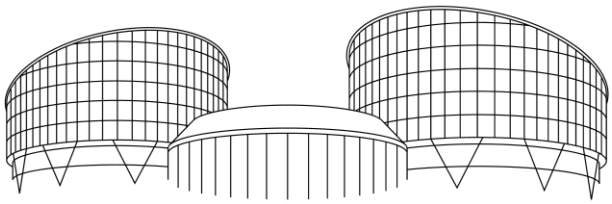

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HUSSEINI v. SWEDEN

(Application no. 10611/09)

JUDGMENT

STRASBOURG

13 October 2011

FINAL

08/03/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Husseini v. Sweden**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 6 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 10611/09) against the Kingdom of Sweden 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, Aftab Hussein Husseini ("the applicant"), on 23 February 2009.

2. The applicant was represented by Mr Sture Tersaeus, a lawyer practising in Goteborg. The Swedish Government ("the Government") were represented by their Agent, Mrs Charlotte Hellner, from the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that an implementation of the order to deport him to Afghanistan would be in breach of Articles 3 and 8 of the Convention.

4. On 24 July 2009 the President of the Third Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the applicant until further notice.

5. On 14 October 2009 the said President decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the above application was assigned to the newly composed Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Asylum proceedings

7. The applicant was born in 1980 and currently lives in Sweden.

8. On 1 September 2003 he applied for asylum and a residence permit in Sweden. In interviews before the Migration Board (*Migrationsverket*) on 5 November 2003 and 11 March 2004 the applicant stated that he was ethnic Hazara, Shia Muslim and born and raised in a small community consisting of approximately thirty-five families in the province of Ghazni. He had never been to school and was illiterate. He claimed that his problems emanated from the fact that his father was of Hazara ethnicity and his mother was of Pashtun ethnicity. As a child of mixed ethnicity, he had not been allowed to play with other children as they had been unkind to him. Since it had not been possible to leave him alone, he had always been with his father at his store in the nearest city. When the Taliban had taken power in the province, they had frequently come to the store and taken food without paying, for which reason other people in the city had believed that the family sympathised with the Taliban. The fact that his mother was Pashtun had reinforced this view. Moreover, his father had inherited everything from his grandfather, despite there being an older uncle, as the latter had been disowned due to bad behaviour. The uncle had then become very hostile to the applicant and his family. After the fall of the Taliban, the applicant's situation had worsened as other villagers looked upon the applicant and his parents as traitors. He had been assaulted and severely beaten on several occasions and twice he had lost consciousness. They had also broken his nose and cut him with a knife. During the summer of 2003 he had been kidnapped twice and ill-treated. The first time he was locked up in a cellar for one day, and some months later he was held prisoner for two days. Each time he had been released when his father had paid a large amount of money. His father had been advised by his business partner to move but he had refused as he thought things would get better over time. Moreover, the applicant did not know if his mother had any relatives as she had never mentioned any, but they could not have moved to her home town since she had married a man from another ethnic group.

9. In July 2003 a group of masked men had come to their house and his father had told him to leave the house, which he had managed to do by escaping through the basement. He had seen the assailants kill his mother before he fled. He had then gone to Kabul where he had found out from a taxi driver who had a route to his home town that his father had also been

killed. His father's business partner had helped him to leave the country and he had had contact with no one since he left. The applicant was convinced that he would be killed if returned to Afghanistan and that the authorities neither could nor would help him. As he was of mixed ethnicity he would not be welcome anywhere in the country.

10. On 4 May 2004 the Migration Board rejected the application. It found that the general situation in Afghanistan was not such that the applicant could be granted leave to remain in Sweden on this sole ground. Turning to the applicant's personal circumstances, the Board observed that it had found no evidence that persons of mixed ethnicities faced specific problems in Afghanistan. According to the applicant's own account, ethnicity was passed down by the father, for which reason the applicant was considered a Hazara. Thus, the Board did not believe that the applicant had faced such discrimination as claimed because of his mixed ethnicity. Moreover, it noted that, again according to the applicant, everyone in his village had tried to get along with the Taliban and had paid to be well treated by them. Therefore the Board was not convinced that the applicant and his family had been suspected of being collaborators with the Taliban and ill-treated on this ground. The Board further questioned the claim that the applicant had no relatives other than his uncle, having regard to the very strong family ties in Afghan culture. In any event, his father's business partner was still there and had shown a friendly and supportive attitude to the applicant and his family. Consequently, the Board concluded that the applicant had a social network in Afghanistan which made it possible for him to return. Since there was no other reason to grant the applicant leave to remain in Sweden, his application was rejected.

11. The applicant appealed to the Aliens Appeals Board (*Utlänningsnämnden*), and was therefore heard again. He maintained his claims and added that he was not considered a Hazara simply because his father was one. Moreover, the suspicion that they had collaborated with the Taliban was also based on the fact that his mother was Pashtun and that the Taliban had not touched their home. The family's poor reputation had then been used against them by his uncle. His mother had no contact with her family since she had married outside her ethnicity. Moreover, his father's business partner had become wealthy thanks to the applicant's father and therefore had owed him a favour. In any event, it was money from their business which had paid for the applicant's trip.

12. On 28 February 2005 the Aliens Appeals Board rejected the applicant's appeal as concerned his asylum application. It noted that the U.S. Coalition Forces had established a military base in Ghazni to stabilise the area. Against this background, and for the reasons set out in the Migration Board's decision, the Aliens Appeals Board found it unsubstantiated that the applicant would risk persecution upon return.

B. Proceedings as to a residence permit based on family ties

13. In February 2004 the applicant married a Pakistani woman, who had been granted a residence permit in Sweden due to a previous marriage. In December 2004 the couple had a daughter and therefore, on 28 February 2005 the Aliens Appeals Board exempted the applicant from the regulation on family reunification which set out that an applicant must apply for a residence permit on the basis of family from his country of origin. The Aliens Appeals Board thus granted the applicant a temporary residence permit for one year. On 28 March 2006 the applicant was granted a permanent residence permit in Sweden on the same grounds. The couple had a son on 11 April 2006.

C. Criminal proceedings against the applicant

14. On 3 August 2007 the applicant's wife left him, and, together with the children, went to live at a protected address. The children were at that time approximately two and a half and one and a half years old. The estranged wife reported to the police that she had been raped and ill-treated by the applicant for the last two years and that he had also hit their daughter. She explained that she had already tried to leave the applicant in August 2006 after he had threatened her with a knife and the police had to intervene. Criminal proceedings were immediately initiated.

15. Subsequently, the prosecution authority issued restraining orders against the applicant vis-à-vis his estranged wife and their children, under section 1 of the Restraining Orders Act (*lagen (1988:688) om besöksförbud*).

16. On 25 March 2008 the applicant was examined by two psychiatrists at the National Board of Forensic Medicine, who in a medical report of 7 April 2008 noted that the applicant described having symptoms of PTSD and depression with suicidal thoughts. Should a sentence of imprisonment be considered, an examination of the applicant by a forensic psychiatrist was recommended.

17. The trial took place before the District Court (*tingsrätten*) in Norrköping, and commenced on 8 April 2008, when the applicant, his estranged wife, her mother and two neighbours were heard and documentary evidence submitted. The applicant was detained on remand on 11 April 2008 and submitted for examination by a forensic psychiatrist, who concluded that the applicant was not suffering from a serious mental disturbance and that he had not committed the act of which he was accused due to serious mental disturbance.

18. By judgment of 19 May 2008 the District Court (*tingsrätten*) in Norrköping convicted the applicant of rape and aggravated violation of a woman's integrity (*grov kvinnofridskränkning*) committed several times a

week over a period of two years, between 2005 and 3 August 2007. The violation included hitting, pushing, hair pulling and threatening to harm or kill the wife and the children, or to take the children away from the wife by taking them to Afghanistan. The District Court noted that the wife had made a very composed and credible impression. She had presented her story, which was supported by witness statements, in a calm and balanced way.

19. The applicant was sentenced to two years' imprisonment and five years' expulsion from Sweden, with a prohibition on returning before 19 May 2013.

20. In its decision to expel the applicant the District Court had regard, *inter alia,* to a report dated 8 April 2008 from the relevant social welfare board relating to the issue of the children's need for contact with their father and how they would be affected by his expulsion. It pointed out that the estranged wife was afraid of the applicant and therefore still lived at a secret address. The children had not seen their father since August 2007 and the mother would only take part in visits if a contact person were present. An expulsion would most likely mean that the children would not have any contact with their father during the expulsion period. Generally, children needed close and good contact with both their parents. However, the courts and the social services also had to take into account the risk of children being subjected to violence, abuse, abduction, etc. Having regard to the crimes at issue, the overall assessment was therefore that the children's need for contact with their father, if convicted, should be balanced against the risk of their being subjected to, or becoming witness to, violence or other degrading treatment during access.

21. In its decision to expel the applicant, the District Court essentially stated the following. In view of the nature of the crimes and the circumstances of the case, there was reason to fear that the applicant would continue to commit crimes in Sweden. Moreover, in view of the ill-treatment endured by the estranged wife and caused by the applicant, the crimes were considered to be so serious that the applicant should not be allowed to remain in Sweden. He lacked any substantial connection to Sweden other than his family, who had to live at a secret address to avoid being persecuted by him. In conclusion, the children's need for contact with their father could not be considered to be so significant that an expulsion should be avoided. However, having regard to the children, the expulsion period was limited to five years. Finally, the Migration Board had been heard and had stated that there were no impediments to the expulsion of the applicant to his home country.

22. The applicant appealed to the Göta Court of Appeal (*hovrätten*), before which the applicant and the estranged wife were heard, as were the witnesses who had been heard before the District Court. On 25 July 2008 the Göta Court of Appeal upheld the lower court's judgment in full.

23. The applicant requested leave to appeal to the Supreme Court (*Högsta domstolen*) which was refused on 17 September 2008.

D. Proceedings concerning custody and access

24. Having left the applicant on 3 August 2007, on 17 August 2007 the estranged wife filed for divorce from the applicant and sole custody of the children. She contended that she had been ill-treated by the applicant, that he had also hit the children, and that she had reported the abuse to the police. The applicant agreed to a divorce but requested sole custody of the children. He also demanded access to the children for four hours a month in the presence of a contact person.

25. On 9 November 2007, the District Court temporarily granted the estranged wife sole custody of the couple's children while the proceedings were pending before it. It further decided temporarily that the applicant should not have physical contact with the children during this time. It noted in that respect that the applicant had been accused of serious crimes, including violence against the daughter. The prosecutor was considering whether to charge the applicant and, while awaiting developments in this regard, the District Court found joint custody to be incompatible with the children's best interest. Nor should access between the applicant and the children be established under those circumstances.

26. The applicant's appeal against the decision was rejected by the Court of Appeal on 30 November 2007.

27. As stated above, in the criminal proceedings the applicant was convicted on 19 May 2008 by the District Court.

28. In the custody and access proceedings, at the request of the District Court, the social welfare board submitted a report dated 5 June 2008 concerning custody and access rights, based on four interviews with the estranged wife and two interviews with the applicant (one at home and one at the pre-trial detention centre). The social welfare board had also met the children at their home in March 2008, and spoken to the children's nursery school and to a deaconess involved in the case. In addition, they had had access to relevant written material such as the first instance criminal judgment against the applicant and the examination conducted by the forensic psychiatrist. The report stated that in view of the applicant's abuse of his estranged wife and the fact that he had probably also physically abused his daughter, there was a high risk that the children would be harmed if the applicant were to have custody of them. The children were very young when they last had contact with the applicant and they would have no memories of their father that they could express in words. Their need for a relationship with their father would increase when they became older. Access between them and the applicant would involve an increased risk that their secret address would become known to him. This risk should be

balanced against the fact that the applicant had subjected his family to abuse and that he would probably be expelled upon release from prison. Thus, it was advised that he should not have access to the children. In order to meet the children's need for contact with their origins, it was noted that such could be accommodated through letters. The social welfare board could distribute letters from the applicant to the children via the estranged wife, who in turn could reply within a month to report on the children's development.

29. The applicant and his estranged wife divorced in July 2008.

30. On 17 September 2008 the applicant's conviction and sentence became final.

31. In letters of 17 and 26 June, and 1 September 2008 the applicant submitted his observations on the report from the social welfare board. He found that the report was partial to the benefit of the estranged wife and not in the interests of the children.

32. On 4 November 2008, the District Court held a hearing in the case. Represented by legal counsel, the applicant and his ex-wife were heard. Seven witnesses were heard at the applicant's request. A representative from the social welfare board stated that the aim had been to see both parents an equal number of times during the custody investigation but that this had not been possible because the applicant was detained on remand. In general young children were directly affected by how their mother was treated and it was therefore very likely that the applicant's daughter would experience bad memories if she had to see the applicant. Moreover, if the children were to have contact with the applicant, they would be exposed to yet another separation from him when the expulsion order was implemented. Thus, for the moment it was not in the children's best interests to see the applicant.

33. By judgment of 18 November 2008, the District Court granted the ex-wife sole custody of the couple's two children and ordered that the applicant should not have visiting rights to the children. The court noted that the ex-wife and the children lived at a secret location and that the children were well and felt safe with their mother. Moreover, the applicant was in prison, and once his sentence was served he would be expelled to Afghanistan with a prohibition on returning until May 2013. Against this background, it was most appropriate that the ex-wife be granted sole custody of the children.

34. As concerned access rights, the court noted that according to several witness statements the applicant had been a good father to his children. However, there was a considerable risk that the children had experienced the violence to which their mother had been subjected and that seeing the applicant could bring back bad memories and disturb the sense of safety that the children now experienced. Moreover, the applicant was now in prison, from where he would only be able to have very restricted access to his

children. Furthermore, even if the children were able to create a safe relationship with the applicant during such limited access, the applicant would subsequently be expelled and therefore separated from his children until May 2013. The District Court therefore found that access was not in the children's best interest. It did not rule out that access might be established at a later point in time.

35. The District Court only took a stand on access as requested by the applicant, namely to have physical contact with his children in the presence of a contact person. It did not take any decision regulating or limiting the applicant sending letters to his children. Practically, however, sending letters was complicated by the fact that the children lived with their mother at a secret address. Nevertheless, it was possible to send letters to the children via the Swedish Tax Agency. Also, the offer by the social welfare board to pass on letters from the applicant to the children via their mother still stood. The applicant availed himself thereof once at Christmas when he send gifts to the children. Moreover, on 23 October 2008 the ex-wife gave detailed information about the children and their everyday life to the social welfare office, and that information was subsequently communicated to the applicant.

36. The applicant appealed against the District Court judgment of 18 November 2008 to the Court of Appeal, stating that he had requested the Government to repeal his expulsion order and that he had lodged a complaint with the European Court of Human Rights on 23 February 2009 as he considered that his expulsion to Afghanistan would be in violation of Article 3 of the Convention. Consequently, it was not certain that he would be expelled and hence his proposed expulsion was not a reason to deny him access to his children. Moreover, he owned a house and had a job and several friends, for which reason he could offer the children a stable place to visit once he was released from prison. He found it unacceptable that he had no news at all of his children and allegedly was only allowed to send two letters per year to them. The ex-wife stated that the applicant could have access to the children when they were older.

37. On 23 March 2009 the Court of Appeal refused leave to appeal and, on 29 May 2009, so did the Supreme Court.

E. Requests for the expulsion order to be revoked

1. Application in August 2008

38. On 1 August 2008, the applicant requested the Government to repeal his expulsion order and grant him a residence permit in Sweden. He submitted essentially that there were problems in Afghanistan between Shia and Sunni Muslims, that he had been wrongfully convicted and that he had two children in Sweden.

39. In a submission of 20 August 2008, the applicant stated that when the Taliban came into power in 1996 and took control of the Hazara area, his father started talking about schools and freedom with others in the Hazara group. The Taliban perceived from this that his father was dissociating himself from his religion. They tried to capture him but he went into hiding. The applicant was captured instead and imprisoned. He was ill-treated for thirty-five days, which included beating and being stabbed in the back with a knife, to get him to reveal his father's hiding place, which he refused. His father paid a large ransom for his release after thirty-five days and the applicant was admitted to hospital for over a month. A few weeks later he went with his father to the mosque, where they were captured by the Hazaras who told the applicant that he was not a Shia Muslim since his father was married to a Pashtun. They wanted him to prove his loyalty to the Shia by walking on burning coals. When he refused, they stabbed him in the shoulder. He walked on the coals and suffered serious burns to his feet. He was left alone and his father came in disguise in the middle of the night to pick him up. His father had to carry him home, where he was treated for his injuries. About a week later, he and his father went to the mosque again and there the others decided that his father should kill him and his mother, which his father refused. Then it was decided that the whole family should die and one of his father's friends warned them of this. The applicant was twenty-one at the time. He and his parents woke up in the middle of the night to find that the house was on fire and that people were trying to get in through the window. His father fetched a weapon and his mother opened a hatch to an escape tunnel under the house. Before jumping down he saw his mother being injured. They threw down money to him and closed the hatch. He had no choice but to crawl out through the tunnel. He stood and watched while the house burned down and then went to the home of one of his father's friends who lived in another city. This man helped him leave Afghanistan.

40. In a submission of September 2008, the applicant added that he suffered from post-traumatic stress syndrome (PTSD), that he had tried to commit suicide, and that he had no family other than his children and a new girlfriend in Sweden.

41. On 4 December 2008 the Government rejected the applicant's request. It found that there was no impediment to the enforcement of the expulsion order and no other special reasons to grant the applicant a residence permit in Sweden.

2. Application in January 2009

42. In January 2009, the applicant submitted a new application, dated 31 December 2008, for revocation of the expulsion order. He added that he had not been in contact with his country of origin since he left but knew that his father's business partner, who had helped him escape, had been killed.

Since his parents had been killed and he himself had been tortured by the Taliban, his life was in great danger. He also risked being killed upon return to Afghanistan for having married a Sunni Muslim woman although he was a Shia and for having violated a Sunni Muslim woman in the acts for which he had been convicted in Sweden. Invoking anew his poor mental health, the applicant submitted some medical certificates. One certificate was dated 16 February 2009 and written by a physician at the prison. It stated that the applicant had alleged that he had been imprisoned and tortured on several occasions in Afghanistan and that the physician had seen a large number of scars on his back from cuts. He also had two scars from stab wounds to his thigh and his shin. The physician confirmed that the scars might have been caused by torture as alleged by the applicant. A second medical certificate was dated 17 April 2009 and written by a chief physician and specialist in psychiatry, and by a psychologist at the Medical Centre for Refugees. It stated that the certificate was based on the applicant's contacts with the Centre from October 2005 to October 2008. He had begun psychotherapy at the Centre in October 2005 to talk about his background and traumatic experiences. The physicians had considered that he was clearly traumatised and had several symptoms of PTSD such as nightmares, flashbacks and anxiety. However, the applicant had been found stable in May 2006 for which reason the sessions had ended. In August 2007 the applicant had contacted the physicians again because he had been feeling unwell. When he had been arrested on suspicion of raping B., he had been placed in a cell and had experienced strong flashbacks from when he had been kidnapped and tortured for one month in Afghanistan. He had been so desperate that he had cut his wrists with a table knife and had then spent one night in the psychiatric emergency department. He had then resumed his sessions with the psychologist and had received medication to help him sleep. However, he had overdosed on the medication in October 2007 due to the strain caused by the criminal trial against him. His last session had been in April 2008, before being imprisoned, and after the judgment he had again tried to commit suicide by taking an overdose of pills. According to the two physicians, the applicant suffered from PTSD, depression, anxiety and had a serious stress reaction to his situation. He was therefore in a very fragile state mentally, with a high risk of suicide if the expulsion order were to be enforced. Thus, they concluded that there were medical-psychiatric impediments to the enforcement of the expulsion order.

43. On 4 June 2009 the Government rejected the new request as it found that there was no impediment to the enforcement of the expulsion order and no other special reasons to grant the applicant a residence permit in Sweden.

3. Application in July 2009

44. Finally, in July 2009 the applicant submitted a third application for revocation of the expulsion order based essentially on the same grounds as the previous ones. That case is still pending before the Ministry of Justice.

D. Subsequent events

45. On 24 July 2009 the Court decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the applicant until further notice.

46. On 5 August 2009, following the Court's indication under Rule 39 of the Rules of Court, the acting Minister of Justice decided to stay the enforcement of the expulsion until further notice.

47. The Minister also decided that the applicant should be taken into custody upon his conditional release from prison. Accordingly, the applicant was taken into custody on 11 August 2009. He was released on 28 January 2010 by decision of the Supreme Administrative Court.

48. In the meantime, the Government requested additional information from the Migration Board about some of the issues raised in the present case. Having made an investigatory visit to Afghanistan in November/December 2009, the Migration Board concluded, *inter alia,* that the security situation in Afghanistan was not such that an expulsion thereto in general would entail a violation of Article 3 of the Convention. The Board noted, however, that according to various sources, the Taliban had increased their operation in Ghazni province where arbitrary killings and civilian deaths among supporters of Government forces had been reported. In Ghazni province the violence had increased mostly in the Pashtu-dominated south, while the situation was relatively calm in the Hazara-dominated northern part of the province. Thus, at the relevant time, there were impediments to enforcing expulsion orders to Ghazni province, notably due to the unstable security situation, which meant, among other things, that humanitarian organizations could not operate in the province and that there were problems for travellers on the road between Kabul and the province.

49. On l4 June 2010 the prosecution authority issued restraining orders against the applicant vis-à-vis his ex-wife and their children, under section 1 of the Restraining Orders Act. The prosecution noted that the applicant had previously been convicted of rape and aggravated violation of a woman's integrity regarding his former wife, and found that there was a risk that the applicant would commit a crime against, persecute or in some other way seriously harass his former wife or the children. The orders were in force for one year, that is until 13 June 2011. Violation of restraining orders is a

crime under the aforementioned Act that can result in a fine or a maximum prison sentence of one year. The applicant failed to bring the decision before the courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law on asylum

50. The provisions concerning the right of aliens to enter and to remain in Sweden are laid down in the Aliens Act (*Utlänningslagen*, 2005:716 - hereafter referred to as "the Aliens Act") which replaced, on 31 March 2006, the old Aliens Act (*Utlänningslagen*, 1989:529). The Aliens Act was amended anew on 1 January 2010. The following refers to the Aliens Act in force at the relevant time.

51. Under the previous Aliens Act, asylum applications were dealt with by the Migration Board and the Aliens Appeals Board. Under the Aliens Act in force, matters concerning the right of aliens to enter and remain in Sweden are normally dealt with by three instances, the Migration Board, the Migration Court and the Migration Court of Appeal. Thus, appeal against a decision or an order for expulsion issued by the Migration Board, which carries out the initial examination of the case, lies to the Migration Court. The Migration Board is, in principle, obliged to review its decision before it forwards an appeal to the Court. Appeal against a judgment or decision of the Migration Court in turn lies to the Migration Court of Appeal. This instance will, however, only deal with the merits of the case after having granted leave to appeal. Leave to appeal will be granted if (1) it is considered of importance for the guidance of the application of the law that the appeal is examined by the Migration Court of Appeal or (2) there are other exceptional grounds for examining the appeal.

52. Chapter 5, Section 1, of the Aliens Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, Section 1, of the Aliens Act, the term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being

sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, Section 2, of the Aliens Act).

53. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies, under Chapter 12, Section 18, of the Aliens Act, where new circumstances have emerged that mean there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the Aliens Act, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not doing so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, Section 19, of the Aliens Act).

B. Domestic law on expulsion

54. Pursuant to Chapter 1, Article 8 of the Penal Code (*Brottsbalken*, 1962:700) a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a consequence and the decision in this respect is made by the court in which the criminal proceedings take place.

55. Provisions on expulsion on this ground are laid down in the Aliens Act. According to Chapter 8, sections 8 and 11, an alien may not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are satisfied and the person’s links to Swedish society have been taken into account.

56. Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to Chapter 12, section 1, of the Aliens Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment. Furthermore, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

57. If the Government find that a judgment or decision to expel a person on account of having committed a criminal offence cannot be executed or if there are otherwise special reasons not to enforce the decision, by virtue of

Chapter 8, section 14 of the 2005 Act, the Government may repeal, in part or completely, the judgment or decision of the court. When considering whether to repeal an expulsion order, the Government shall above all take into account any new circumstances, namely circumstances that did not exist at the time of the courts' examination of the criminal case. In the *travaux préparatoires* to this provision (Government Bill 1988/89:86, p. 193), strong family ties and severe illness are given as examples of such "special reasons" that may warrant revocation of an expulsion order. The Government may also, in accordance with Chapter 11, Article 13, of the Instrument of Government (*Regeringsformen*), pardon or reduce a penal sanction or other legal effect of a criminal act.

C. Domestic law on custody and access

58. Rules concerning rights of access to children are primarily to be found in Chapter 6 of the Children and Parents Code (SFS 1949:381; hereinafter the Code). The best interests of the child must be the determining factor in all decisions concerning custody, residence and access. In the assessment of what is in the best interests of the child, particular attention shall be paid to the risk of the child or another member of the family being exposed to abuse or of the child being unlawfully abducted, retained or otherwise harmed. Particular attention shall also be paid to the child's need for close and good contact with both parents. Regard should also be given to the wishes of the child while taking into account the age and maturity of the child (Chapter 6, Section 2 a, of the Code).

59. A child shall have the right to access with a parent with whom he or she is not living. Access may take place by the child and the parents seeing each other or by other kinds of contact. The child's parents have a joint responsibility to ensure that, as far as possible, the child's need for access to a parent with whom he or she is not living is met. If both parents have custody of the child and the child is to have access to a parent with whom he or she is not living, the other parent shall provide such information about the child as will promote access, unless there are special reasons to the contrary. If the child is to have access to a parent who does not have custody or with some other person who is particularly close to the child, the information referred to in the previous sentence shall be provided by the person with custody (Chapter 6, Section 15, of the Code).

60. The courts may decide that particular conditions or directions shall apply to the right of access, such as the presence of a contact person or where the contact should take place. However, according to the Supreme Court such directions shall be decided only in exceptional cases since too detailed directions may lessen the parents' will to cooperate. Directions may

be given if, without them, the contact would not take place at all or would only take place to a lesser extent contrary to the child's interests.

61. Prior to 1 July 2006 it was not explicitly stated in the Code that access could take place by means of contact other than direct contact between the child and parent, such as telephone or letters. Normally, the parents should be able to agree on the extent of such indirect contact. The municipalities also assist in reaching agreements on such contact. However, through the introduction of the new provision in Chapter 16, Section 15, of the Code, the courts have been enabled to decide that access is to take place in some other way than by the child meeting with the parent. The aim is to provide, in exceptional cases, a way of bringing about contact between a child and a parent when direct access is not an option. This may be the case for instance when the child and the parent live a considerable distance from each other or when the freedom of movement of the parent is restricted as a result of a prolonged hospital stay or similar circumstance (see Government Bill 2005/2006:99, p. 55.)

62. According to the rules on right to access, it is in the child's best interests to have close and good contact with both parents in most cases. However, that does not mean that the child must have contact with a parent in all circumstances. A child must have an absolute right not to be subjected to violence, abuse or other degrading treatment. It is also well known that a child's psychological health may be endangered if the child has to see or hear domestic violence. Accordingly, the courts and social authorities shall pay particular attention to the risk of violence and other kinds of abuse directed against a child or other members of the family, and the finding of such a risk shall weigh heavily in the overall assessment of what is in the best interests of the child in a particular case. The result of the assessment may be that it is best for the child not to have any contact at all, to have contact, *inter alia,* in the presence of a contact person or that access should be established when the child has reached a mature age (see Government Bill 2005/2006:99. p. 42.)

III. RELEVANT INFORMATION ON AFGHANISTAN

63. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 17 December 2010 ("UNHCR 2010 Afghanistan Guidelines") observed, *inter alia,* under "I. Introduction":

> "... In light of the worsening security environment in certain parts of the country and the increasing number of civilian casualties UNHCR considers that the situation can be characterized as one of generalized violence in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces. Therefore, Afghan asylum-seekers formerly residing in these areas may be in need of international protection under broader international protection criteria, including complementary forms of protection. In addition, given the fluid and volatile nature of the conflict, asylum applications by

Afghans claiming to flee generalized violence in other parts of Afghanistan should each be assessed carefully, in light of the evidence presented by the applicant and other current and reliable information on the place of former residence. This latter determination will obviously need to include assessing whether a situation of generalized violence exists in the place of former residence at the time of adjudication.

UNHCR generally considers internal flight as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of prospective relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. Given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas, a case-by-case analysis will, nevertheless, be necessary.

In light of the serious human rights violations and transgressions of international humanitarian law during Afghanistan's long history of armed conflicts, exclusion considerations under Article 1F of the 1951 Convention may arise in individual claims by Afghan asylum-seekers. Careful consideration needs to be given in particular to the following profiles: (i) members of the security forces, including KHAD/WAD agents and high-ranking officials of the communist regimes; (ii) members and commanders of armed groups and militia forces during the communist regimes; (iii) members and commanders of the Taliban, Hezb-e-Islami Hikmatyar and other armed anti-Government groups; (iv) organized crime groups; (v) members of Afghan security forces, including the NDS; and (vi) pro-Government paramilitary groups and militias."

64. Further, as to "Members of (Minority) Ethnic Groups" it was stated:

"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 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 ...

As an example, one of the groups affected are the Pashtuns, who have been uprooted in large numbers by ethnic violence in the north and the west of the country following the collapse of the Taliban regime. Pashtuns throughout northern Afghanistan, where they constitute an ethnic minority, have since been subject to discrimination, arbitrary arrests, violence and reprisal killings by non-Pashtun militias and groups because of their (perceived) association with the former Taliban regime, whose leadership consisted mostly of Pashtuns from southern Afghanistan. Political power in the north reportedly still rests with local powerbrokers associated with the (Tajik-dominated) Northern Alliance, who are reluctant to allow the sustainable reintegration of Pashtun returnees or provide for their protection. As such, formerly displaced Pashtuns may be unable to recover their land and property upon return to their area of origin...

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 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."

65. In respect of "Internal Flight or Relocation Alternative" it was set out, among other things:

"A detailed analytical framework for assessing the availability of an internal flight or relocation alternative (IFA/IRA) is contained in the UNHCR *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* ...

Whether an IFA/IRA is "reasonable" must be determined on a case-by-case basis, taking fully into account the security, human rights and humanitarian environment in the prospective area of relocation at the time of the decision. To this effect, the following elements need to be taken into account: (i) the availability of traditional support mechanisms, such as relatives and friends able to host the displaced individuals; (ii) the availability of basic infrastructure and access to essential services, such as sanitation, health care and education; (iii) ability to sustain themselves,

> including livelihood opportunities; (iv) the criminality rate and resultant insecurity, particularly in urban areas; as well as (v) the scale of displacement in the area of prospective relocation ...
>
> In light of the foregoing, UNHCR generally considers IFA/IRA as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of intended relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. A case-by-case analysis will, nevertheless, be necessary given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas."

66. According to the World Health Organisation's Mental Health Atlas, 2005, on Afghanistan, mental health was not covered by the primary health care system. Four Community Mental Health Centres had been established in the capital and there were two general psychiatric rehabilitation centres with one hundred and sixty beds. There were only very few trained psychiatrists. Most doctors working as psychiatrists had either had in-service training or had attended short courses abroad. Psychologists were trained at Kabul University. Much of the qualified manpower and technical expertise had left the country. NGOs were involved with mental health in the country. The following therapeutic drugs were generally available at the primary health care level of the country: carbamazepine, phenobarbital, amitriptyline, hlorpromazine, diazepam and haloperidol. The cost of medicines kept fluctuating due to the effect of war on the stability of the local currency. Over-the-counter sales of psychotropic drugs occurred.

67. In an article published by Canadian Women for Women in Afghanistan in May 2011 (http://www.cw4wafghan.ca/MentalHealth) it was stated, *inter alia:*

> "Afghanistan reportedly has only 42 psychologists and psychiatrists in the entire country. In the capital, the Ministry for Public Health manages the Kabul Psychiatric Hospital, founded around 1985, which also includes inpatient services for men and women, and a drug treatment centre called the Jangalak Substance Misuse Centre. In 2009, this centre saw more than 800 inpatients suffering from drug addiction, mainly heroin and opium addiction (International Medical Corps, IMC, 2011). The hospital, long notorious for its dilapidated and unhygienic state, has only 60 beds; while experts say at least a 300-bed facility is needed. It was also criticized in a 2010 assessment by the IMC for not providing follow-up treatment post-discharge and for the high relapse rates of addicts and mental health patients. In 2010, over 6,400 patients were admitted to the hospital and 21,000 patient consultations took place (of which nearly half were treated for depression and 5,000 treated for psychosis), which remains the only mental health hospital in the country, despite announcements by the Minister of Public Health back in 2006 that 30-bed mental health hospitals would be opened in every region of the country, in addition to 20-bed hospitals in every province, and 10-bed clinics in every district. As of early 2011, the Ministry of Public Health had no plans in place to construct a new hospital in Kabul; however, in 2010, the European Commission moved ahead with plans to design a program to support the existing hospital and to

build the capacity of the 128 hospital personnel. The program will be implemented by the international NGO, International Medical Corps.

... tertiary care facilities like the 60-bed mental health Hospital and 40-bed Jangalak detox center, which are mandated to accept patients from across Afghanistan, lack the resources, space, qualified personnel and internal systems to provide appropriate, humane care for patients." – International Medical Corps in Afghanistan, February 23, 2011.

The Ministry of Mental Health currently operates a mental health training program with funding from the European Union and Caritas, with plans to expand it to four hospitals in the northern region of the country in 2011. In Afghanistan, there is no dedicated university faculty to train mental health personnel; however, International Medical Corps announced in February 2011 its plans to work with the Ministries of Higher Education and Public Health "to improve advanced psychiatric education at medical universities in Afghanistan" (IMC website).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

68. The applicant complained that an implementation of the deportation order to return him to Afghanistan would be in violation of Articles 2 and 3 of the Convention, which in so far as relevant read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

Article 3

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

69. The Government contested that argument.

A. Admissibility

70. The Court finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3 and will proceed on this basis (see *NA. v. the United Kingdom*, no. 25904/07, § 95, 17 July 2008). It notes that the complaint is

not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. In so far as the complaint relates to the third application for revocation of the expulsion order submitted by the applicant in July 2009, which is still pending before the Ministry of Justice, the complaint is premature and must be declared inadmissible. Otherwise, the complaint is not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

1. The applicant

71. The applicant complained that if returned to Afghanistan, he would be persecuted and killed because he is of mixed ethnicity, Hazara and Pashtun, and has no family or network to protect him. He also risked being killed upon return to Afghanistan for having married a Sunni Muslim woman although he was a Shia and for having violated a Sunni Muslim woman in the acts for which he had been convicted in Sweden. Finally, in his observations before the Court, he added that he would risk persecution upon return, because he was cohabiting with his new girlfriend, who was Christian.

2. The Government

72. From the outset, the Government pointed out that the situation in Afghanistan was not such that there was a general need to protect asylum seekers.

73. Regarding the individual risk assessment, the Government contended that an enforcement of the expulsion order would not give rise to a violation of Article 3. In respect of the applicant's motive for asylum, the Government referred to various subjects on which the applicant had provided conflicting or divergent stories, for example about why he and his parents were disliked, whether due to mixed ethnicity, suspected as supporters of Taliban or because the Taliban did not approve of his father's ideas; how many days he had been kidnapped, two or thirty-five; how the applicant was injured; by whom and how his parents were killed; and how the applicant escaped. Having regard thereto, the Government found that there were strong reasons to question the veracity of the applicant's submissions.

74. In any event, they pointed out that the applicant would not be sent back to his village or province of origin since, according to the most recent report from the Migration Board of December 2009, there were impediments to enforcement of the expulsion order against the applicant to Ghazni province.

75. Moreover, according to the findings of the domestic authorities and available country information, there was no indication that disputes between ethnic groups had increased or that people of mixed background would run a higher risk of violence and persecution in Afghanistan. In addition, although disputes between ethnic groups, such as for instance Hazaras and Pashtuns, did exist, these primarily involved entitlement to land and opposing political views rather than ethnicity and religious affiliation as such.

76. Likewise, the applicant had failed to substantiate that he would be killed upon return to Afghanistan for having married a Sunni Muslim woman or for having violated a Sunni Muslim woman in the acts for which he had been convicted in Sweden.

77. Finally, in the Government's opinion, the applicant was a young man fit for work without any particular health problems and it would be possible and reasonable to expect him to re-settle, for example, in Kabul or Mazar-e Sharif.

3. The Court

(a) General principles

78. 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 (*Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-....; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42).

79. 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 (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).

80. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards 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 (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). 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 (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

81. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *N. v. Sweden*, no. 23505/09, § 53, 20 July 2010 and *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007).

82. 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 Geneva 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, *NA. v. the United Kingdom*, cited above, § 119).

83. Aliens who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case (*D. v. the United Kingdom*, application no. 30240/96, Commission's report of 15 October 1996) the very

exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support (see also, *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

(b) The general situation in Afghanistan

84. The Court considers there are no indications that the situation in Afghanistan is so serious that the return of the applicant thereto would constitute, in itself, a violation of Article 3 of the Convention.

(c) The applicant's case

85. The Court notes that in the original asylum proceedings the applicant based his motive for requesting asylum on his mixed ethnicity and his family being suspected of being collaborators with the Taliban, which had resulted in the applicant being kidnapped and ill-treated and his parents being killed. The Migration Board observed that it had found no evidence that persons of mixed ethnicities faced specific problems in Afghanistan and the Board did not believe that the applicant had faced such discrimination as claimed because of his mixed ethnicity. Moreover, the Board noted that, according to the applicant, everyone in his village had tried to get along with the Taliban and had paid to be well treated by them. Therefore the Board was not convinced that the applicant and his family had been suspected of being collaborators with the Taliban and ill-treated on that ground. The Board further questioned the claim that the applicant had no relatives other than his uncle, having regard to the very strong family ties in the Afghan culture. In any event, his father's business partner was still there and had shown a friendly and supportive attitude to the applicant and his family. Consequently, the Board concluded that the applicant had a social network in Afghanistan which made it possible for him to return. Since there was no other reason to grant the applicant leave to remain in Sweden, his application was rejected. On appeal, the Aliens Appeals Board noted that at the relevant time, the U.S. Coalition Forces had established a military base in Ghazni to stabilise the area. Against this background, and for the reasons set out in the Migration Board's decision, it found it unsubstantiated that the applicant would risk persecution upon return.

86. The Court notes that the Migration Board and the Aliens Appeals Board both conducted a thorough examination of the applicant's case, which entailed that the applicant was heard three times. Before both instances the applicant was assisted by appointed counsel. The national authorities had the benefit of seeing, hearing and questioning the applicant in person and of assessing directly the information and documents submitted by him, before deciding the case. The Court finds no reason to

conclude that their decisions were inadequate or that the outcome of the proceedings before the two instances was arbitrary.

87. Furthermore, there are no indications that the assessment made by the domestic authorities was insufficiently supported by relevant materials or that that the authorities were wrong in their conclusion that there were no substantial grounds for finding that the applicant would risk being persecuted upon return to Afghanistan.

(d) The applicant's request for the expulsion order to be revoked

88. In his request to the Government on 1 August 2008 that the expulsion order be revoked, the applicant gave another account about what had happened to him in his home town. Furthermore, he alleged that there were problems in Afghanistan between Shia and Sunni Muslims. He added that he suffered from PTSD. Finally, he referred to his two children in Sweden. On 4 December 2008 the Government rejected the applicant's request, finding that there was no impediment to the enforcement of the expulsion order and no other special reasons to grant the applicant a residence permit in Sweden.

89. In his request of 31 December 2008 the applicant added, *inter alia,* that his father's business partner, who had helped him escape, had been killed, and that he risked being killed upon return to Afghanistan for having married a Sunni Muslim woman although he was a Shia and for having violated a Sunni Muslim woman in the acts for which he had been convicted in Sweden. Anew he invoked his poor mental health and submitted medical certificates dated 16 February and 17 April 2009, which stated that the applicant suffered from PTSD, depression, anxiety and had a serious stress reaction to his situation. He was therefore in a very fragile state mentally, with a high risk of suicide if the expulsion order were to be enforced, and there were thus medical-psychiatric impediments to the enforcement of the expulsion order at the relevant time. On 4 June 2009 the Government rejected also that request, finding that there was no impediment to the enforcement of the expulsion order and no other special reasons to grant the applicant a residence permit in Sweden.

90. In the Court's view, there are no indications that the Government were wrong in their conclusions that the applicant had not adduced any new circumstances, substantiating that he would risk being persecuted upon return to Afghanistan.

91. In respect of the applicant's health the question is whether his case is so exceptional that humanitarian grounds against the removal are compelling. The applicant did not invoke poor mental health as a motive for asylum when he arrived in Sweden nor during the proceedings before the Migration Board and the Aliens Appeals Board, which led to the final

refusal to grant him asylum on 28 October 2005. Thereafter, the applicant's mental health deteriorated and included suicide attempts.

92. The most recent medical certificate submitted in the case was from 17 April 2009. The Court notes that there is no recent information indicating whether the applicant's mental health has improved or deteriorated. There are no elements either indicating that the State and the physicians in psychiatry previously involved will not react to a concrete threat as far as possible or that the State will enforce the deportation order if it is medically impossible for the applicant to travel to his home country.

93. The Court also notes that medical treatment is available in Afghanistan. In any event, the fact that the applicant's circumstances would be less favourable than those he enjoys in Sweden cannot be regarded as decisive from the point of view of Article 3 (see *Bensaid v. the United Kingdom*, no. 44599/98, § 38, ECHR 2001-I; *Salkic and others v. Sweden* (dec.), no. 7702/04, 29 June 2004; and *Al-Zawatia v. Sweden* (dec.) no. 50068/08, 22 June 2010).

94. Accordingly, having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the possible harm, in the Court's view, the present case does not disclose the very exceptional circumstances established by its case-law (see, among others, *D v. United Kingdom*, cited above, § 54; and *N. v. the United Kingdom* [GC], cited above, §§ 43 and 51).

(e) Changed situation in Afghanistan

95. The Court observes that the Government in their observations stressed that in the light of the Migration Board's conclusion in December 2009, confirmed by various other sources, that at the relevant time there were impediments to enforcing expulsion orders to Ghazni province, the applicant would not be sent back to his village or province of origin. However, they found it possible and reasonable to expect the applicant to re-settle elsewhere in Afghanistan, for example, in Kabul or Mazar-e Sharif. The applicant disagreed and pointed out that he had no family or network left in Afghanistan to protect him.

96. The Court notes that the UNHCR in its 2010 Afghanistan Guidelines generally considers Internal Flight Alternative or Internal Relocation Alternative reasonable where protection is available from the individual's own extended family, community or tribe in the area of intended relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. A case-by-case analysis would, nevertheless, be necessary given the breakdown in the traditional social fabric of the country caused by decades

of war, massive refugee flows, and growing internal migration to urban areas.

97. The Court also reiterates its finding in for example *Salah Sheekh v. the Netherlands* (no. 1948/04, § 141, ECHR 2007-I (extracts), that while the Court by no means wishes to detract from the acute pertinence of socio-economic and humanitarian considerations to the issue of forced returns of rejected asylum seekers to a particular part of their country of origin, such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question of whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas. Moreover, Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision (see *Chahal v. the United Kingdom*, 15 November 1996, § 98, *Reports of Judgments and Decisions* 1996-V and *Hilal v. the United Kingdom*, no. 45276/99, §§ 67-68, ECHR 2001-II). However, the Court has previously held that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III). It sees no reason to hold differently where the expulsion is, as in the present case, not to an intermediary country but to a particular region of the country of origin. The Court considers that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility that the person expelled will find him or herself in a part of the country of origin where he or she may be subjected to ill-treatment.

98. In the present case, having regard *inter alia* to the Government's submission (see § 95) and the UNHCR guidelines (see §§ 65 and 96), it appears that an internal relocation alternative is available to the applicant in Afghanistan. Moreover, the Court is not convinced by the applicant's submission that no matter where in Afghanistan he were to re-settle he would be exposed to a real risk of being subjected to treatment proscribed by Article 3 of the Convention.

(f) Conclusion

99. Having regard to the above, the Court finds that an implementation of the order to deport the applicant to Afghanistan would not give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

100. The applicant further complained that he had not had access to his children in Sweden since August 2007 and that he was only allowed to send two letters per year to them. Those complaints fall under Article 8 of the Convention, which reads as follows:

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The criminal proceedings and the expulsion order

101. The Court notes that when lodging his application before the Court on 23 February 2009 the applicant did not in the application form invoke Article 8 of the Convention. However, as to the object of the application, he stated that he wanted to "maintain his life and the possibility to have contact with his children in Sweden". In subsequent observations he added that he had not had access to his children since August 2007 and that he was only allowed to send two letters per year to them, but he did not as such complain that the deportation order issued in the criminal proceedings, which became final on 17 September 2008, was in violation of Article 8 of the Convention. However, in so far as the application can be understood in substance to include such a complaint the Court will proceed on this assumption.

102. It observes that the interference had a basis in domestic law and served a legitimate aim, namely "the prevention of disorder and crime". The principal issue to be determined is whether the interference was "necessary in a democratic society". The relevant criteria that the Court uses to assess whether an expulsion measure is necessary in a democratic society have been summarised as follows (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 57 - 58, ECHR 2006-...):

"57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in ... and Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX; see also Amrollahi v. Denmark, no. 56811/00, 11 July 2002; Yılmaz v. Germany, no. 52853/99, 17 April 2003; and Keles v. Germany, 32231/02, 27 October 2005). In the case of Boultif the Court

elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

- the nature and seriousness of the offence committed by the applicant;

- the length of the applicant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the applicant's conduct during that period;

- the nationalities of the various persons concerned;

- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

- whether the spouse knew about the offence at the time when he or she entered into a family relationship;

- whether there are children of the marriage, and if so, their age; and

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

- the solidity of social, cultural and family ties with the host country and with the country of destination."

103. The order to expel the applicant, with a prohibition on returning before 19 May 2013, was imposed after he had been sentenced to two years' imprisonment for rape and aggravated violation of his then wife's integrity, committed several times a week over a period of two years, between 2005 and 3 August 2007, which included hitting, pushing, hair pulling and threatening to harm or kill the wife and the children, or to take the children away from the wife by taking them to Afghanistan. Accordingly, there can be no doubt that the expulsion order was based on a crime, which was not only serious, but also of such a nature that the applicant himself, by committing it, significantly harmed his family life (see for example *Cömert v. Denmark* (dec.), application no. 14474/03, 10 April 2006). The severity and nature of the offence must therefore weigh heavily in the balance.

104. The applicant arrived in Sweden around 1 September 2003, when he was twenty-three years old. Shortly after, in February 2004, he married

and was consequently granted a residence permit on 28 February 2005. As regards the applicant's private life, he has thus lived most of his life in Afghanistan. Moreover, the national courts stated that the applicant lacked any substantial connection to Sweden other than his family, who had to live at a secret address to avoid being persecuted by him.

105. The applicant did not commit any further offences following his release on 11 August 2009. It should be noted, however, that he was taken into custody on that day and released on 28 January 2010. Moreover, by decision of l4 June 2010 the prosecution authority issued restraining orders against the applicant vis-à-vis his ex-wife and their children, under section 1 of the Restraining Orders Act as it found that there was a risk that the applicant would persecute or in some other way seriously harass his former wife or the children. The orders were in force for one year until 13 June 2011 and there are no indications that they have been violated by the applicant.

106. As regards the applicant's family situation, in August 2007 the applicant's estranged wife filed for divorce. The applicant agreed thereto and the spouses divorced in July 2008. Accordingly, within the meaning of Article 8 of the Convention the applicant's "family-life" can no longer relate to his ex-wife and the case differs from those in which the main obstacle to expulsion was the difficulty for the spouses to stay together (see for example *Boultif v. Switzerland* and *Amrollahi v. Denmark*, cited above).

107. Therefore, within the meaning of Article 8 of the Convention the applicant's "family life" relates solely to his children, namely his daughter born in December 2004 and his son born in April 2006. This leads the Court to reiterate that besides the negative obligation under Article 8 of the Convention to refrain from measures which cause family ties to rupture, a positive obligation also exists to ensure that family life between parents and children can continue after divorce (see e.g. *Cılız v. the Netherlands*, no. 29192/95, § 62, ECHR 2000-VIII; and *mutatis mutandis*, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 50). In its decision to expel the applicant the national courts took this aspect into account but concluded that the children's need for contact with their father could not be considered to be so significant that expulsion should be avoided. However, having regard to the children, the expulsion period was limited to five years.

108. The Court understands that after 19 May 2013, when the applicant's prohibition on returning to Sweden will expire, he can apply anew to enter Sweden. At that time, the children will be respectively about eight and a half years old and seven years old. Thus, in principle there are no hindrances for the applicant to establish a strong link with his children in the future.

109. More importantly, having regard to the crimes of which the applicant was convicted, it must be considered a fact that the children were

born into a family with very serious domestic violence against their mother which led her to leave the applicant and take the children with her to a secret address in August 2007, when the children were about two and a half years old and one and a half years old. Furthermore, when the expulsion order became final on 17 September 2008, the applicant faced a prison sentence of two years which would in any event deprive him of enjoying a daily family life with his children during that time.

110. In these circumstances, it cannot be said that the Swedish courts failed to strike a fair balance between the applicant's interests on the one hand and the prevention of disorder or crime, on the other hand. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 of the Convention and must be rejected pursuant to Article 35 § 4.

B. The proceedings regarding custody and access

111. The applicant complained that he had been denied access to his children since 3 August 2007. The Court notes that two sets of proceedings took place in that respect, namely a temporary decision on custody and access and the final decision on custody and access.

1. The temporary decision on access

112. On 9 November 2007 the District Court decided temporarily to grant the estranged wife sole custody while the proceedings were pending before it and temporarily to refuse the applicant physical contact with the children during that time. It noted that the applicant had been accused of serious crimes, which included violence against the daughter and that the prosecutor was considering whether to charge the applicant. While awaiting developments in this regard, the District Court found that joint custody was incompatible with the children's best interest and that access between the applicant and the children should not be established under those circumstances. The applicant's appeal against the decision was rejected by the Court of Appeal on 30 November 2007. The applicant lodged his application with the Court on 23 February 2009, thus more than six months after the final decision was taken in the proceedings on temporary custody and access. It follows that this part of the application must be rejected, in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The final decision on access

113. When the applicant's conviction and sentence were final on 17 September 2008, the proceedings on custody and access proceeded and resulted in a decision to refuse the applicant access.

(a) Admissibility

114. The applicant found that this part of the application should be declared admissible.

115. The Government contested that argument.

116. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) The applicant

117. The applicant maintained that the refusal to grant him access was in violation of Article 8. He also alleged that he was only allowed to send two letters per year to his children.

(ii) The Government

118. From the outset the Government contested that there were any decisions from domestic authorities preventing the applicant from sending letters to his children or receiving information on them and their daily life. As regards the decision by the national courts to refuse the applicant physical contact with his children, it was taken in accordance with the law, pursued a legitimate aim and was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention. In particular, the courts had regard to the special circumstances of the case and what in their view was in the best interest of the children. Their decision only excluded physical contact between the applicant and his children at the relevant time and did not rule out access being established at a later point in time.

(iii) The Court's assessment

119. In determining whether the refusal of access was "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what is in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation. Article 8 requires that the domestic authorities should strike a fair balance between the

interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, amongst others, *Sahin v. Germany* [GC], no. 30943/96, §§ 65 and 66, ECHR 2003-VIII and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V).

120. By judgment of 18 November 2008 the District Court granted custody of the children to the applicant's ex-wife and refused the applicant's request that he be granted access to the children for four hours per month in the presence of a contact person. Leave to appeal against the decision was refused by the Court of Appeal on 23 March 2009 and by the Supreme Court on 29 May 2009.

121. It was not in dispute between the parties that that interference was in accordance with the law and served a legitimate aim, namely the protection of health or rights and freedom of others. The crucial issue remains whether the interference was proportionate and necessary in a democratic society.

122. The Court observes that in November 2008 when the District Court was about to take the decision on access, the applicant had been convicted of a serious crime and sentenced to two years' imprisonment and expulsion with a ban on his return to Sweden until May 2013. *De facto*, the District Court was thus required to determine whether access should be granted to the applicant until the order to expel him could be implemented, which normally takes place immediately after the prison sentence has been served. The applicant's request also implied that access take place while he served the prison sentence and that the practical arrangements necessary for the applicant to see his children should be organised by the social authorities since for obvious reasons the mother of the children could not be the contact person to be present during visits with the applicant.

123. Before the District Court, the applicant was heard and represented by counsel. Beforehand, in letters of 17 and 26 June, and 1 September 2008 he had contested a report of 5 June 2008 from the social welfare board, which he found partial and not in the interests of the children. Moreover, seven witnesses were heard at the applicant's request before the District Court.

124. The social welfare board had based the report on four interviews with the estranged wife and two interviews with the applicant (one at home and one at the pre-trial detention centre). The social welfare board had also met the children at their home in March 2008, and spoken to the children's nursery school and to a deaconess involved in the case. The report stated that in view of the applicant's abuse of his estranged wife and the fact that he had probably also physically abused his daughter, there was a high risk

that the children would be harmed if the applicant were to have custody of them. The children were very young when they last had contact with the applicant and they would have no memories of their father that they could express in words. Their need for a relationship with their father would increase when they became older. Access between them and the applicant would involve an increased risk that their secret address would become known to him. Moreover, the applicant would probably be expelled upon release from prison. Thus, it was recommended that he should not have access to the children. In order to meet the children's need for contact with their origins, it was noted that such could be accommodated through letters. The social welfare board could distribute letters from the applicant to the children via the estranged wife, who in turn could reply within a month to report on the children's development.

125. At the hearing on 4 November 2008, the representative from the social welfare board stated that the aim had been to see both parents an equal number of times during the custody investigation but that it had not been possible because the applicant was detained on remand. In general young children were directly affected by how their mother was treated and it was therefore very likely that the applicant's daughter would experience bad memories if she had to see the applicant. Moreover, if the children were to have contact with the applicant, they would be exposed to yet another separation from him when the expulsion order was to be implemented. Thus, in his view it was not in the children's best interests to see the applicant.

126. In its judgment of 18 November 2008, the District Court noted among other things that the applicant was in prison, and that when his sentence was served, he would be expelled to Afghanistan with a prohibition on returning until May 2013. Moreover, although there had been witnesses who had stated that the applicant had been a good father, there was a considerable risk that the children had experienced the violence to which their mother had been subjected and that seeing the applicant could bring back bad memories and disturb the sense of safety that the children now experienced. Moreover, the applicant was now in prison, from where he would only be able to have very restricted access to his children. Furthermore, even if the children were able to create a safe relationship with the applicant during such limited access, the applicant would subsequently be expelled and therefore separated from his children until May 2013. The District Court therefore found that access was not in the children's best interest. It did not rule out that access might be established at a later point in time.

127. The judgment did not mention, or in any way limit, the applicant's possibility to send letters to his children as alleged by him.

128. Having regard to the foregoing and to the respondent State's margin of appreciation, the Court is satisfied that the applicant was placed

in a position enabling him to put forward all arguments in favour of obtaining a visiting arrangement and also had access to all relevant information which was relied on by the courts (see, for example, *Sahin v. Germany* [GC], no. 30943/96, § 71) and that the Swedish courts struck a fair balance between the interests of all concerned.

129. Accordingly, there has been no violation of Article 8 of the Convention as to that part of the application.

C. The restraining orders

130. It appears that the applicant, in his observations before the Court, also complained that the restraining orders issued on l4 June 2010 by the prosecution authority against the applicant vis-à-vis his ex-wife and the children were in breach of Article 8 of the Convention.

131. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

132. The applicant failed to raise, either in form or substance, before the domestic courts the complaint made to it. It follows that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

III. ALLEGED VIOLATION OF ARTICLE 5 AND 6 OF THE CONVENTION, AND ARTICLE 1 OF PROTOCOL 6 AND ARTICLE 5 OF PROTOCOL 7 TO THE CONVENTION.

133. The Court has examined the applicant’s complaints as they have been submitted. In the light of all the material in its possession, and in so far as the criteria set out in Article 35 § 1 have been complied with and the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints must be rejected in accordance with Article 35 § 4 of the Convention.

IV. RULE 39 OF THE RULES OF COURT

134. 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 referral 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.

135. It considers that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention (see *F.H. v. Sweden*, no. 32621/06, § 107, 20 January 2009).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 3 admissible, in so far as it does not relate to the applicant's third application for revocation of the expulsion order;

2. *Declares* unanimously the complaint as regards the final decision on access under Article 8 admissible;

3. *Declares* unanimously the remainder of the application inadmissible;

4. *Holds* by five votes to two that an implementation of the order to deport the applicant to Afghanistan would not give rise to a violation of Article 3 of the Convention;

5. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 13 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spielmann joined by Judge Zupančič is annexed to this judgment.

D.S.
C.W.

DISSENTING OPINION OF JUDGE SPIELMANN JOINED BY JUDGE ZUPANČIČ

I am unable to agree with the majority that there has been no violation of Articles 3 and 8 of the Convention.

Even if I agree that, having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the possible harm, the present case, in respect of the applicant's health situation, does not disclose the very exceptional circumstances established by its case-law (paragraph 94 of the judgment), I have much more difficulty in following the majority view concerning the possibility for the applicant to resettle elsewhere in Afghanistan.

In the crucial paragraph 97 of the judgment, the majority recall that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision.

However, as a precondition for relying on an internal flight alternative, certain guarantees have to be in place. The majority rightly emphasise in this respect that the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, all the more so if in the absence of such guarantees there is a possibility that the person expelled will end up in a part of the country of origin where he or she may be subjected to ill-treatment.

Those are questions of fact and in my view it is the respondent Government which should satisfy the Court that, on the basis of the facts, resettlement is possible, not only in theory, but also in practice. Admittedly the Migration and Aliens Appeals Boards conducted an examination of the applicant's case. But I cannot find any support in the file for the opinion that, in the particular circumstances of the case, it is possible and reasonable to expect the applicant to resettle elsewhere in Afghanistan. This issue should have been examined separately and thoroughly by the domestic authorities. In my view, the existence of such a thorough and separate examination, focusing on internal flight alternatives and concrete possibilities of resettlement, is not apparent from the file and I cannot therefore support the majority view that there has been no violation of Article 3 of the Convention.

Concerning, more specifically, the complaint as regards the final decision on the applicant's access to his children and its compatibility with Article 8 of the Convention, I am unable to agree with the domestic authorities' reasoning, which is upheld by the majority. This reasoning was based to a large extent on the fact that, if the children were to have contact with the applicant, they would be exposed to yet another separation from him when

the expulsion order was implemented and that it was not therefore in the children's best interest to see him. The authorities also relied, unconvincingly in my view, on the fact that, even if the children were able to create a safe relationship with the applicant during limited access arrangements, he would subsequently be expelled and therefore separated from his children until May 2013 (see District Court's decision of 18 November 2008, paragraph 126 of the judgment). This cannot be a reason to refuse access. Nor can it be justifiable to refuse access at an earlier stage on the ground that, in any event, access will potentially become possible after May 2013 (see paragraph 108 of the judgment concerning the non-communicated and inadmissible part of the application under Article 8). Hence, in my view, the interference with the applicant's rights under Article 8 of the Convention was not proportionate. I would like to stress in this context that the possibility of access after May 2013 is purely theoretical, as it is more than doubtful that the applicant would, as a matter of fact, be granted leave to return to Sweden in 2013. In other words, and to sum up, the denial of access, in a situation where contact with the children has been impossible for such a long time, constitutes a disproportionate interference with a right protected by Article 8.

Finally, I would like to emphasise that the mere fact that the applicant was placed in a position enabling him to put forward all arguments in favour of obtaining a visiting arrangement and also had access to all relevant information which was relied on by the courts (see paragraph 128 of the judgment) is insufficient to convince me that the Swedish courts struck a fair balance between the interests of all concerned or that there has been no violation of Article 8 of the Convention.