CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 3049/06
by S.A.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 12 December 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mrs I. ZIEMELE,
Mrs I. BERRO-LEFÈVRE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 18 January 2006,

Having regard to the ruling under Rule 47 § 3 made by the President of the Chamber that the identity of the applicant should not be disclosed to the public and under Rule 33 §§ 1 and 2 that the documents included in the file should remain confidential,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms S.A., is a citizen of Afghanistan who was born in 1980 and lives in the Netherlands. She was represented before the Court by Ms J.A. Younge, a lawyer practising in Haarlem.

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

In 1996, the applicant married her cousin F. The couple remained childless. In 2001, the applicant and her husband fled from Afghanistan to the Netherlands where they applied for asylum on the basis of the husband's alleged problems with the Taliban. On 26 March 2001, an immigration official held a first interview (*eerste gehoor*) with the applicant in connection with her asylum request. A further interview (*nader gehoor*) was held on 27 July 2001. The applicant, who had been assisted by an interpreter during both interviews, availed herself on 14 August 2001 and 27 November 2002 of the opportunity to submit written comments on the records that had been drawn up of these interviews. As from an unspecified date, the applicant's husband started to receive medical treatment for a post-traumatic stress disorder.

In March 2002, the applicant gave birth to a child, whose physical features (complexion and hair) were alleged to be markedly different to those of the applicant and her husband.

On 26 February 2003, in view of the changed situation in Afghanistan, an additional interview (*aanvullend gehoor*) was held with the applicant who was assisted by an interpreter. On 13 March 2003, the applicant submitted written comments on the record drawn up of this additional interview.

On 4 April 2003, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) notified the applicant of her intention (*voornemen*) to reject the applicant's asylum request. The applicant submitted her views (*zienswijze*) on this intention on 28 April 2003.

On 3 June 2003, the Minister for Immigration and Integration rejected the asylum request filed by the applicant and her husband. On 30 June 2003, the applicant and her husband filed an appeal against this decision with the Regional Court (*arrondissementsrechtbank*) of The Hague.

On 18 October 2004, a staff member of a Netherlands refugee aid organisation informed the applicant's lawyer by way of a written memorandum that, in a recent conversation with this staff member, the applicant had said that her husband was not the father of her child and that he did not know this. Fearing to be sent back to Afghanistan where she risked to be killed if this became known – which was probable –, she had now decided to confess to it. She had not dared to tell her husband, but because the situation had become untenable she was planning to do so on 14 November 2004 when she and her husband would have a meeting with a mental health care counsellor. This document does not contain any mention of the child's physical features.

By letter of 28 October 2004, the applicant's lawyer transmitted the written memorandum of 18 October 2004 to the Regional Court, submitting that also for this reason the applicant risked exposure to treatment contrary to Article 3 of the Convention if expelled to Afghanistan. The lawyer's

submissions were transmitted to the Minister who filed written comments in reply with the Regional Court on 2 November 2004.

On 11 November 2004, a hearing on the appeals filed by the applicant and her husband was held before the Regional Court. This hearing was attended by the applicant and her husband, who were assisted by an interpreter.

On 14 November 2004, in the presence and under the guidance of a mental health counsellor, the applicant informed her husband of the origins of the child. According to the applicant, her husband was obviously very upset but he refused to give any reaction. During the following months, he was under heavy medication (sleeping medication and tranquillizers), and did not speak with or touch the applicant. He further completely neglected the child since 14 November 2004 whereas before that date he had given the impression of simply not knowing what to do with a child in general in that he did not touch or mind the child very much.

On 3 February 2005, the Regional Court rejected the appeals filed by the applicant and her husband. As regards the applicant's submissions in relation to her child, the Regional Court held that these personal circumstances which had only been raised for the first time in the proceedings on appeal could not be regarded as new facts and circumstances having arisen after the taking of the impugned decision and which should be taken into account under section 83 § 1 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), in that the applicant should have raised these circumstances at an earlier stage in the proceedings. It further held that it had not been argued and that it had not appeared that there were special circumstances on the basis of which this could not have been done earlier.

On 3 March 2005, the applicant and her husband filed an appeal with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*). In these appeal proceedings, the applicant submitted that the child had been born after a fleeting sexual encounter she had had in the asylum seekers reception centre where she and her husband had stayed shortly after their arrival in the Netherlands, and that, as the child grew older, gradually more and more clearly different racial characteristics became noticeable, as a result of which the child obviously bore no resemblance to either the applicant or her husband.

The appeal filed by the applicant and her husband was dismissed by the Administrative Jurisdiction Division on 19 July 2005. It upheld the Regional Court's judgment. As regards the applicant's submissions relating to her child, it held:

> "2.1.1. Pursuant to section 83 § 1 of the Aliens Act 2000, the court shall, in the determination of the appeal, take into account facts and circumstances having arisen after the taking of the impugned decision.
>
> 2.1.2. As the Administrative Jurisdiction Division has held previously (ruling of 24 September 2003 in case no. 200304820/1; JV 2003/501), this provision is aimed at

preventing that repeated requests [for a residence title] must be filed in case of relevant circumstances having emerged after the [taking of the] impugned decision but before the ruling [on appeal] and entails that the determination of the question whether there are such facts and circumstances must be made on the basis as the same criteria as under section 4:6 § 1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*). According to the case-law, under newly appeared facts or altered circumstances – in so far as relevant for now – must be understood facts or circumstances having taken place after the taking of the earlier decision or which could not and, noting section 31 § 1 of the Aliens Act 2002, therefore should not be submitted before the taking of that decision.

2.1.3. As also held by the Division in that ruling, the alien who asks for protection must – even where it concerns a forced return to a country where there allegedly exists a risk of treatment in breach of Article 3 of the Convention – as a rule comply with procedural requirements under domestic law, including section 83 of the Aliens Act 2000, which [requirements] enable the national authorities to determine requests for a residence permit in an orderly manner and only under special, to the individual case relating facts and circumstances, may a necessity arise not to hold a failure to respect these rules against the person concerned.

2.1.4. The Regional Court has not taken into account under section 83 § 1 of the Aliens Act 2000 the personal circumstances only submitted on appeal by the appellant, because it found that the appellant could and therefore should have submitted those circumstances earlier and that no special circumstances had appeared justifying that this not be held against her.

2.1.5. By letter, received at the Regional Court on 27 October 2004, the appellant has submitted a record of 18 October 2004 on a conversation between a collaborator of the Dutch Refugee Council (*Vluchtelingenwerk*) Drenthe and the appellant concerning personal circumstances in relation to her child born on ... March 2002.

2.1.6. The applicant has thus after the taking of the decision of 3 June 2003 submitted for the first time circumstances in relation to her child that had taken place before that decision was taken. It has not been argued that the thus submitted circumstances were not known to her at the time when this decision was taken. The Regional Court has correctly considered that the appellant, also in view of the provisions of section 31 § 1 of the Aliens Act 2000, should have raised those circumstances earlier in the proceedings. The Regional Court has further correctly found no reasons in what has been put before it in this respect for finding that this could nevertheless not be asked from the appellant.

The Regional Court has correctly found that the circumstances submitted by the appellant in relation to her child were not facts or circumstances within the meaning of section 83 § 1 of the Aliens Act 2000.

2.1.7. Neither can the applicant's submissions to the Regional Court be regarded as special facts and circumstances relating to the individual case, on which basis the Regional Court ought not have held this national procedural rule against the appellant."

No further appeal lay against this ruling. To date, the applicant's husband has not taken any initiative from which it could be concluded that he is considering a separation, divorce or to challenge his paternity of the child.

COMPLAINTS

The applicant complained that she, if expelled to Afghanistan, would be exposed to a risk of being subjected to treatment in violation of Articles 2 and/or 3 of the Convention in that she would either risk becoming a victim of an honour killing or, in application of Islamic law (sharia), be sentenced to death for adultery, possibly by stoning.

The applicant further complained that in respect of her complaints under Articles 2 and 3 of the Convention, she did not have an effective remedy within the meaning of Article 13 of the Convention.

THE LAW

The applicant complained that she, if expelled to Afghanistan, would face the risk of an extra-judicial killing, a death sentence and/or torture and ill-treatment as an adulterous spouse. She invoked Articles 2 and 3 of the Convention which provide, in so far as relevant:

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."

She further complained that, in respect of these complaints, she did not have an effective remedy within the meaning of Article 13 of the Convention, which reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court observes at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien 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 in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person to that country (see, among other

authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34). The Court further considers that analogous considerations apply to Article 2 of the Convention where the person in question, if expelled, would face a real and personal risk of being killed (see *Headley v. the United Kingdom* (dec.), no 39642/03, 1 March 2005).

The Court notes at the outset that, by the applicant's own admission, her husband has not undertaken any steps indicating that he is considering a separation, divorce or to challenge his paternity of the child. The Court further notes that, although the applicant has been explicitly requested by the Court's Registry to submit within a reasonable time further materials, such as for instance photographs, substantiating her claim that her daughter was born out of an extramarital relationship and that this is more than obvious given the child's physical features which are markedly different from those of the applicant and her husband, she has failed to do so. Her claim in this regard therefore remains wholly unsubstantiated.

In these circumstances, the Court cannot but conclude that the applicant's complaint under Articles 2 and 3 must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For the reasons given above, the Court further does not consider that the applicant had an arguable claim of a violation of Articles 2 and/or 3 of the Convention. Accordingly, her complaint under Article 13 must also be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52).

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President