS.pdf](#)[19]

Authentic Language:

English

State Party:

Netherlands

National / Other Legislative Provisions:

Section 29 (1)

31 (1) and 42 Aliens Act 2000 (Vreemdelingenwet 2000)

the Aliens Decree 2000 (Vreemdelingenbesluit 2000)

the Aliens Regulation 2000 (Voorschrift Vreemdelingen 2000)

Aliens Act 2000 Implementation Guidelines (Vreemdelingencirculaire 2000)

The General Administrative Law Act (Algemene wet bestuursrecht)

Links:

[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A24

[2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A43

[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A72

[4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A203

[5] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A89

[6] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A74

[7] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

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- [10] https://www.asylumlawdatabase.eu/node/4038#toc_95
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- [16] <https://www.asylumlawdatabase.eu/en/content/ecthr-salah-sheekh-v-netherlands-application-no-194804-0>
- [17] <https://www.asylumlawdatabase.eu/en/content/ecthr-h-and-b-v-united-kingdom-application-no-7007310-and-4453911>
- [18] <https://www.asylumlawdatabase.eu/en/content/ecthr-na-v-uk-application-no-2590407>
- [19] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20A.S.N.%20AND%20THE>