

Strategic Litigation as a tool to help the Afghan 1F?ers in the Netherlands

Date:

Thursday, February 16, 2017

Introduction

One of the strategic litigation cases of the Dutch Public Interest Litigation Project (PILP), a project of the [Dutch section of the International Commission of Jurists](#) [1] (NJCM), is about the so-called Afghan 1F?s. This blog aims to highlight the problem of the ?Afghan 1F?ers? in the Netherlands and it aims to demonstrate the way in which PILP has built litigation against the state.

Afghan refugees in legal limbo

Article 1F of the [UN Refugee Convention](#) [2] essentially prescribes that people who have committed war crimes or crimes against humanity will be exempted from protection under the UN Refugee Convention. In the Netherlands, this will mean you will not get asylum. You will also be excluded from all services and benefits for asylum seekers: you will not receive shelter, food, housing and you will not have the right to work. The Netherlands is not unique in this approach, however, it is unique in its mass rejection of Afghan asylum claims, based on article 1F.

When the Mujahedin came to power in Afghanistan in the mid-nineties, a lot of Afghans, due to continued civil war, fled the country. Many of these Afghans became asylum seekers in the Netherlands. In 1999 the Dutch government [drafted a report](#) [3] on Afghanistan which would serve as the basis for every asylum application from that country. In this highly disputed report the Dutch government stated, quite simply, that all Afghan officers who had worked for the secret services and/or a liaison organisation in the eighties and the nineties, during the time that Afghanistan was considered a Soviet satellite state, were in fact war criminals. All of the officers of the secret services, the Khad/Wad, according to the report, must have had actively or passively participated in crimes against humanity or war crimes. The consequence of this report was that if a refugee from Afghanistan had worked for the secret service as an officer, he (or she, but mostly he) would get an ?1F-status? and would be excluded from asylum and all social rights. Any proof and/or piece of evidence from individual Afghan asylum seekers that they have been falsely accused and do not fall under 1F, was and is still until today [not accepted](#) [4]. This resulted in a situation where hundreds of Afghans were denied a status as refugees.

Deportation to Afghanistan is and was not possible. It would [amount to a breach of article 3](#) [5] of the [European Convention on Human Rights](#) [6], as the safety of Afghans could not be guaranteed in Afghanistan. Deportation to another country is also not an option. If the Afghans go to another European country, they will be sent back to the Netherlands by virtue of the [Dublin Regulation](#) [7]. And getting to another part of the world, outside Europe, is also not possible (primarily since they

lack documentation and there is an additional risk they will be excluded elsewhere).

The Afghan 1F?ers are thus stuck in the Netherlands in a legal limbo. They are not allowed to be here and they can't be sent back. With no right to food or to work they are very dependent on their families and friends to survive. These families and friends get punished if they allow the person accused of 1F?er to live with them. For example, most of the families of the Afghan 1F?ers have, over the years, become Dutch and have acquired the Dutch nationality. They have the right to child support benefits, housing benefits and other benefits if they have lower income. If a person who is undocumented, this goes for the majority of 1F?ers, lives with them, they [will lose most of the benefits](#) [8]. Hence, this is a very difficult situation, for the Afghan 1 F?ers, and for their families. A precarious situation which has been subsisting for more than 15 years.

Of the hundreds of Afghan 1F?ers, only three have been brought to a criminal court for war crimes and crimes against humanity in the Netherlands. Two of them have [been convicted](#) [9].

There have been a lot of debates in the media and in parliament about the Afghan 1F?ers and the legal limbo they are in. There is no solution yet though.

Lawyers have also tried various legal routes to address the problems of the Afghan 1F?ers. None of them have proved successful.

PILP case

PILP was asked to look into the problem by relatives of 1F?ers. We organised several brainstorm sessions. Legal scholars, representatives of the Afghan 1F?ers, ICJ-members and several lawyers were present.

We were aware of the fact that several legal routes were used to try to change the situation of the Afghan 1F?ers: civil, migrant, administrative and criminal proceedings, which unfortunately all led to nothing. We invited the different lawyers that tried these legal routes to the brainstorm meeting to exchange ideas and discuss this further. One of them, [Attorney-at-law Eertink](#) [10], mentioned that every possibility was tried, except one: the Court of Justice of the European Union. This was a shame, because this exact court had just recently decided, [in B and D v Germany](#) [11], that, simply put, a state has to do individualised research **before** deciding to exclude under 1F.

To get to the Court of Justice though, a domestic court has to ask preliminary questions. In these particular cases the high administrative court of the Netherlands (the Council of State or *Raad van State*) has never wanted to ask these questions. Even when the lawyers in Afghan 1F cases specifically requested the Council of State, it was refused. The Council of State is of the opinion that this is an *acte eclair*. It is clear the Dutch law and policies regarding the Afghan 1F?ers does not amount to a violation of EU law, they [therefore are not obliged to ask the preliminary questions](#) [4].

With this attitude and these decisions, the Council of State effectively blocks access to the Court of Justice of the EU in cases that, according to legal experts, clearly belong to be decided by this Court.

It was at this point that Attorney-at-law Eertink mentioned an Italian case he had heard of, the Traghetti case, in which an Italian citizen was also effectively refused access to the Court of Justice. The Italian citizen decided to sue the Italian State and the case eventually ended up at the [Court of Justice](#) [12]: right where the citizen wanted it to be.

None of the participants in the brainstorm were experts on the combination of EU law and the

accountability of the State for the refusal of judges to apply the law. So we had no one in the room that was able to see if a Traghetti case was possible in the Netherlands.

Fortunately, PILP works with a clearing house, [Pro Bono Connect](#) [13], also a project of the Dutch section of the ICJ. And thirteen of the biggest Dutch corporate law firms participate with Pro Bono Connect. One of them is [De Brauw Blackstone Westbroek](#) [14]. Lawyers from the Brauw were interested to write litigation advice on the question whether or not the state could be held responsible in court for the Council of State's refusal to ask preliminary questions to the Court of Justice. De Brauw wrote an extensive and thorough report. Several lawyers of De Brauw had worked on it. The lawyers became enthralled by the case and offered to help pro bono with the actual litigation.

Together with Marieke van Eik, a lawyer specialising in migrant law and expert on 1F-cases at the human rights law firm [Prakken d'Oliveira](#) [15], we decided what kind of clients would be best.

We wanted to find an Afghan 1F'er that had his or her case decided at the Council of State in the past 5 years. It had to be someone who claims to be innocent and who had explicitly asked for preliminary questions in his/her court case.

PILP contacted all of the migrant lawyers in our network and we made use of the Afghan 1F organisation to find clients. We were eventually able to find two eligible cases. Because of personal reasons one of them did not want to participate. Since the case is mainly about access to justice and human rights, the Dutch section of the ICJ also wanted to become a claimant in the case.

De Brauw started writing the litigation files, a tort case against the state, for the Afghan 1F client and the Dutch section of the ICJ. Marieke van Eik and I contributed on parts regarding migrant law and human rights and we are co-counselling the case.

Together we argue the State of the Netherlands is accountable for the Council of State if this Council, in breach of domestic and international law, refuses to ask preliminary questions in cases where they should do so. The lawyers request the court to give a 'declaration of law' and to declare that the state has acted wrongfully these cases.

Conclusion

If the case shows to be successful for us, we hope to eventually end up at the Court of Justice with an Afghan 1F'er. We argue in our case that the Court of the EU will declare this practice of the Netherlands, denial to refer a preliminary question to the Court of Justice of the EU, a breach of EU law. The verdict of the Court of Justice could positively bring an end to the problems of many Afghan 1F'ers living in legal limbo. If the Court of Justice decide that an individual test would be necessary, ensuring that the state has to prove, in each individual case, that a person has committed war crimes or crimes against humanity, this would reverse the current burden of proof in the Netherlands in these cases. This would mean the Dutch Council of State could perhaps be forced to redo their cases on the Afghan 1f'ers and for many, it could eventually mean their 1F status will be annulled. But, for now, the case is primarily about a high court refusing to apply EU law correctly.

This case is a unique one. The state has never been sued on the grounds such as in this case. The collaboration of lawyers, from a corporate firm, a human rights firm and a human rights NGO, makes this case one of a kind.

To keep track and receive updates on this case, please see [here](#) [16].

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(This journal entry is an expression of the author's own views, and not necessarily those of EDAL or ECRE)

Keywords:

Exclusion from protection

Strategic Litigation

Litigation

Material reception conditions

Reception conditions

Links:

[1] <https://njcm.nl/>

[2] <http://www.unhcr.org/uk/1951-refugee-convention.html>

[3] <http://cdn1.tekenvoorrechtvaardigheidinnederland.nl/uploads/Editor/20000229-aab-veiligheidsdiensten-afghanistan.pdf>

[4] <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=75131>

[5] <http://jure.nl/ECLI:NL:RBDHA:2013:19636>

[6] http://www.echr.coe.int/Documents/Convention_ENG.pdf

[7] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

[8] <http://wetten.overheid.nl/BWBR0018472/2017-01-01>

[9] <http://www.trouw.nl/tr/nl/4500/Politiek/article/detail/3869661/2015/02/20/Jurist-hekelt-Nederlandse-behandeling-verdachte-asielzoekers.dhtml>

[10] <http://www.vme-advocaten.nl/pagina2.html>

[11] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-5709-and-c-10109-bundesrepublik-deutschland-v-b-and-d>

[12]

<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d66f512d75e9ba4b1994c68767470d2e66.e>

[13] <https://probonoconnect.nl/>

[14] <http://www.debrauw.com/>

[15] <http://www.prakkendoliveira.nl/>

[16] <http://pilpnjcm.nl/files/afghans-the-1f-procedure/>

[17] <http://pilpnjcm.nl/en/>