



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

**UNHCR Regional Representation for the Benelux and the
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Dear Minister Hirsch Ballin,

Under the Statute of the Office of the United Nations High Commissioner for Refugees [UNGA Res. 428 (V)], UNHCR has the responsibility to supervise the application of international instruments for the protection of refugees. Article 35 of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) specifically refers to UNHCR's duty to supervise the application of the provisions of that Convention. Within the European Union, UNHCR works to ensure respect for international legal norms applicable to refugees. UNHCR attaches particular importance to promoting fair and efficient procedures for refugee status determination.

In this letter, UNHCR would like to address the application by the Netherlands of the exclusion clauses contained in Article 1F of the 1951 Convention, in view of the forthcoming debate on this topic in the Second Chamber of the States-General.

It is clear that the rationale of the exclusion clauses is to deprive those who are guilty of heinous acts, including serious common crimes, of international refugee protection, and to ensure that such persons do not abuse the institution of asylum. However, in light of the serious consequences of exclusion for the individuals concerned, these clauses must be applied restrictively, with great caution, and only after a full assessment of each individual case. An individual examination is needed (a) to establish if the nature of the criminal act(s) in question is such as to bring the act or acts within the scope of the crimes enumerated in Art. 1F of the 1951 Convention, and (b) to assess the extent of responsibility for the act or acts of the individual concerned. With certain exceptions, there is generally no basis under Art. 1F for imputing group or collective responsibility for criminal acts, nor for doing away with an examination of individual responsibility.

1. The application of the exclusion clauses of Art. 1F of the 1951 Convention by the Netherlands:

Based on its monitoring experience, UNHCR can confirm what is stated in your letter to the President of the Second Chamber of 13 August 2007¹, namely that the Netherlands invoke the exclusion clauses of the 1951 Convention more often than other European States.

¹ Tweede Kamer, 2006-2007, 30 800 VI nr. 123

Specifically, UNHCR observes that the Netherlands authorities invoke the exclusion clauses vis-à-vis Afghan asylum-seekers to a much greater extent than other European States receiving large numbers of Afghan asylum-seekers.

Many cases in which the Netherlands invoke the exclusion clauses concern Afghan asylum-seekers who had been working in the security services KHaD and/or WAD. This appears to be due to the fact that the Country Report of the Dutch Ministry of Foreign Affairs dated 29 February 2000, which focuses on the activities of the Afghan security forces in the period 1978-1992, concludes, without indicating its sources, that: “all NCOs and officers were active in the macabre sections of the KHaD and WAD, and were personally involved in the arrest, interrogation, torture and even execution of suspects”.²

In a subsequent policy decision, the State Secretary for Justice introduced a rebuttable presumption of excludability for officers and NCOs of the KHaD and WAD applying for asylum in the Netherlands. The exclusion clauses would be invoked in principle, while the burden of proof to exonerate themselves would be on the applicants.³ Since then, case-law of the first instance courts and the Council of State has affirmed that the report of the Ministry of Foreign Affairs has the status of “expert advice”, and may be relied upon by the State Secretary in taking decisions on asylum applications of Afghan nationals.

In UNHCR’s assessment, while the use of a rebuttable presumption of excludability is not in itself contrary to the requirements of the 1951 Convention, the combined use of this procedural device and very broad unsourced conclusions in the Ministry of Foreign Affairs’ country report, leads to results which are not fully in conformity with the requirements of the exclusion clauses of the 1951 Convention.

2. The requirement for defining the criminal act and for assessing individual responsibility under Art. 1F of the 1951 Convention:

UNHCR observes that the decision by the Netherlands to invoke the exclusion clauses in relation to Afghan asylum-seekers is not based on individual responsibility, but rather, extends to personnel of certain Afghan government agencies. In these cases there is no (further) examination of the nature of the criminal act(s) in question or the degree of involvement of the individual asylum-seeker concerned, although both elements are in principle required in order to satisfy the exclusion clauses.

The Dutch Aliens Circular section C4/3.11.3.3 contains instructions for the application of the exclusion clauses. On the one hand it introduces the ‘personal and knowing participation’ test for deciding whether or not a person can be excluded from refugee status, but on the other hand also opens the possibility to designate entire categories of persons as excludable.

² Council of the European Union, CIREA, doc. No. 7953/01, 26 April 2001.

³ Tweede Kamer, 1999-2000, 19 637, nos. 520 and 672.

The latter option has been chosen in respect of officers and NCOs from the KHaD and WAD. In these cases, once membership in the KHaD or WAD has been established, it falls upon the asylum-seeker to rebut this presumption of excludability.

In 2003, UNHCR published updated Guidelines on the Application of the Exclusion Clauses⁴. These Guidelines emphasize that the criminal act concerned must be one which falls within the scope of crimes stipulated in the exclusion clauses (Art. 1F a-c) of the 1951 Convention, and that the asylum-seeker must be individually responsible for the criminal act before he or she may be excluded. The Guidelines state:

“18. For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. (...) In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.”

The fact that a person occupied positions of responsibility within a repressive institution does not in itself constitute a reason to assume excludability or to reverse the burden of proof. The UNHCR Guidelines clarify this as follows:

“19. The fact that a person was at some point a senior member of a repressive government or a member of an organization involved in unlawful violence does not in itself entail individual liability for excludable acts. A presumption of responsibility may, however, arise where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. Moreover, the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise a presumption of individual responsibility. Caution must be exercised when such a presumption of responsibility arises, to consider issues including the actual activities of the group, its organizational structure, the individual's position in it, and his or her ability to influence significantly its activities, as well as the possible fragmentation of the group. Moreover, such presumptions in the context of asylum proceedings are rebuttable.”

An important difference between the instructions in the Dutch Aliens Circular and the UNHCR Guidelines, lies in the fact that the Guidelines stress the need, even where a presumption of responsibility arises, to have regard for an *individual's actual position* within a group. The Aliens Circular, on the contrary, foresees that categories of persons may be excluded on the basis of their *association* with a particular government institution, unless the individual concerned is able to show that his case constitutes a *significant exception (significante uitzondering)*.

⁴ UNHCR Guidelines on Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (Ref. HCR/GIP/03/05 of 4 September 2003).

3. Basic rules of fairness and burden of proof.

UNHCR observes that in the application by the Dutch authorities of the exclusion clauses in cases of Afghan asylum-seekers, there is a legal presumption in favor of the authorities, based on information available only to them.⁵

Although the Dutch Aliens Circular refers to “authoritative and freely accessible reports” as a basis for determining excludability, it would seem that the current practice in regard to Afghan asylum-seekers does not conform to that approach. The application of the exclusion clauses to Afghans who were officers and NCOs of the KHaD/WAD is based on the February 2000 report by the Ministry of Foreign Affairs, which does not cite any sources for its conclusion that “all NCOs and officers were active in the macabre sections of the KHaD and WAD and were personally involved in the arrest, interrogation, torture and even execution of suspects.”

In view of the expert status of the Foreign Ministry’s reports in asylum procedures, *concrete indications*⁶ from *objective sources*⁷ have to be provided to establish doubt about the veracity of the report or to establish a significant exception. This requirement, together with the absence of sources for the conclusions which are drawn in the February 2000 report on Afghanistan, leads UNHCR to believe that the burden of proof placed on the individual concerned is of a too heavy nature.

With respect to the burden of proof, the UNHCR Guidelines specify:

“34. The burden of proof with regard to exclusion rests with the State and, as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt....”

“36. Exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker’s ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered *in camera* (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker’s due process rights.”

UNHCR would urge the Netherlands Government to review its current procedures for applying the exclusion clauses to Afghan asylum-seekers, in particular with regard to use of the Ministry of Foreign Affairs’ report of February 2000, which forms the basis for

⁵ The underlying information used for the Ministry of Foreign Affairs’ country of origin reports may be disclosed to the courts in asylum procedures, but may be withheld from the asylum-seeker in such a procedure. Arts. 8:45 and 8:29 General Act on Administrative Law (Algemene wet bestuursrecht).

⁶ ABRvS 30/11/2004, no. 200404008/1.

⁷ ABRvS 7/12/2004, no. 200401436/1.

the application of the exclusion clauses to the entire group of persons who have served as officers or NCOs in the Afghan security forces (KHAD/WAD) in the period 1978-1992.

UNHCR believes that it should be possible to establish an updated report which, on the basis of new and transparent research, would shed light on the kinds of criminal acts which may fall within the exclusion clauses and the profile of persons who should be held responsible for such acts while serving in the afore-mentioned security forces.

UNHCR hopes that this letter contributes to a fruitful debate on the Netherlands' policy with regard to the application of the exclusion clauses. I have taken the liberty to share a copy of this letter with interested members of the Second Chamber of the States-General, and with UNHCR's non-governmental partners in the Netherlands.

Yours sincerely,



Judith Kumin
Regional Representative