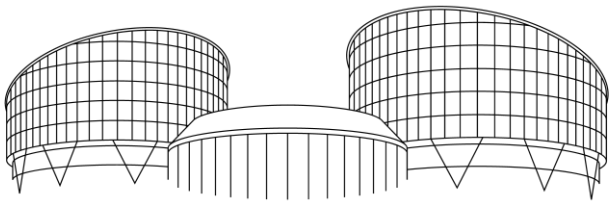

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF J.H. v. THE UNITED KINGDOM

(Application no. 48839/09)

JUDGMENT

STRASBOURG

20 December 2011

FINAL

20/03/2012

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

In the case of J.H. v. the United Kingdom**,**

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 29 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 48839/09) against the United Kingdom of Great Britain and Northern Ireland 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, J.H. ("the applicant"), on 10 September 2009.

2. The applicant was represented by Ms N. Mole, a lawyer practising in London with the AIRE Centre. The United Kingdom Government ("the Government") were represented by their Agent, Ms Y. Ahmed of the Foreign and Commonwealth Office.

3. The applicant alleged that, if expelled from the United Kingdom to Afghanistan, he would face a real risk of ill-treatment contrary to Article 3 and/or a violation of Article 2 of the Convention.

4. On 15 September 2009, the Vice-President of the Fourth 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 before the Court that the applicant should not be expelled to Afghanistan pending the Court's decision.

5. On 13 October 2009, the Vice-President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1), to grant priority to the application (Rule 41 of the Rules of Court) and to grant the applicant anonymity (Rule 47 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. The applicant claimed that he was born in 1991. The Government contested that and claimed that he was born in 1988. He currently lives in London.

A. The domestic proceedings in relation to the applicant's brother

8. On 12 December 2003, the applicant's older brother, SH, arrived in the United Kingdom and made an application for asylum based on the risk to him as the son of a high-ranking member of the Communist People's Democratic Party of Afghanistan ("PDPA"). That application was refused by the Secretary of State on 19 December 2003.

9. On 11 May 2004, SH's asylum appeal was allowed by an Adjudicator of the then Immigration Appellate Authority ("IAA"). The Adjudicator accepted that SH's father had been a prominent, high-ranking member of the PDPA who had been in touch with its highest officials and who had also been a member of the central committee responsible for policy making. He also accepted that SH's father was "known" by armed factions; was without any existing political party or tribal protection in Afghanistan; was living outside Afghanistan; and would be at risk upon return. The Adjudicator noted that SH had, in later years, made some contacts and forwarded documents to others on behalf of his father and that a powerful person with political influence had occupied the family land for a considerable time. He concluded that the evidential basis for an historical and present day interest in SH had been established. In the circumstances, the Adjudicator found that the applicant's brother fell "fairly and squarely" within the protection category set out by the United Nations High Commissioner for Refugees ("UNHCR") as a relative of a former PDPA member, and that there were substantial grounds for believing that he would face a real risk of ill-treatment contrary to Article 3 of the Convention if he were to be returned to Afghanistan.

10. As a result, the applicant's brother was granted refugee status in the United Kingdom by the Secretary of State.

B. The domestic proceedings relating to the applicant

11. The applicant arrived in the United Kingdom on 3 July 2009 and was arrested by the police as an illegal immigrant.

12. On 6 July 2009, he claimed asylum and claimed to be 17 years of age, giving his date of birth as 30 July 1991. The factual basis of his asylum claim was similar to that of his brother, SH, and he also relied upon his father's previous position as a high-ranking member of the PDPA. He claimed that his father had been a close friend and the personal doctor of several prominent politicians, including Dr Najibullah (the President of Afghanistan between 1986 and 1992) and other Government ministers. He claimed that, in 1992 when the communist regime had collapsed, his father had been forced to flee Afghanistan for the Russian Federation. He claimed that his father had continued to be politically active in opposition to a number of warlords and people involved in the current Afghan Government, including Generals Dostum, Fahim and Sayat who he had known personally. The applicant claimed that, after his father had left Afghanistan, his family had been forced to move to Khost in eastern Afghanistan where they had lived for over a decade using different surnames so that they would not be identified. Approximately six years ago, his family had moved to Kabul for seven or eight months. During that time, members of the National Security Intelligence had come to their home on two or three occasions. On the last occasion, they had arrested his uncle who had subsequently been detained for a year. They had also tried to arrest the applicant's brothers. The family had therefore moved to stay with another uncle, but whilst there, one of his brothers, FH, had been shot and killed in 2003. The applicant had travelled to Pakistan with his mother and a younger brother where he had lived for five or six years before travelling alone with an agent to the United Kingdom via Iran, Greece, Italy and France.

13. On the same date, two social workers from Liverpool Social Services assessed the applicant as being significantly over the age of 21 and in the region of 25 years of age. In coming to that conclusion, they stated that they had considered his physical appearance, general demeanour, account of his life in Afghanistan and Pakistan and his experiences during his travel to the United Kingdom.

14. On 4 August 2009, his application for asylum was refused by the Secretary of State, who considered that his account was vague and contradictory, and that it was not plausible that he would not be able to recollect any of the significant details of his life in Khost, his journey to Pakistan or the activities of his father. In particular, it was not accepted that his father was still politically active because it was implausible that the applicant would not be able to recollect any details of his father's activities given that he had remained in relatively regular contact with him. It was also not considered to be credible that the Afghan authorities or any

warlords would be interested in the applicant given, *inter alia*, the fact that he had not been politically active himself; the length of time that had passed since his father had left Afghanistan; and the fact that he had lived in Afghanistan without problems for ten years before leaving. It was also noted that his father had voluntarily returned on one trip to Afghanistan, undermining his claim that his father was at risk there due to his high profile. His claim that the death of his brother, FH, was related to his father's political activity was considered to be entirely speculative. His account of events in Kabul was rejected because the details of the same were vague and because they contradicted the account that his brother had given at his appeal hearing in 2004. His credibility was considered to be undermined by his failure to claim asylum in Greece, Italy or France. Even taking his claim at its highest, it was considered that he could relocate within Afghanistan to avoid any problems from warlords.

15. On 14 August 2009, the applicant's appeal was dismissed by an Immigration Judge at the then Asylum and Immigration Tribunal ("AIT"). The Immigration Judge acknowledged that the applicant's brother's asylum appeal had been successful in 2004 because the Adjudicator had accepted that his father had occupied a position of prominence and a high-ranking position within the PDPA. Nevertheless, the Immigration Judge referred to the later AIT country guideline determination of *SO and SO (KhaD – members and family) Afghanistan CG* [2006] UKAIT 00003 (see paragraphs 24-25 below) and found that there were differences between the claims of the two brothers, including the fact that the applicant had never been involved in any political activity, whilst his brother had carried out some activities on behalf of their father which might have drawn the authorities' attention to him. In addition, the Immigration Judge did not accept that their father continued to be politically active or to have a high profile in Afghanistan, because the only evidence of any political activity related to events over 17 years previously, prior to 1992, when the applicant had still been a small child, and politics and personnel in Afghanistan had changed since that time. Even if his father had continued to be politically active, the Immigration Judge did not accept that the Afghan authorities or warlords would have any adverse interest in the applicant, given his lack of political profile and education; his age on leaving Afghanistan; the fact that he had only been a small child when his father had been politically active; and recent political developments in Afghanistan.

16. The Immigration Judge also made a series of adverse credibility findings against the applicant due to his vagueness when giving evidence; his failure to claim asylum in safe countries en route to the United Kingdom, including Greece, Italy and France; and the discrepancies between his account and that of his brother including, *inter alia*, the level of contact that had taken place between the various family members since their respective departures from Afghanistan and whether or not one brother FH

had been shot. In particular, it was not accepted that SH would not have mentioned during his own asylum application that one of their brothers had been shot had such an event occurred. Even if his brother FH had died, the Immigration Judge did not accept that he had been killed by the Mujaheddin, given that the applicant himself had stated that he did not know who had killed him but thought it was the Mujaheddin. The Immigration Judge considered that the applicant had used his age as a convenient cover whenever he did not know the answer to a question even though he had been age-assessed by social workers as being between 20 to 25 years of age. The Immigration Judge considered that it would have been expected that the applicant would have discussed matters with his family and would have had some awareness of his father's political activities.

17. Finally, the Immigration Judge did not accept that the level of indiscriminate violence in Afghanistan, and in Kabul in particular, reached a level such as to constitute a real risk to the applicant.

18. On 19 August 2009, his application for reconsideration was dismissed by a Senior Immigration Judge at the AIT because there had been no error of law.

19. On 17 September 2009, his application for reconsideration was dismissed by the High Court because the appeal determination did not disclose any error of law. The findings of fact and the findings in relation to credibility were matters for the Immigration Judge having, as he had done, properly directed himself in relation to the law. The reasons for his findings were clear and carefully expressed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Primary legislation

20. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"), provides a right of appeal against an immigration decision made by the Secretary of State for the Home Department.

21. Until 4 April 2005, appeals in asylum, immigration and nationality matters were heard by the IAA.

22. From 4 April 2005, the then AIT replaced the former system of Adjudicators and the Immigration Appeal Tribunal ("IAT"). Section 103A of the Nationality, Immigration and Asylum Act 2002 (as amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) provided that a party to an appeal could apply to the High Court, on the grounds that the AIT had made an error of law, for an order requiring the AIT to reconsider its decision on the appeal. The High Court could make such an order if it thought that the AIT had made an error of law. At the relevant time, all applications for reconsideration went through a "filter

procedure", so that an application for reconsideration was first made to an authorised immigration judge of the AIT. If the immigration judge refused to make an order for reconsideration, the applicant could renew the application to the High Court, which would consider the application afresh.

23. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

B. *SO and SO (KhaD – members and family) Afghanistan CG* [2006] UKAIT 00003

24. Country guideline determinations of both the former AIT and IAT are to be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. Unless expressly superseded or replaced by a later country guideline determination, country guideline determinations are authoritative in any subsequent appeals so far as that appeal relates to the country guidance issue in question and depends upon the same or similar evidence.

25. In the country guideline determination of *SO and SO (KhaD – members and family) Afghanistan CG* [2006] UKAIT 00003, the AIT held that the issue of risk to persons having a connection with the PDPA had to be considered by weighing up a number of factors including some personal to the individual. Furthermore, it could not be said that former membership of Khadimat-e-Atalat-e Dawlati ("KhaD" - the secret service wing of the Communist PDPA regime in Afghanistan until 1992) or the PDPA would generally suffice to establish a risk of persecution or treatment contrary to Article 3 on return unless an individual had personally crossed or had had "concrete conflicts" with people who were now in power. In that context, the AIT considered that past or present personal conflicts were more important than political conflicts. The AIT further held that in assessing whether family members of a PDPA and/or a KhaD member would be at risk, there may be factors reducing or removing risk such as the death of the PDPA/KhaD member, and the amount of time that had elapsed since his death.

C. *GS (Article 15 (c) : Indiscriminate violence) Afghanistan* CG [2009] UKAIT 00044

26. In the country guideline determination of *GS (Article 15 (c): Indiscriminate violence) Afghanistan* CG [2009] UKAIT 00044, promulgated on 15 October 2009, the then AIT held that there was not in Afghanistan such a high level of indiscriminate violence that substantial grounds existed for believing that a civilian would, solely by being present there, face a real risk which threatened the civilian's life or person, such as to entitle that person to the grant of humanitarian protection, pursuant to Articles 2(e) and 15(c) of Council Directive 2004/83/EC.

III. RELEVANT EUROPEAN UNION LAW

27. Council Directive 2004/83/EC of 29 April 2004 (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: "the Qualification Directive") has the objective, *inter alia*, of ensuring EU Member States apply common criteria for the identification of persons genuinely in need of international protection (recital six of the preamble).

28. In addition to regulating refugee status, it makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection status as someone who would face a real risk of suffering serious harm if returned to his or her country of origin and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.

"Serious harm" is defined in Article 15 as consisting of:

> "a) death penalty or execution; or
>
> b) torture or inhuman or degrading treatment of an applicant in the country of origin; or
>
> c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

29. The Qualification Directive was transposed into domestic law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

IV. RELEVANT INFORMATION ABOUT AFGHANISTAN

30. In July 2009 UNHCR issued Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan ("the

July 2009 UNHCR Guidelines") and set out the categories of Afghans considered to be particularly at risk in Afghanistan in view of the security, political and human rights situation in the country at that time.

31. With regard to persons associated with the former PDPA, those Guidelines stated the following:

> "The People's Democratic Party of Afghanistan (PDPA) was formed in 1965 by Nur Mohammad Taraki on Marxist/Leninist ideology due to domestic discontent and the absence of political freedoms. It believed in a one-party, heavily secularized state, and was particularly intolerant of political opposition from its Islamist rivals. The PDPA eventually split into the *Khalq* (People) and *Parcham* (Flag) branches. After the *Khalq* faction of the PDPA deposed the ruling party through a coup carried out by its supporters in the military in 1978 (the Saur Revolution), it formed a government that was violently intolerant of political opposition. The Soviet-supported PDPA government's attempts at forcible reform of polity and society resulted in a surge of support for its Islamist rivals, who attempted to oust it with Pakistani support. In 1977, the two factions reunited under Soviet pressure and its name was changed to *Watan* (Homeland) Party. It collapsed in 1992 when, following the Peshawar Accords, Mujaheddin troops entered Kabul and the last President of a communist government in Afghanistan, Mohammed Najibullah (previously head of the secret service *KhAD*) had to seek refuge in a UN-building in Kabul where he stayed until he was killed by *Taleban* troops entering Kabul in September 1996.
>
> In late 2003, a congress of the People's Democratic Party of Afghanistan (PDPA) took place in Afghanistan, which led to the creation of *Hezb-e-Mutahid-e-Mili* (National United Party), a party registered in 2005 then comprising 600 members. Former PDPA members have also reportedly founded several other parties. Most recently, a new parliamentary group, the United National Front, was inaugurated on 12 March 2007 as a broad coalition of former and current militia leaders, commanders from the anti-Soviet resistance, ex-Communist leaders, and various representatives of social and ethnic groups.
>
> Significant numbers of the former People's Democratic Party of Afghanistan (PDPA) – subsequently renamed *Watan* (Homeland) – members and former security officials, including the Intelligence Service (*KhAD/WAD*), are working in the Government.
>
> While many former PDPA members and officials of the communist government, particularly those who enjoy the protection of and have strong links to influential factions and individuals in the current Government, are generally not at risk, some high-ranking members of the PDPA continue to face a risk of persecution. Such risk depends on the individual's personal circumstances, including family background, professional profile, political links, and whether he or she has been associated, or perceived to be associated, with the human rights violations of the communist regime in Afghanistan between 1979 and 1992.
>
> Former PDPA high-ranking members without factional protection from Islamic political parties, tribes or persons in a position of influence, who may be exposed to a risk of persecution, include the following:
>
> • high-ranking PDPA members, irrespective of whether they belonged to the *Parcham* or *Khalq* faction of the party may be at risk if they are known and had a

public profile. These encompass high-ranking members of Central and Provincial PDPA Committees and their family members and secretaries of PDPA's Committees in public institutions; and

• former security officials of the communist regime, including *KhAD* members, also continue to be at risk, in particular from the population – e.g. families of victims of *KhaD* ill-treatment – given their actual or perceived involvement in human rights abuses during the communist regime.

Former PDPA high-ranking members, or those associated with the commission of human rights violations during the former Communist regime, may also be at risk of persecution by *mujaheddin* leaders, and armed anti-Government groups."

32. On 17 December 2010, UNHCR issued updated Eligibility Guidelines for Assessing the International Protection needs of Asylum-Seekers from Afghanistan ("the December 2010 UNHCR Guidelines"). Those Guidelines observed, *inter alia*, under "I. Introduction":

"These Guidelines supersede and replace the July 2009 *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*. They are issued against a backdrop of a worsening security situation in certain parts of Afghanistan and sustained conflict-related human rights violations as well as contain information on the particular profiles for which international protection needs may arise in the current context in Afghanistan.

...

UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF); (ii) humanitarian workers and human rights activists; (iii) journalists and other media professionals; (iv) civilians suspected of supporting armed anti-Government groups; (v) members of minority religious groups and persons perceived as contravening Shari'a law; (vi) women with specific profiles; (vii) children with specific profiles; (viii) victims of trafficking; (ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals; (x) members of (minority) ethnic groups; and (xi) persons at risk of becoming victims of blood feuds.

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."

33. Members of the former PDPA and their families were not included within the potential risk profiles set out in the December 2010 UNHCR Guidelines.

THE LAW

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

34. The applicant complained that his removal to Afghanistan would violate his rights under Articles 2 and 3 of the Convention. Article 2 of the Convention provides that:

> "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.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

35. Article 3 of the Convention provides that:

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

36. The Government contested that argument.

A. Admissibility

37. 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 (*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 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant's submissions

38. The applicant contended that his expulsion to Afghanistan would expose him to a real risk of ill-treatment due to the high and visible profile of his father in Afghanistan as a result of his involvement with the PDPA Government until its overthrow in 1992. Whilst not disputing the findings of *GS* (set out at paragraph 26 above), he argued that the assessment of the risk to him required consideration of the level of violence in Afghanistan as well as his personal circumstances, having regard to the Court's case-law that even though a number of individual factors may not, when considered separately, constitute a real risk, they may do when taken cumulatively and when considered in a situation of general violence and heightened security (*NA. v. the United Kingdom*, no. 25904/07, § 130, 17 July 2008). He argued that his personal circumstances were such that he had established that there existed special distinguishing features that could or should have enabled the Secretary of State to foresee that he would be exposed to a very personal risk upon return to Afghanistan (*Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 112, Series A no. 215).

39. The applicant maintained that, until 1992, his father had had a personal role in assisting the former President Najibullah. His father had been appointed Lieutenant General within the PDPA and had been the Head of the Military Medical Academy and Hospital in Kabul providing medical assistance to very prominent members of the Government of the time as well as to members of the opposition who held positions in the current

Government. The applicant further asserted that, before 1992, his father had had a high profile, speaking out on radio and national television against extremism and members of the Mujaheddin who were members of the current Government. In support of his claims, the applicant submitted photographs of his father during that time together with a number of witness statements from former members of the PDPA Government confirming his father's role within the PDPA administration prior to 1992 and stating their belief that the applicant's life would be at risk if he were to be returned to Afghanistan. The applicant also submitted a witness statement from his father which, *inter alia*, asserted that he continued to be politically active and have a high profile in Afghanistan and that the applicant would be at risk of retribution upon return to Afghanistan, in particular from the Vice-President of Afghanistan (see further paragraph 41 below).

40. The applicant pointed out that in the consideration of his brother SH's appeal in 2004, the IAA had recognised the high profile of his father and had accepted that he had been a prominent, high-ranking member of the PDPA who was known by armed factions and was without any existing political party or tribal protection. The IAA had further accepted that, following UNHCR Guidelines (see paragraphs 30-31 above), there were substantial grounds for believing that his brother SH would face a real risk of ill-treatment contrary to Article 3 if returned to Afghanistan as a relative of a former PDPA member. The applicant submitted that his father's profile had not diminished since 2004 and that, if anything, the threat to the applicant would be more serious now than that recognised by the IAA in his brother's appeal determination because at that time, neither SH nor the IAA had known that another brother FH had been shot and killed in Kabul in 2003. He argued that FH had been a student and had not been involved in any political activity. Therefore, he asserted that there could be no reason for his death other than that he had been targeted because of his relationship with his father. The applicant argued, in terms, that FH's death indicated that the risk to his family remained to the present day.

41. The applicant further submitted that, prior to 1992, his father had publicly spoken out against Mohammad Qasim Fahim who had been implicated in war crimes in Afghanistan in the 1990s and was now Vice-President of Afghanistan. He alleged that he would be identified as his father's son and targeted upon return by members of the current Government, particularly given that his family had been identified by the security forces in Kabul in 2002. He argued that he would be unable to avail himself of the protection of the Afghan authorities because they were the very authorities who posed a personal and real risk to him.

42. He argued that both the case of *SO and SO* (see paragraph 25 above) and the July 2009 UNHCR Guidelines (see paragraphs 30-31) supported his case because, as the son of a high-ranking member of the PDPA whose family had been targeted for reprisals, he ran a very high risk of being

subjected to treatment contrary to Articles 2 and 3 upon return, particularly given the appointment of Mohammed Qasim Fahim as Vice-President in 2009.

b. The Government's submissions

43. The Government submitted that the applicant's removal to Afghanistan would not expose him to a real risk of being subjected to treatment in breach of Article 3 of the Convention, nor a violation of Article 2.

44. The Government pointed out that the applicant's claim had been fully considered and rejected by both the Secretary of State and the then AIT. They argued that the AIT had conducted an individualised assessment of the risk that the applicant faced by reason of his connection with his father, having weighed up a number of factors including some personal to the individual in accordance with the case-law set out in *SO and SO* (see paragraph 25 above). The Government reiterated all of the AIT's findings (as set out in full at paragraphs 15-17 above).

45. The Government did not accept that any of the material submitted to the Court by the applicant was capable of displacing the AIT's findings. First, they asserted that there remained no documentary evidence that the applicant's father had continued to be politically active after his departure from Afghanistan in 1992 and that there were no grounds for believing that he maintained a political profile in Afghanistan until the present day. Indeed, the Government pointed out that the witness statements submitted to the Court only demonstrated his historical connections with the PDPA prior to 1992 and failed to provide any support for the applicant and his father's assertions that his father had continued to condemn members of the current Afghan Government.

46. Second, the Government argued that the applicant had not submitted any evidence capable of disturbing the AIT's conclusions that the applicant himself had no individual profile in Afghanistan; that he had not been involved in his father's political activities; and that he had been absent from Kabul for at least five years. The Government therefore maintained that there was nothing to suggest that the applicant would be at any risk of retribution for his father's political opinions. In that regard, the Government pointed out that the AIT had rejected the applicant's claim that his brother FH had been killed in 2003 by the Mujaheddin and there remained no formal evidence regarding the date and circumstances of FH's death. In particular, there was no evidence linking FH's alleged killing with the Mujaheddin, with those who formed part of the present Government of Afghanistan or with the political activities of his father. The Government therefore considered that there was no evidence that FH had been targeted at all, and had not simply been the victim of a random act of criminal violence. The Government argued that the applicant's speculative assertions that FH

must have been killed by the Mujaheddin could not amount to "substantial grounds" that the applicant would be at risk upon return to Afghanistan.

47. Third, although the Government argued that the above matters were reason in themselves for the AIT to have held that the applicant had not established substantial grounds to believe that he would be at real risk contrary to Articles 2 and/or 3 upon return, they pointed out that the AIT, having had the advantage of hearing the applicant's and his brother's evidence, had made adverse credibility findings against the applicant for a range of reasons; and they did not accept that the applicant had adequately responded to any of those credibility findings.

48. Additionally, the Government relied upon the UNHCR Guidelines of July 2009 (set out at paragraphs 30-31 above) which stated that the risk to former PDPA members depended upon the applicant's personal circumstances, including family background, professional profile, political links and whether he or she had been associated, or perceived to be associated, with the human rights violations of the communist regime in Afghanistan between 1979 and 1992. By extension, they argued that the position of family members of former PDPA members, such as the applicant, must equally depend on their particular circumstances and that it could not be said that the mere fact of the relationship between the applicant and his father would be sufficient to disclose substantial grounds for believing that there would be a real risk of the applicant being subjected to treatment contrary to Articles 2 or 3 in the event of his return to Afghanistan.

49. Finally, although the applicant had not alleged the same in his application, the Government, relying on the country guideline determination of *GS* (set out above at paragraph 26), observed that the position in Afghanistan could not be described as one of the most extreme cases of general violence where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence upon return.

2. The Court's assessment

a) General principles

50. The Court reiterates that 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-....). 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).

51. The assessment 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).

52. 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).

53. In order to determine whether there is a real risk of ill-treatment in this case, the Court must examine the foreseeable consequences of sending the applicant to Afghanistan, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108 *in fine*, Series A no. 215). If an applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time. Even though the historical position is of interest insofar as it may shed light

on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light since the final decision taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I (extracts)).

54. The Court has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others v. the United Kingdom*, cited above, § 111, and *Saadi v. Italy*, cited above, § 131) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov v. Turkey*, cited above, § 73; and *Saadi v. Italy*, cited above, § 131). The Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008).

b) Application to the facts of the case

55. In considering whether the applicant has established that he would be at real risk of ill-treatment in Afghanistan, the Court observes, as a preliminary matter, that the applicant has not claimed that the levels of violence in Afghanistan are such that any removal there would necessarily breach Article 3 of the Convention. In that regard, the Court notes that the applicant did not dispute the findings of the AIT's country guideline determination *GS* (set out at paragraph 26 above) that there was not in Afghanistan such a high level of indiscriminate violence that substantial grounds existed for believing that a civilian would, solely by being present there, face a real risk which threatened the civilian's life or person. The Court further observes that the applicant did not submit any evidence to the Court regarding the general security situation or levels of violence in Afghanistan. In the circumstances, the Court considers that there are no indications that the general situation of violence in Afghanistan, and in particular Kabul to where the applicant would be returned, is at present of sufficient intensity to create a real risk of ill-treatment simply by virtue of his being exposed to such violence on return.

56. In the present case, therefore, the Court must establish whether the applicant's personal situation and circumstances are such that his return to Afghanistan would contravene Article 3 of the Convention.

57. The applicant alleged that he would be at risk of ill-treatment in Afghanistan due to his father's involvement with the PDPA Government

until its overthrow in 1992 and his father's claimed continued high profile in Afghanistan. The Court notes that the applicant has never claimed to have had any personal political involvement in Afghanistan, nor has he claimed that he has an individual profile there unconnected to his relationship with his father. Furthermore, the applicant has not claimed that he has ever had any role in, or knowledge of, his father's political activities. The AIT, when assessing his claim in 2009, acknowledged that the applicant's father had been involved with the PDPA Government prior to 1992 and that his brother SH's appeal had been successful in 2004 but nevertheless found that there were differences between the claims of the two brothers, including the fact that, unlike his brother, the applicant had never been involved in any political activity in Afghanistan. In addition, the AIT did not accept that the applicant's father had continued to be politically active or to have had a high profile in Afghanistan, because the only evidence of any political activity related to events prior to 1992. Furthermore, the AIT did not accept that the Afghan authorities or warlords would have any adverse interest in the applicant, even if his father continued to be politically active, given his lack of political profile and education; his age on leaving Afghanistan; the fact that he had only been a small child when his father had been politically active; and later political developments in Afghanistan. The AIT also made adverse credibility findings against the applicant and did not accept that his brother FH had been killed in Afghanistan in 2003 by the Mujaheddin.

58. The Court notes that the Secretary of State and the AIT conducted a thorough examination of the applicant's case, which entailed the applicant being heard on at least two occasions both at his asylum interview and before an Immigration Judge at the AIT. He was legally represented both before the AIT and in his applications for reconsideration of the appeal determination. The national authorities had the benefit of seeing, hearing and questioning both the applicant and his brother, SH, 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; that their assessment was insufficiently supported by relevant materials including the country guideline determination of *SO and SO* (see paragraphs 24-25 above); or that the reasons given were insufficient.

59. Moreover, the Court considers that there is no new evidence before it which would indicate that the domestic authorities were wrong in their conclusion that there were no substantial grounds for finding that the applicant would face a real risk of being persecuted upon return to Afghanistan. In particular, in its assessment of the risk to the applicant, the Court takes heed of the following matters.

60. First, the Court accepts that the applicant's father was a Lieutenant General within the PDPA who had been the Head of the Military Medical Academy and Hospital in Kabul until 1992. In coming to that conclusion,

the Court has regard to the findings of the Adjudicator in the applicant's brother, SH's, asylum appeal in 2004 (as set out at paragraph 9 above); and the photographs of the applicant's father during that period together with the witness statements of former members of the PDPA Government confirming his father's role prior to 1992 (see paragraph 39 above).

61. Nevertheless, the Court considers that the applicant has failed to adduce any independent evidence to support his claim that his father has remained politically active to the present day and/or has continued to have a profile in Afghanistan after his departure from the country in 1992. Indeed, the Court notes that the only evidence regarding the same is the unsupported assertions in the applicant's and his father's witness statements. Even having regard to the special situation in which asylum seekers often find themselves, and the need to give them the benefit of the doubt when it comes to assessing their credibility, the Court is not convinced that, in the present case, a bare assertion can be considered to be sufficient to establish that his father is still politically active or has a public profile in Afghanistan such as to give rise to any risk upon return to the applicant. In that regard, the Court considers it to be relevant that none of the witness statements submitted from any of the members of the former PDPA Government members (see paragraph 39 above) indicate or make any reference to any continuing activism or political role on the part of the applicant's father post 1992. Furthermore, if the applicant's father had continued to make radio, television or any other public statements condemning members of the current Government, the Court considers that the applicant would have been able to refer to the same or submit some form of evidence regarding the same to support those assertions. The fact that no such material is available suggests to the Court that, even if his father may have remained politically active in some way whilst living in the Russian Federation, such activities are not publicised and are therefore unlikely to be known in Afghanistan or elsewhere. Furthermore, his father's apparently voluntary return to Afghanistan, on one trip since 1992 (see paragraph 14 above), without encountering any difficulties there, corroborates the view that his father was of no adverse interest in Afghanistan.

62. In all of the circumstances, the Court is not convinced that the applicant's father has an ongoing public profile in Afghanistan or has been engaged in any political activity since 1992 to the extent that it would attract the adverse interest of any person or faction in Afghanistan in the applicant. Further, in the absence of any evidence regarding the same, the Court is not persuaded by the applicant's claim that members of the current Government would either be able to identify him as his father's son upon his return, or would be motivated to target him, given both the passage of time since his father was involved in politics and the applicant's lack of political activity.

63. Second, the Court notes that the AIT did not accept that the applicant's brother FH had been killed by the Mujaheddin in 2003 (see

paragraph 16 above). Indeed, at his appeal hearing before the AIT, the applicant himself had acknowledged that he was not able to state who had killed FH and had only asserted that he thought it had been the Mujaheddin (see paragraph 16 above). In his submissions before the Court, the applicant argued that, given FH's lack of political profile, there could be no reason for his having been killed other than due to his relationship with their father (see paragraph 40 above). The Court notes that there is no evidence before it regarding FH's death, how he died or the circumstances of his death which would indicate that he was killed by any particular person in Afghanistan or that his death would have any significance for the assessment of the risk to the applicant upon return to Afghanistan. The Court therefore considers that the Government were entitled to take the view that FH's death in 2003 could not amount to substantial grounds for believing that the applicant would be at risk upon return.

64. Third, the Court recalls that, if an applicant has not yet been removed when the Court examines the case, the relevant time for the examination of the risk to the applicant will be that of the proceedings before the Court. Furthermore, even though the historical position is of interest, it is the present conditions in Afghanistan which are decisive. It is therefore necessary to take into account information which has come to light since the final decision was taken by the domestic authorities. In that regard, the Court recognises that the July 2009 UNHCR Guidelines (see paragraphs 30-31 above), whilst acknowledging that many former PDPA members would not generally be at risk in Afghanistan, also indicated that, depending on the individual's personal circumstances, certain high-ranking PDPA members and their family members may be at risk of persecution in Afghanistan if they were known, had a public profile and were without any factional support in Afghanistan. Indeed, it was on that basis that the applicant's brother, SH, was granted refugee status in the United Kingdom in 2004 after the IAA had found that he had fallen "fairly and squarely" within the protection category set out by the UNHCR Guidelines in place at that time. The Court also takes heed of the AIT country guideline determination of *SO and SO* from 2006 (see paragraphs 24-25 above) which found similarly, in light of the UNHCR Guidelines and other evidence, that the risk to persons with a connection with the PDPA had to be considered by weighing up a number of factors including past or present personal conflicts.

65. The Court finds it highly significant that the December 2010 UNHCR Guidelines, which superseded and replaced the July 2009 UNHCR Guidelines and post-dated *SO and SO*, do not cite former PDPA members and their family amongst the extensive list of potential risk profiles of asylum seekers from Afghanistan. The Court acknowledges that the UNHCR Guidelines do not necessarily provide an exhaustive list of risk categories. Nevertheless, the Court considers that the omission of PDPA

members and, more critically, UNHCR's own change in their position between July 2009 and December 2010, is significant. It indicates that former PDPA members are no longer considered to be at risk in Afghanistan. Indeed, the Court considers that the lack of other background evidence indicating that PDPA members continue to be at risk upon return to Afghanistan to the present day further corroborates that position. Having regard to all of the above, the Court is not persuaded that the applicant, who was never a PDPA member himself but merely a family member of a former PDPA member who had left Afghanistan 19 years ago, has demonstrated that he would be at risk upon return.

66. Following an overall examination of the applicant's case, the Court concludes that the applicant has failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 if removed to Afghanistan having particular regard to, *inter alia*, the lack of any evidence that the applicant's father still has any profile in Afghanistan; the length of time that has elapsed since his father, in any event, had left Afghanistan; the applicant's lack of individual profile in Afghanistan; and, critically, the absence of any recent evidence to indicate that family members of PDPA members would be at risk in Afghanistan in the present circumstances prevailing there.

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

II. RULE 39 OF THE RULES OF COURT

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

69. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 3) must continue 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

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

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President