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“Asylum Procedure *versus* Human Rights”

Obstacles to later statements or evidence in the light of the European Convention on Human Rights

with an afterword by Thomas Spijkerboer

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Migration Law Series



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INTRODUCTION

Hana H. applied for asylum in the Netherlands on April 9, 2002. Three days later her application was rejected. On the 19th of April 2002 she stated in a letter to the Court that security officers had raped her several times in her country of origin. To substantiate her account, she submitted a medical report by a Dutch trauma therapist, that stated that Hana's story was credible, that she was traumatised and that she urgently was in need of professional aid. However, the Court did not take Hana's account into consideration, as it could not be regarded as a 'new' fact. The rapes occurred prior to Hana's departure from Iran and so could and therefore should have been adduced at an earlier stage in the procedure. The fact that she was not able to mention the rapes any sooner due to shame towards her husband and psychological problems, did not lead to a different judgment according to the Administrative Jurisdiction Division of the *Raad van State* (hereafter *Raad van State*).

Since 1 April 2001, the *Raad van State* is authorized to take cognisance of disputes in appeal in asylum cases. Since then, the question has arisen whether certain judgments by the *Raad van State* are in accordance with all the treaty obligations of the Netherlands. This is particularly the case in instances like the one mentioned above, in which an applicant speaks of his or her traumatic experiences after the Minister's decision to reject the application, to demonstrate that expulsion to the country of origin would be in breach of Article 3 of the European Convention on Human Rights. The *Raad van State* strictly applies Article 4:6 of the *Algemene wet bestuursrecht* (hereafter Awb), Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 and considers these articles applicable in cases in which facts could and therefore should have been adduced at an earlier stage. Hence these facts are not included in the judgment and further research on the possible violation of the Convention will not take place.

This book focuses on the question to what extent the application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 results in a judgment allowing the expulsion in violation of the absolute prohibition of Article 3 and/or Article 13 of the Convention.

Chapter one provides an overview of the Dutch asylum procedure, in which a distinction is made between the regular asylum procedure and the accelerated procedure in the application centres, the so-called AC-procedure. Subsequently, chapter 2 discusses Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 with the relevant jurisprudence. In the chapters three and four an answer will be given to the question to what extent these Dutch articles violate Article 3 respectively Article 13 of the Convention, on the basis of some leading judgments of the European Court of Human Rights.

1 THE PROCEDURE

1.1 The asylum procedure

The application (Article 3.42 of the Aliens Regulation 2000)

To seek for asylum, an asylum seeker must file an official request at one of the three Application Centres (AC) as soon as he arrives in the Netherlands. There are AC's in Rijsbergen, Ter Apel and at Schiphol Airport. Asylum seekers claiming asylum at a border point where there is no AC are referred to an AC to submit their application.¹ The same applies to in-country applicants who contact the asylum authorities or a police station.

The first interview (Article 3.110 Aliens Decree 2000)

Soon after the applicant has filed the request for asylum, an official from the Immigration and Naturalization Department (IND) subjects him to a first interview. The IND does not pay attention to the motives and grounds for the application during this interview, but asks questions about the asylum seeker's identity, nationality and travel route.² A (legal) adviser may be present as observer, but hardly ever is.

On the basis of this first interview it is determined whether the application can be settled in the accelerated application procedure in the AC, or should be transferred to the regular asylum procedure. In the accelerated procedure, a case will be settled within 48 procedural hours (see paragraph 1.2). If, however, the IND decides that further investigation is necessary, the application will be forwarded to the regular asylum procedure in a Reception and Investigation Centre (OC).

The detailed interview (Article 3.111 Aliens Decree 2000)

In not less than six days after the alien has submitted his application, he will be subjected to the detailed interview. This second interview is the basis of the asylum procedure, in which the asylum seeker can explain in detail his reasons for requesting asylum. He can also produce any document that might substantiate his account. On request, a (legal) adviser may render assistance to the alien. The asylum seeker receives a written report afterwards of the questions and answers given during this second interview. Research, however, has shown that these reports do not always contain a neutral reproduction of the interviews. Most reports are merely a reasonable description of the substance of the interview. This is, amongst other things, caused by the fact that a large part of a report consists of answers to constrained questions that are often asked at a great pace and repeated numerous times. The reports give little insight into the way statements are made. Furthermore, incorrect translation or interpretation in the reports of the interviews sometimes causes the loss of information.³ The

¹ See Aliens Circular C3/11.1

² Article 3.44 Aliens Regulation 2000.

³ N. Doornbos 2003a, p. 233-234. See also N. Doornbos 2003b.

asylum seeker can submit any corrections and additional information to the report of the detailed interview in writing.

The letter of intention (Article 39 of the Aliens Act 2000)

The IND makes a decision on the request for asylum based on the two interviews. It either decides to forward the case to the regular asylum procedure or prepares a so-called letter of intention, notifying the asylum seeker the reasons why it plans to reject the application. Next, the asylum seeker has the opportunity, with the support of his (legal) adviser, to respond to this letter of intention in writing within a reasonable time by means of a so-called view.

The letter of intention should state all relevant grounds on which the intended rejection is based, so the applicant knows which grounds he should pursue in his view.

In the regular application procedure the asylum seeker is given four weeks' time to submit his view to this letter of intention.⁴ A decision can be given when this term expires, even if the applicant has not yet responded to the letter of intention.⁵

The decision (Article 42 and 43 of the Aliens Act 2000)

The official period in which the decision should be given is six months after the initial application for asylum. In individual cases this time limit can be extended by another six months, when advice from or research by a third party or the Prosecution Counsel is necessary according to the Minister of Justice.

If the asylum seeker's view does not lead to a different judgment – and the IND still intends to reject the application –, the IND has to react in its decision to the asylum seeker's reply.⁶ However, the rejection cannot be based on different material grounds than laid down in the letter of intention, as the applicant would then be deprived of his possibility to respond to these grounds.

1.2 The Application Centre procedure

In addition to the regular asylum procedure, the Minister has the option of using the accelerated procedure for determining asylum applications in an Application Centre. In general, applications that do not need an extensive research and that can be dealt with within 48 procedural hours are determined in this Application Centre procedure, also known as the AC procedure⁷. During this forty-eight-hour period, IND officers have to determine whether the case warrants full asylum consideration or should be rejected without further consideration.

⁴ Article 3.115 paragraph 2 sub a Aliens Decree 2000.

⁵ Article 3.115 paragraph 6 Aliens Decree 2000.

⁶ Article 42, paragraph 3, of the Aliens Act 2000.

⁷ Aliens Circular C3/12.1.1.

Although the AC procedure was initially conceived as a procedure to weed out “manifestly unfounded” asylum claims, by the second half of 2002 it was applied to at least 60 percent of all cases lodged in the Netherlands.⁸ This is triple the rate to which the AC procedure was used in past years. Even so, the former Minister of Immigration and Integration has indicated that the aim is to examine 80 percent of the asylum requests within the accelerated procedure.⁹ Although this percentage is not an official target, it has been seen as illustrative of the significant number of asylum cases the ministry believes can safely be processed through the AC procedure.¹⁰

The procedure in the AC takes 48 procedural hours at the most.¹¹ Procedural hours are to be defined as hours that are available for determining the procedure in an AC, not including the hours from 10 p.m. to 8 a.m.¹²

According to paragraph C3/12.2.6 of the Aliens Circular, the IND is entitled to continue the procedure in the AC, if the case involves:

- Counter indications regarding the public order; or
- Deceptive statements on identity, nationality and/or travel route or unwillingness to cooperate on establishing this information; or
- Another country is responsible for the asylum application and/or for giving the needed protection; or
- Regulatory or law related counter indications for granting an asylum; or
- Abuse of the asylum application procedures.

Cases that in any case will be dealt with in the regular procedure, concern asylum seekers¹³:

- That fall within the non-removal policy; and
- Whose identity, nationality and travel route are undisputed facts; and
- For whom no other country is responsible; and

⁸ In the first four months of 2003, this percentage has dropped to 38 percent. However, this decrease is predominantly caused by the great influx of Iraqi asylum seekers, as their applications cannot be determined in the AC's according to the present policy. See *Kamerstukken II 2002/03*, 19 637, no. 756.

⁹ See the parliamentary debate with former Minister for Immigration and Integration, Hilbrand Nawijn, on 31 October 2002, *Kamerstukken II 2002/03*, 19 637 and 27 557, no. 696, p. 6. With reference to these figures, the UNHCR expressed its concern that accelerated procedures in the Netherlands have become the rule and that the stated aim is to have an even higher share of claims examined in an accelerated procedure. From UNHCR's perspective, channelling claims into the accelerated procedure should not be statistics-driven but rather be determined on the merits of the claim. UNHCR 2003, p. 2.

¹⁰ This assumption is in contradiction with research results, which show that 44% of all asylum seekers receive a residence permit within 3 to 5 years after their initial application. The researchers even believe that this percentage will increase to 50 or more when all the decisions on asylum applications have become irreversible. See N. Doornbos and K. Groenendijk 2001.

¹¹ Article 3.117 Aliens Decree 2000.

¹² Article 1.1 sub f Aliens Decree 2000.

¹³ According to the *Raad van State*, however, the law does not exclude certain categories of applications from the procedure in the AC. The only criterium is whether the decision to reject an application can be meticulously taken within 48 hours. See *Raad van State* 25 June 2002, *JV 2002/292*; *Raad van State* 25 March 2002, *JV 2002/150* and *NAV 2002/128*; *Raad van State* 8 November 2001, *JV 2002/12*, *NAV 2002/1* and *RV 2001*, 11; *Raad van State* 12 October 2001, *JV 2001/325*, *NAV 2002/2* and *AB 2001*, 359; *Raad van State* 9 October 2001, *NAV 2001/341*; *Raad van State* 4 October 2001, *JV 2001/321* and *RV 2001*, 21; *Raad van State* 4 October 2001, *NAV 2001/335*; *Raad van State* 27 August 2001, *NAV 2001/ 317* and *RV 2001*, 19.

- For whom there are no other contra indications.

If the IND decides to continue the case in the AC, the asylum seeker has two procedural hours to prepare himself together with his (legal) adviser for the detailed interview. Following this detailed interview, there are three procedural hours available for the alien and his (legal) adviser to review the detailed interview report and the letter of intention. If the applicant wishes to file corrections and additional information to the report and/or respond to the IND's letter of intention by means of a view, he has to do so within that same three-hour period.¹⁴ Otherwise, the intended decision will become final.

The AC-procedure does not offer the (legal) adviser the opportunity to create a relationship based on trust with the asylum seeker. In practice, the alien is confronted with two, three and sometimes four alternate (legal) advisers (and even different interpreters). There is hardly any time for the (legal) adviser to review the account of asylum with his client. Therefore, most of the (legal) advisers use the IND reports of the interviews as their guideline and are restrained to asking merely additional questions. However, these IND reports may be biased or contain errors. By reading these reports beforehand some (legal) advisers are led to question the credibility of the case even before they have met their client.¹⁵

At each moment in the procedure, the IND can decide to transfer the asylum seeker to the OC to continue the case in the regular, not accelerated procedure. The application is automatically transferred to an OC when no decision is made within 48 procedural hours.

¹⁴ Article 3.118 paragraph 2 Aliens Decree 2000.

¹⁵ N. Doornbos, p. 204 and p. 234 -237. See also the report of Human Rights Watch, p. 10.

2 RELEVANT DUTCH LAW

2.1 Introduction

Can application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and/or Article 3.119 of the Aliens Decree 2000 result in a judgment allowing the expulsion in violation of Article 3 and/or Article 13 of the European Convention on Human Rights? Before one can answer this principle question, I will try to explain these Dutch articles and discuss the relevant jurisprudence in this chapter.

To present a clear overview, the jurisprudence will be discussed collectively in the following paragraph on Article 4:6 of the Awb. Although by far the most jurisprudence refers to this article, it now also applies to Article 83 of the Aliens Act 2000¹⁶ and Article 3.119 of the Aliens Decree 2000¹⁷.

2.2 Article 4:6 of the Awb

Article 4:6 of the Awb reads as follows:

1. *If a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state new facts that have emerged or circumstances that have altered;*
2. *If no new facts or altered circumstances are stated, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application.*¹⁸

According to the *Memorie van Toelichting* of the Awb, this article is related to the fact that a decision becomes irreversible, when no legal recourse is taken. It would not be in line with the legal protection provided by administrative law, if one could affect an irreversible decision by simply asking the administrative authority to retract the decision through the filing of a new (unamended) application.¹⁹

Article 4:6 of the Awb provides the administrative authority with the *authority* to simply dismiss the repeated application by referring to its earlier decision dismissing the application, when the applicant does not make a reasonable case for new facts or altered circumstances. Although this concerns a discretionary power, the *Raad van State* does not examine whether the administrative authority in reasonableness could use this power, but it restricts itself to the question of if new facts and circumstances have arisen.

¹⁶ *Raad van State* 3 August 2001, *JV* 2001/258 and *NAV* 2001/319-kort.

¹⁷ *Raad van State* 22 August 2003, *JV* 2003/452. See also the District Court of The Hague 22 August 2002, *JV* 2002/418, *NAV* 2003/18-kort and *Jub* 2002 no. 17-484.

¹⁸ The translation of this article originates from the website of the Ministry of Justice; http://www.justitie.nl/Images/11_11380.doc (10 August 2003).

¹⁹ *Kamerstukken II* 1988/89, 21 221 A.

In asylum cases, the *Raad van State* applies the following standard consideration:

*If an administrative authority determines that there are no grounds for reviewing an irreversible decision, one cannot obtain a judgment of this initial decision by lodging an appeal against the decision of the administrative authority. The appeal can only lead to the judgment, whether facts or circumstances have occurred - after the initial irreversible decision dismissing applicant's application - which should impel the State Secretary to review.*ⁱ (the Dutch quotation can be found in the endnote).

Thus, the administrative authority can apply Article 4:6, paragraph 2, of the Awb, if the subsequent application is based on facts and circumstances that theoretically could and therefore should have been adduced during the first procedure. According to the *Raad van State*, the latter does not only derive from Article 4:6 of the Awb, but also from Article 31, paragraph 1, of the Aliens Act 2000. This last article obliges the alien to make a reasonable case for the fact that his application is based on circumstances that constitute a juridical foundation for the granting of a residence permit.²⁰

According to the history of the realization of Article 4:6 of the Awb, this article does not apply to the situation that law has altered.²¹ According to the *Raad van State*, however, it does apply to later produced evidence of previous adduced facts and circumstances, except if that evidence could not have been submitted at an earlier stage.²²

The *Raad van State* does not easily consider a document to be a new fact. For example, a warrant for arrest that existed during the course of the initial procedure but was obtained by the applicant after issuance of a decision on his or her claim – often due to difficulties with gathering the necessary documentation from the country of origin within the short timeframe – is not regarded as a new fact.²³ Nor will a medical report that is drawn up after the decision, be taken into consideration, if it could have been drawn up earlier in the procedure.²⁴ The *Raad van State* has taken the view that these documents theoretically could, and thus should, have been submitted in time. In a recent case, in which an asylum seeker adduced facsimiles of a colleague in Sudan to substantiate his application, the *Raad van State* stated:

*Apart from the fact that the authenticity of the facsimiles cannot be examined, they are also not dated. Consequently, one cannot determine whether there are new facts or circumstances that have arisen after the disputed decision was taken. Therefore, the facsimiles cannot be considered as facts or circumstances in the meaning of the aforesaid article.*ⁱⁱ

In addition, the *Raad van State* requires that the applicant makes a reasonable case for the new facts or circumstances to be a juridical ground to reverse the earlier decision. In the case of

²⁰ *Raad van State*, 16 October 2001, *JV* 2002/6.

²¹ *Kamerstukken II* 1988/89, 21 221, no. 3, p. 93-94.

²² *Raad van State* 3 August 2001, *JV* 2001/258 and *NAV* 2001/319-Kort. See also *Raad van State* 8 August 2002, *JV* 2002/471.

²³ See e.g. *Raad van State* 19 July 2002, 200203531/1; *Raad van State* 17 May 2002, 200201653/1; *Raad van State* 23 April 2002, 200201688/1; *Raad van State* 5 March 2002, *JV* 2002/124.

²⁴ See e.g. *Raad van State* 23 April 2002, 200201688/1. See also *Raad van State* 22 May 2003, *JV* 2003/294 and *NAV* 2003/206-kort; *Raad van State* 11 April 2003, *JV* 2003/224 and *NAV* 2003/162.

two undated, handwritten letters of allegedly the father and brother of the asylum seeker, the *Raad van State* decided that this could not lead to the reversal of the dismissal of the application. The father and brother cannot be considered as an objective source of information and their letters can therefore not be regarded as facts or circumstances, as mentioned in Article 4:6, paragraph 1, of the Awb.²⁵

Thus the *Raad van State* requires that the applicant demonstrates that only new facts and circumstances are involved, which could not possibly have been adduced at an earlier stage of the procedure. This requirement is strictly applied. The *Raad van State* considered among other things:

*The fact that the alien states that he did not mention the scars earlier due to translation problems, does not mean that these are nevertheless facts or circumstances in the meaning of aforesaid Article 4:6, paragraph 1, of the Awb. Apart from that, the alien has been given ample scope during the interview regarding the initial application to inform the IND about the scars.*ⁱⁱⁱ

In another case, the asylum seeker based her second application on the fact that she was kidnapped by two men prior to her flight from Kazakhstan. She claimed that these men had held her in which period she said she had been raped and battered. The *Raad van State* stated: *The fact that the applicant states, that she was pressured by her husband not to mention these events in the initial application, does not mean that the events could be considered as new facts or circumstances. The Raad van State points out in this respect that it appears from the report of the detailed interview of the initial procedure that the reporter has informed the applicant that she can speak freely, that all what has been said will be held confidential and that it is vital that she does not withhold any facts concerning her application for asylum.*^{iv}

Another example. An Iranian woman requested asylum in the Netherlands. She repeatedly stated during the detailed interview in the AC that she had not been raped. Her request was rejected on the 12th of April. On appeal she presented the Court with a letter dated 19 April 2002, only ten days after her official request for asylum. In this letter, she informed the Court that she had been raped when she had presented herself to the revolutionary court in Iran to give information about her husband, and again some months later before fleeing Iran. On 22 April 2002 she submitted a medical report to support her story. The *Raad van State*, however, judged that this woman had been given ample scope to adduce facts that could form a juridical ground for granting a residence permit. Furthermore, the *Raad van State* stated that no special facts or circumstances had been produced that could lead to the conclusion that the procedure has not been meticulous. The *Raad van State* stated:

The letter of the 19th of April 2002 refers to events that occurred before applicants left their country of origin. These events could and therefore should have been adduced at an earlier stage in the procedure. Consequently, these are no new facts or altered circumstances, which should be considered by the Court according to Article 83, paragraph 1, of the Aliens Act

²⁵ *Raad van State* 5 March 2002, *JV* 2002/124. See also *Raad van State* 13 May 2002, *JV* 2002/263 and *NAV* 2002/206-kort.

2000. *The fact that applicant sub 1, due to shame towards her husband and due to psychological problems, was not able to speak about these events any sooner, does not lead to a different judgment. It was the responsibility of applicant sub 1 to report these events – even summarily – within the scope of the decision process. The Raad van State points out in this respect that it appears from the report of the detailed interview of the initial procedure that the female reporter informed the applicant beforehand that she could speak freely, that all that was said would be held confidential and that it was important that she would not withhold any facts concerning her application for asylum.*^v

It is striking that the *Raad van State* expressed no opinion upon the credibility of her later statements. Thus, in the view of the *Raad van State* it is quite possible that the woman due to shame and psychological problems was not able to talk about the rapes any sooner. Nevertheless, this does not, according to the *Raad van State*, lead to a different judgment.

The *Raad van State* gave a similar decision in a case of a Nigerian asylum seeker who stated during the appeal that she had been a victim of female genital mutilation. She stated that she had been circumcised shortly after her wedding, at the age of seventeen. Her husband forced her to undergo this treatment. She stated that she had not mentioned this before, as she had been constantly confronted with men during the asylum procedure and it was difficult for her to talk about this subject. The *Raad van State* ruled:

According to the Raad van State, the alien should have produced the statements about her forced circumcision within the scope of the examination of the application instead of doing so at the hearing. If need be, only summarily worded. Therefore, these are no facts and circumstances that arose after the disputed decision was taken, as mentioned in aforesaid Article 83 of the Aliens Act 2000.^{vi}

Apparently language problems²⁶, fear to endanger family members²⁷, shame or psychological problems²⁸ are not valid reasons – according to the *Raad van State* – that could redeem the fact that one did not report certain facts or circumstances in time, although this had been theoretically possible. The *Raad van State* would not even indulge when applicants claimed that application of Article 4:6 of the Awb could result in a judgment of a repetitive application allowing the expulsion in violation of the absolute prohibition of Article 3 of the European Convention on Human Rights. It concerned a case in which applicants produced only during their second application that their daughter, if expelled, would face a real risk of being circumcised. The *Raad van State* considered:

Even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3 of the Convention, the formal requirements and time-limits laid down in domestic law should normally be complied with, since such rules have been designed to enable the national jurisdictions to discharge their case-load in an orderly manner. Whether there are special circumstances, which absolve an applicant from the obligation to comply

²⁶ *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

²⁷ *Raad van State* 5 March 2002, *JV* 2002/124.

²⁸ *Raad van State* 28 June 2002, *JV* 2002/294 and *Raad van State* 16 July 2002, *JV* 2002/304.

with such rules, or not will depend on the facts of each case (Judgment of the European Court of Human Rights in the case of Bahaddar v. the Netherlands). Article 4:6 of the Awb is such a rule. It passes the responsibility onto the alien to bring forward everything that is known or should be known to him and which could lead to the granting of the application. Thus it is forestalled that the national jurisdictions are unnecessarily charged with the handling of repetitive applications, and so enables them to discharge their caseload in an orderly manner.

Since, according to applicants, girls are circumcised from the age of seven in Sudan and the applicant's daughter had reached this age before their first application for asylum, the Court upheld the decision of the State Secretary, in which he states that possible circumcision cannot be regarded as a new fact within the meaning of Article 4:6 of the Awb as this fact should have been introduced during the first procedure. In general, there are no special circumstances that would absolve applicants from the obligation to comply to Article 4:6.^{vii}

However, in a later case concerning Article 4:6 of the Awb, the *Raad van State* denied the relevance of the judgments in the cases of Bahaddar²⁹ and Jabari³⁰, by stating:

Like the Raad van State considered before (judgment of 5 March 2002, JV 2002/125, NAV 2002/129 and AB 2002, 169), the alien who asks for protection should normally comply with the formal requirements and time-limits laid down in domestic law, even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, as such rules have been designed to enable the national jurisdictions to discharge their case-load in an orderly manner. Whether there are special circumstances, which absolve an applicant from the obligation to comply with such rules, or not will depend on the facts of each case. That is not the case here. One cannot compare the applicant's situation with the one in the judgment of the European Court of Human Rights of 19 February 1998 in the case of Bahaddar v. the Netherlands and in the Court's judgment of 11 July 2000 in the case of Jabari v. Turkey, as this case does not concern an obligation to comply with a certain deadline. Therefore, the applicant's appeal to these judgments does not hold.^{viii}

Thus, according to the *Raad van State*, the judgments in the cases of Bahaddar and Jabari are not relevant here, as this case involves the failure of submitting new facts or circumstances in a subsequent application instead of exceeding a time limit. This is not correct. In the case of Bahaddar, the Court does not only mention time limits, but it states that “the *formal requirements* and time-limits laid down in domestic law should normally be complied with”. The *Raad van State*, however, has apparently acknowledged its lapse in a later judgment where it refers to the judgment of the Court in the case of Bahaddar again.³¹

²⁹ ECHR 19 February 1998, Reports 1998-I.

³⁰ ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

³¹ *Raad van State* 17 October 2003, application no. 200304580/1, not published.

2.3 Article 83 of the Aliens Act 2000

Article 83 of the Aliens Act 2000 states:

1. *In assessing an application for judicial review, the District Court may take account of facts and circumstances that have occurred since the disputed order was made, unless this would be contrary to due process of law or the disposal of the case would as a result be delayed to an unacceptable extent.*
2. *The power referred to in subsection 1 shall exist only in so far as the facts and circumstances may be relevant to the decision on the residence permit referred to in sections 28 and 33.*
3. *At the request of the District Court Our Minister shall inform the opposite party and the Court as quickly as possible whether the facts and circumstances that have been invoked are grounds for upholding, altering or cancelling the disputed order.*³²

In administrative law, the main rule applies that a judge will examine a decision on the basis of the facts and the law that existed at the time that the decision was taken, the so called *ex tunc*-test. Article 83 of the Aliens Act 2000, however, states that in cases concerning asylum, the Court may take into account facts and circumstances that have occurred since the disputed order was made, unless this would be contrary to due process of law or the disposal of the case would as a result be delayed to an unacceptable extent. This examination is called the *ex nunc*-test.

According to the *Memorie van Toelichting*³³, this article is inserted to prevent new applications. In case of an *ex tunc*-test, new facts and circumstances, which have come up between the disputed decision and the judgment, shall play no part. In that case, a new application is the only possibility to obtain a judgment of these new facts. Because of the *ex nunc* jurisdiction of Article 83 of the Aliens Act 2000, one can refrain from filing a new application.

This objective necessitates, according to the judgment of the *Raad van State* of 3 August 2001³⁴, that the question whether something is a fact or circumstance as mentioned in Article 83 of the Aliens Act 2000, or not should be answered by the same criteria as are used for the enforcement of Article 4:6 of the Awb. A fact or document that theoretically could and therefore should have been adduced before the decision in the initial procedure was taken, is thus not a new fact as alluded in Article 83, paragraph 1, of the Aliens Act 2000.³⁵

³² The translation of this article originates from the website of the Ministry of Justice; http://www.minjust.nl:8080/a_beleid/thema/vreemd/aliebill.pdf (10 August 2003).

³³ *Kamerstukken II* 1998/99, 26 732, no. 3, p. 78-80.

³⁴ *Raad van State* 3 August 2001, *JV* 2001/258 and *NAV* 2001/319-kort. See also *Raad van State* 28 February 2003, *JV* 2003/143

³⁵ See e.g. *Raad van State* 22 May 2002, *JV* 2002/227 and *AB* 2002, 247; *Raad van State* 26 July 2001, *JV* 2001/255, *NAV* 2001/263 and *AB* 2001, 299; *Raad van State* 6 July 2001, *JV* 2001/s250;.

According to the *Raad van State*, the meaning of Article 83 of the Aliens Act 2000 does not extend to the phase of appeal. Within the scope of reviewing Article 4:6 of the Awb, the Minister cannot remonstrate against the alien that he could, and therefore should, have adduced the facts and circumstances that came up after the decision in the initial procedure, during the appeal.³⁶

Besides preventing new applications, this Article also gives a safeguard to the alien, as the Court will consider the most recent situation. Consequently, the chances for the alien to be expelled to a country in which he fears to be subjected to torture, inhuman or degrading treatment or punishment, are limited.³⁷

Article 83, paragraph 2, of the Aliens Act 2000 stipulates that the Court can only consider facts and circumstances that may be relevant to the decision on the residence permit for asylum. New facts or circumstances that could lead to the granting of a residence permit on other grounds than asylum, are not to be taken into consideration.

Paragraph 3 of Article 83 of the Aliens Act 2000 states explicitly that the Court is not to reverse a decision on the basis of new facts and circumstances without enabling the Minister to express his view. One cannot, however, deduce from this third paragraph that only the alien can adduce new facts and circumstances. The Minister could also bring forward new facts and circumstances that may be relevant for the judgment. For example, if it appears pending the appeal that the alien has kept silent about a stay in a third country before coming to the Netherlands, this aspect can be taken into consideration.

Ex officio application of Article 83 of the Aliens Act 2000 is not possible. Parties must appeal to Article 83 of the Aliens Act 2000, even if the facts concerned can be regarded as common knowledge. An Afghan asylum seeker objected in appeal to her possible expulsion. She claimed that the District Court did not consider a letter from the Pakistani embassy in the Netherlands to *VluchtelingenWerk* (the Dutch Refugee Council) of 28 November 2001, from which followed that she could not return to Pakistan. Certainly in professional circles, this letter was considered controversial. The letter was dated nine days after the hearings and 2,5 months prior to the judgment. The *Raad van State* stated:

Also in view of the third paragraph, the enforcement of the aforesaid articles is only under discussion in the case that facts and circumstances have come forward after the disputed decision was taken, which the Court could consider when judging the appeal, as applicant(s) appealed to these facts within the given term. The applicant did not request the Court to reopen the inquiry that was closed at the hearings of 19 November 2001, with reference to the letter of 28 November 2001. Therefore, this is not a fact or circumstance as cited in above-mentioned Article 83, paragraph 1, of the Aliens Act 2000. The procedure of the third paragraph could not be enforced by virtue of one's office. The objection fails.^{ix}

³⁶ *Raad van State* 12 May 2003, *JV* 2003/289.

³⁷ See e.g. *Kamerstukken II* 1999/00, 26 732, no. 9, p. 61-62.

2.4 Article 3.119 of the Aliens Decree 2000

Article 3.119 of the Aliens Decree 2000 reads:

When, after the letter of intention has been issued or sent, facts or circumstances:

a. become known, or

b. were already known, but are judged differently as a result of the alien's view, that could be of considerable importance for the decision to be taken and Our Minister still intends to reject the application, the alien will be informed about this and will have the opportunity to produce a new view.

This article derives logically from the rule that the Minister must state all the relevant material grounds on which the intended dismissal is based in his letter of intention, so it becomes clear to the alien to which grounds he can respond in his view.

The *Nota van Toelichting*³⁸ of the Aliens Decree 2000 gives as an example of a new fact and circumstance that could lead to a new letter of intention the situation that facts and circumstances have become known that could lead to a complete new reason for dismissing the application through research as a result of the applicant's view. As an example for an altered judgment, the *Nota van Toelichting* states the situation that statements, given during the detailed interview, are considered to be credible after all, although the Minister did neither credit the statements at first nor mention them in the letter of intention.

The *Raad van State* applies the same definition of new facts and circumstances for the enforcement of Article 3.119 of the Aliens Decree 2000 as is used for Article 4:6 of the Awb and Article 83 of the Aliens Act 2000. Thus, a fact can only be considered a new fact, when it could not possibly have been adduced at an earlier stage in the procedure.³⁹

2.5 The relation between Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000

Article 4:6 of the Awb is interpreted by the Raad van State in such way that in case of a subsequent application only new facts or circumstances (including documents) will be considered which could not possibly have been adduced at an earlier stage⁴⁰. According to the Raad van State, it does not make any difference if the alien were not able to produce certain facts or circumstances in the first procedure due to language problems⁴¹, fear to endanger family members⁴², shame or psychological problems⁴³.

³⁸ *Staatsblad* 2000, 497, p. 184.

³⁹ *Raad van State* 22 August 2003, *JV* 2003/452. See also the District Court of The Hague 22 August 2002, *JV* 2002/418, *NAV* 2003/18-kort and *Jub* 2002 no. 17-484.

⁴⁰ In the UNHCR's view, this narrow interpretation of new facts and circumstances is of particular concern in cases of survivors of gender-related violence, torture as well as other vulnerable cases that are dealt within the time-limited framework of an accelerated procedure. UNHCR 2003, p. 7.

⁴¹ *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

⁴² *Raad van State* 5 March 2002, *JV* 2002/124.

⁴³ *Raad van State* 28 June 2002, *JV* 2002/294 and *Raad van State* 16 July 2002, *JV* 2002/304.

When new facts or circumstances are brought forward during the procedure of appeal, Article 83 of the Aliens Act 2000 becomes relevant. The *Raad van State* has determined that the question, whether something is a new fact or circumstance as stated in Article 83 of the Aliens Act 2000⁴⁴, should be answered by the same criteria as have been used for the enforcement of Article 4:6 of the Awb. Therefore, facts and circumstances that theoretically could have been produced before the decision in the initial procedure will not be taken into account if they are adduced during the appeal stage.

When the asylum seeker adduces new facts or circumstances before the first decision, but after the administrative authority has sent the letter of intention, Article 3.119 of the Aliens Decree 2000 applies. The *Raad van State* applied the same definition of new facts and circumstances with regard to the application of Article 3.119 of the Aliens Decree 2000, as is used for the application of Article 4:6 of the Awb and Article 83 of the Aliens Act 2000.⁴⁵

Consequently, the time available to the asylum seeker to adduce all the relevant facts and circumstances that are known to him or theoretically could be known to him is strongly limited. The effect is that these facts and circumstances must be submitted even *before* the letter of intention has been sent.⁴⁶

The UNHCR states in its authoritative Handbook on Procedures and Criteria for Determining Refugee Status that “[i]t should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country.”⁴⁷ This is also underlined in the UNHCR’s Observations and Recommendations with regard to the implementation of the Aliens Act 2000.⁴⁸

Furthermore, Human Rights Watch states in its report, that some applicants experience difficulties gathering the necessary documentation or evidentiary support for their asylum claims within the short timeframe of the AC procedure, further decreasing their chances of being considered in the full asylum determination procedure.⁴⁹ Moreover, it urges the Dutch government to ensure that cases involving serious physical or psychological problems at the time of the applicant’s asylum interview, cases involving possible survivors of torture or sexual violence, and other persons exhibiting symptoms of trauma, be exempted from

⁴⁴ *Raad van State* 3 August 2001, *JV* 2001/258 and *NAV* 2001/319-kort.

⁴⁵ *Raad van State* 22 August 2003, *JV* 2003/452. See also the District Court of The Hague 22 August 2002, *JV* 2002/418, *NAV* 2003/18-kort and *Jub* 2002 no. 17-484.

⁴⁶ In a single case even the facts and circumstances that were adduced, as a correction and addition to the report of the detailed interview, were not taken into consideration. The *Raad van State* only marginally investigates this decision of the Minister not to consider the corrections and additional information, *Raad van State* 28 August 2002, *JV* 2002/355.

⁴⁷ UNHCR 1992, p. 31.

⁴⁸ UNHCR 2003, p. 3.

⁴⁹ Human Rights Watch, p. 12.

accelerated consideration and admitted to the full asylum procedure.⁵⁰ For these aliens it is impossible to present their case properly within the short timeframe.

Despite the difficulties asylum seekers may have with the gathering of evidentiary documentation from their country of origin and despite the fact that asylum seekers may not be able to speak about their motives for fleeing their country of origin due to various problems (e.g. traumas), the Dutch authorities compel these asylum seekers to mention all the relevant facts and circumstances before the letter of intention has been sent.

Yet, the Dutch authorities do not seem to be completely unaware of these problems. The Aliens Law 2000 stipulates that in the normal procedure the alien will not be subjected to the detailed interview within six days after his initial request for asylum, to enable the alien to settle down before expounding the motives of his flight.⁵¹ The question is whether six days are sufficient to outweigh the problems as mentioned above.

Moreover, the AC-procedure, in which 60 percent of all the applications is determined, does not even contain such a period. Apparently, the Dutch authorities do not deem it necessary that the asylum seekers, whose cases are dealt with in the AC, have the possibility to settle down as the *entire* AC-procedure takes only a maximum of five days.

⁵⁰ Human Rights Watch, p. 8.

⁵¹ Article 3.111, paragraph 1, of the Aliens Decree 2000.

3 VIOLATION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1 Introduction

Article 3 of the European Convention on Human Rights (hereafter the Convention) provides: *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*

The crucial question that has to be answered is whether the restrictions introduced by the *Raad van State* on the possibilities to adduce subsequent propositions and/or advance evidence at a later stage of propositions given beforehand, are compatible with this article. This question becomes relevant in cases, in which a proposition and/or evidence is brought forward later on to substantiate that the expulsion to the country of origin would be a case of refoulement (see paragraph 3.1.1).

Is it possible that application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and/or Article 3.119 of the Aliens Decree 2000 results in a judgment allowing the expulsion in violation of the absolute prohibition of Article 3 of the Convention?

An answer to this question will be given in the following paragraphs on the basis of the judgments of the European Court of Human Rights in the cases *Bahaddar v. the Netherlands*⁵², *Jabari v. Turkey*⁵³ and *Hilal v. the United Kingdom*⁵⁴. But first, paragraph 3.1.1 and 3.1.2 will deal with the two most important characteristics of Article 3 of the Convention: the prohibition of refoulement and its absolute character.

3.1.1 Prohibition of refoulement

Several provisions of treaties that apply to the Netherlands prohibit the expulsion or return of a refugee when he or she can end up in an inhuman situation because of this expulsion. These are the so-called prohibitions of refoulement. Article 3 of the Convention includes such a prohibition implicitly. It does not explicitly prohibit the expulsion or return of a refugee in particular circumstances, but states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.⁵⁵

According to established case law, the expulsion of an alien to a country where there is a real risk of this kind of treatment, constitutes a violation of Article 3 of the Convention by the deporting State.

⁵² ECHR 19 February 1998, Reports 1998-I.

⁵³ ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

⁵⁴ ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II.

⁵⁵ See also Article 7 of the ICCPR and Article 3 of the CAT.

This jurisprudence was developed on basis of the judgment in the Soering Case.⁵⁶ In this judgment of 7 July 1989, the Court held that there would be a violation of Article 3 of the Convention if the applicant was deported to the United States on capital murder charges, where he faced exposure to the ‘death-row phenomenon’. The Court believed that the decision by a Contracting State to extradite a fugitive might give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The Court held that Article 3 of the Convention did not generally prohibit the death penalty itself, but the prospect of six to eight years on death row gave rise to a breach of Article 3 of the Convention. In such circumstances, Article 3 of the Convention implies the obligation not to extradite the person in question to that country.

In other cases the Court also applied this principle to expulsion. The reasoning behind this judgment is based on the idea that a returning State is itself violating Article 3 of the Convention if its act of extradition or expulsion constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment in the country to which the person is returned. In the Cruz Varas Case the Court stated:

*“Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.”*⁵⁷

The Court confirmed this judgment in, inter alia, the case of Vilvarajah and Others v. the United Kingdom. It held:

*“In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker 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 faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.”*⁵⁸

3.1.2 No derogation or limitation

Article 3 of the Convention, which ‘enshrines one of the fundamental values of the democratic societies making up the Council of Europe’⁵⁹, is included in the list of rights, which are declared non-derogable in Article 15 of the Convention. The European Commission of Human Rights (hereafter the Commission) accordingly stated in its report in the case of Ireland v. the United Kingdom:

⁵⁶ ECHR 7 July 1989, Series A no. 161.

⁵⁷ ECHR 20 March 1991, Series A no. 201.

⁵⁸ ECHR 30 October 1991, Series A no. 215.

⁵⁹ ECHR 7 July 1989, Series A no. 161, p. 40 (Soering v. the United Kingdom).

*“It follows that the prohibition under Article 3 of the Convention is an absolute one and that there can never be under the Convention, or under international law, a justification for acts in breach of that provision.”*⁶⁰

Therefore, this article is of an absolute character, not only in the sense that the provision itself leaves no scope for limitations by law, as a number of other provisions do, but also in the sense that the protection against expulsion cannot be limited by:

- a) The capacity of the person involved;
- b) The behaviour of the person involved;
- c) The reasons for imposing a treatment or punishment prohibited by Article 3 of the Convention;
- d) The situation that the feared treatment or punishment does not emanate from public authorities of the receiving country.

The capacity of the person involved

Article 3 of the Convention affords protection to *anyone* on the single condition that one is under the jurisdiction of one of the Parties of the Convention. It is thus not necessary for an alien to be recognised as a refugee to receive protection against expulsion.

The behaviour of the person involved

The protection by Article 3 of the Convention applies irrespective of the behaviour of the person involved. The only decisive factor is whether there is a real risk for the alien to be subjected to a treatment going beyond the threshold set by Article 3 of the Convention. The Court considers it irrelevant whether or not the person involved is accused of, or convicted for any criminal activities.

In *Chahal v. the United Kingdom*⁶¹, the British government wanted to deport Mr. Chahal, who was a Sikh political activist, to India as he appeared to be involved in terrorist activities and thus would endanger the national security of the United Kingdom. The Court, however, held that there was no room for balancing the risk of ill treatment against the reasons for expulsion in determining whether the responsibility of a state under Article 3 of the Convention is engaged; Article 3 of the Convention provides absolute protection and the activities of the individual, ‘however undesirable or dangerous’, cannot be a material consideration.

Reasons for imposing treatment or punishment prohibited by Article 3 of the Convention

In contrast to the 1951 Refugee Convention, Article 3 of the Convention does not establish conditions for protection, like persecution on account of race, religion, nationality, membership of a particular social group or political opinion. Article 3 of the Convention affords protection irrespective of the reasons for imposing a treatment or punishment contrary to this article in the country of origin.

⁶⁰ EComHR 18 January 1978, Series B no. 23-I.

⁶¹ ECHR 15 November 1996, Reports 1996-V.

In the case of *Soering v. the United Kingdom*⁶², the Court held that there would be a violation of Article 3 of the Convention if the applicant was deported to the United States of America on capital murder charges, where he faced exposure to the ‘death-row phenomenon’.

Feared treatment or punishment that does not emanate from public authorities

Article 3 of the Convention may apply not only where public authorities in the receiving country create the risk in question, but also where the risk originates with private organizations or individuals, in circumstances where the risk is real and the authorities in the receiving state are not able or willing to provide appropriate protection. In the case of *H.L.R. v. France*⁶³, the applicant argued against his expulsion that he was no longer safe in Colombia, as he feared reprisals from drug dealers, while the Colombian authorities were not capable of affording the appropriate protection. The Court held that:

“Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that 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. (...) The Court is aware too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection.”

In the case of *Ahmed v. Austria*, the Austrian Minister of the Interior granted Mr. Ahmed the refugee status in 1992, though deprived him of it two years later after a criminal conviction. To determine whether the applicant’s deportation to Somalia would breach Article 3 of the Convention, the Court assessed the present situation in Somalia. It based its assessment on the findings of the Commission, which stated in its report that:

*“ (...) the situation in Somalia had changed hardly at all since 1992. The country was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.”*⁶⁴

The Court reached the conclusion that there would be a violation of Article 3 of the Convention if the applicant were to be deported to Somalia. Further, it stated, that in view of the absolute nature of Article 3 of the Convention that conclusion is not *“invalidated by the (...) current lack of State authority in Somalia.”*

In *D. v. the United Kingdom*⁶⁵ the applicant, who was suffering from the advanced stages of aids, successfully argued that there would be a violation of Article 3 were he to be removed to St. Kitts, where he was born. The lack of moral and social support as well as the lack of

⁶² ECHR 7 July 1989, Series A no. 161.

⁶³ ECHR 29 April 1997, Reports 1997-III.

⁶⁴ ECHR 17 December 1996, Reports 1996-VI.

⁶⁵ ECHR 2 May 1997, Reports 1997-III. See also ECHR 6 February 2001, Reports of Judgments and Decisions 2001-I (*Bensaid v. the United Kingdom*).

shelter and an adequate medical treatment in St. Kitts would expose him to inhuman and degrading treatment. The Court emphasized that the decision was made ‘in the very exceptional circumstances of the case and given the compelling humanitarian considerations at stake’.

3.2 Relevant case law

3.2.1 Bahaddar v. the Netherlands

In recent judgments⁶⁶, the *Raad van State* has rejected appeals on Article 3 of the Convention pursuant to Article 4:6 of the Awb with reference to the Bahaddar judgment⁶⁷. The European Court of Human Rights ruled in that case:

“ (...) even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their case-load in an orderly manner.

Whether there are special circumstances, which absolve an applicant from the obligation to comply with such rules, will depend on the facts of each case.”

In its judgment of 5 March 2002⁶⁸, the *Raad van State* explicitly declared that it regarded Article 4:6 of the Awb as such a rule.

This raises the question which circumstances can be considered as special circumstances within the meaning of the Bahaddar judgment. The *Raad van State* does give examples of situations which, according to itself, do *not* fall into this category⁶⁹, but it remains unclear which circumstances it considers to absolve applicants from the obligation to comply with Article 4:6 of the Awb.⁷⁰

The whole case of Mr. Bahaddar revolved around the procedural rule of Article 26 (now 35) of the Convention. This article states that the Court may only deal with the matter after all the

⁶⁶ *Raad van State* 5 March 2002, *JV* 2002/125, *NAV* 2002/129 and *AB* 2002, 169. See also *Raad van State* 26 May 2003, *JV* 2003/321; *Raad van State* 24 april 2003, *JV* 2003/280 and *NAV* 2003/160; *Raad van State* 9 April 2003, *JV* 2003/222; *Raad van State* 8 November 2002, *NAV* 2003/107; *Raad van State* 6 November 2002, *JV* 2002/448, *NAV* 2003/28 and *RV* 2002, 15; *Raad van State* 21 October 2002, *JV* 2002/444 and *NAV* 2002/285; *Raad van State* 23 September 2002, *JV* 2002/391; *Raad van State* 28 June 2002, *JV* 2002/293.

⁶⁷ ECHR 19 February 1998, Reports 1998-I.

⁶⁸ *Raad van State* 5 March 2002, *JV* 2002/125, *NAV* 2002/129 and *AB* 2002, 169.

⁶⁹ *Raad van State* 16 July 2002, *JV* 2002/304; *Raad van State* 28 June 2002, *JV* 2002/294; *Raad van State* 5 March 2002, *JV* 2002/124 and *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

⁷⁰ The *Raad van State* gives a single example in its judgment of 24 April 2003. The asylum seeker in this case chose to remain silent in the first procedure. Despite the fact that no new facts or circumstances were adduced in the second procedure, the *Raad van State* did not remonstrate Article 4:6 of the Awb, as the government and the applicant agreed that there was a real risk that the applicant would be subjected to an inhuman and degrading treatment in the meaning of Article 3 of the Convention. Unfortunately, the *Raad van State* has not indicated where this case differs from the other applications in which is argued that the expulsion is in violation of Article 3 of the Convention, but in which the *Raad van State* rejects the appeal because of the lack of new facts and circumstances (*JV* 2003/280 and *NAV* 2003/160).

available domestic remedies have been exhausted that might prevent a breach of the Convention.

Mr. Bahaddar, a Bangladeshi national, lodged an application for refugee status or, in the alternative, a residence permit on humanitarian ground on 13 July 1990. The *Raad van State* finally declared the appeal inadmissible as the applicant's lawyer failed to submit any grounds for the appeal. Mr. Bahaddar applied to the European Commission of Human Rights and in the meantime lodged a second application for residence permit. He subsequently lodged a third application for refugee status. In a single decision, the State Secretary of Justice rejected both applications. The appeal against this decision was declared inadmissible for failure to submit any grounds within the time limits set for that purpose. The Netherlands stated before the European Court of Human Rights that Mr. Bahaddar had not exhausted the domestic remedies available to him and the complaint should therefore be declared inadmissible.

The Court stated that when assessing whether there are special circumstances in a specific case that would absolve an applicant from compliance with procedural law:

"It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim."

However, the Court did not consider that there were these kinds of special circumstances in the case of Mr. Bahaddar. The Court adduced the following circumstances.

Mr. Bahaddar's lawyer appealed to the *Raad van State* on 31 March 1993. She stated that the grounds for the appeal would be submitted as soon as possible. Mr. Bahaddar's lawyer had been reminded by the *Raad van State* on 28 June 1993 that no such grounds had yet been received, and she was invited to submit them within a month. She did not ask for an extension of the time limit even though that possibility was open to her, but submitted her grounds of appeal only on 20 October 1993, nearly three months after the time limit had expired, without providing an explanation for the delay. The appeal was declared inadmissible by the *Raad van State* for failure to comply with a formal requirement. Mr. Bahaddar lodged an obligation against this decision in which he stated that he received the information on which he wished to base the appeal only on 20 October 1993. Nevertheless, the Court rejected his obligation on the ground that he ought to have submitted a request for an extension of the time limit before it lapsed.

Even after the time limit had expired, Mr. Bahaddar had the possibility to lodge fresh applications to domestic authorities either for a refugee status or for a residence permit on humanitarian grounds, which in fact he did. Moreover, at no stage of the domestic proceedings was Mr. Bahaddar refused an interim injunction against his expulsion. Finally, it

would be open to Mr. Bahaddar even after the judgment of the Commission to lodge a further application. In these circumstances the Court concluded that Mr. Bahaddar failed to exhaust the available domestic remedies before applying to the Commission and that it was accordingly precluded from considering the merits of the case.

Conclusion

First the Court states that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time limits laid down in domestic law should normally be complied with. Special circumstances, however, can absolve an applicant from the obligation to comply with such rules.

With regard to the question whether there are these kinds of special circumstances in a specific case, the Court provides an additional consideration. It states that *“It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.”*

Although the Court does not give clear directives for what can be regarded as special circumstances that absolve an applicant from the obligation to comply with procedural rules, one can deduce directions from this judgment. In the case of Mr. Bahaddar, which revolved around facts that indicated procedural mistakes of the lawyer, the Court found it decisive that these mistakes could easily have been prevented (extension of the time limit for submitting grounds of appeal was possible, if Mr. Bahaddar's lawyer had simply asked for it), as well as corrected by lodging a new application for asylum.

However, when an application or appeal is dismissed pursuant to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000, the later adduced facts and circumstances cannot once more be considered by a national court through other means. The appeal to this dismissal or a subsequent application will also be rejected as, just like in the initial procedure, only new facts and circumstances are to be judged, which could not possibly have been adduced at an earlier stage.

Furthermore, it remains to be seen whether an asylum seeker can easily prevent facts or circumstances from being adduced too late, when the delay e.g. is caused by language problems, fear to endanger family members, shame or psychological problems. Several authorities have expressed the same doubts.

UNHCR stated that *“generally vulnerable and traumatized asylum-seekers, including unaccompanied and separated children, require time to establish trust and confidence in the person(s) responsible for determining their claim, before they can explain the reasons for*

their flight or the cause of their trauma. Persons raising gender-related claims and survivors of torture or severe trauma in particular require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community. Particularly for survivors of sexual violence or other forms of trauma, subsequent interviews may be needed in order to establish trust and to obtain all the relevant information. UNHCR is concerned that the 48-hour framework of the accelerated procedure does not permit the time required to establish the necessary confidence and trust."⁷¹

In addition to this, the *Adviescommissie voor vreemdelingenzaken* (Advisory Board on Matters concerning Aliens) stated the following with regard to psychological problems.⁷² The current AC-procedure, in which by now most of the cases are being determined, does not offer a sufficient climate of trustworthiness, in which a female asylum seeker can give a - for her - very incriminating account. It often refers to severe ill treatment or rape of the person in question or next of kin. Furthermore, the definition of the Post Traumatic Stress Syndrome (PTSS) in the global 'Diagnostic and statistical manual of mental disorders'⁷³ indicates as a characteristic that people cannot remember what happened to them for a long time. The stress can be too overwhelming to reproduce the memory of the traumatic event. It further declares that a new stressful event (e.g. entering an asylum procedure) can repress the earlier traumatic events, the reasons for which they fled their country.⁷⁴

Within this scope, the Advisory Board is of the opinion that a situation has arisen with regard to severe traumatizing events, to which the general policy which applies to Article 4:6 of the Awb does not have an adequate answer.

Even the *Hoge Raad* – the Dutch Supreme Court – has confirmed that people generally cannot speak about traumatic events shortly after these events have occurred. In one particular case, the victim was raped several times by her brother in law, who was also her employer, between January 1, 1980 and January 1, 1989. The perpetrator entered a plea of limitation as the summons dated January 27, 1994. The *Hoge Raad*, however, stated that the 5-year term set for limitation in sexual cases, will not start in the period in which the victim is not able to submit his or her claim to the perpetrator due to psychological circumstances beyond his or her control. The term will only start when he or she is able to speak about the abuse, even if

⁷¹ UNHCR 2003, p. 3.

⁷² In its report '*Het VN-Vrouwenverdrag in relatie tot de positie van vreemdelingenvrouwen in het Nederlandse vreemdelingenrecht en vreemdelingenbeleid*' of December 2002, p. 26-27.

⁷³ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders: DSM-IV-TR*, Washington D.C. 2000.

⁷⁴ See also J. Herlihy, P. Scragg and S. Turner 2002. The authors state that the assumption that inconsistency of recall means that accounts have poor credibility is questionable. Discrepancies are likely to occur in repeated interviews. For refugees showing symptoms of high levels of post-traumatic stress, the length of the application process may also affect the number of discrepancies. Recall of details rated by the interviewee as peripheral to the account is more likely to be inconsistent than recall of details that are central to the account. Thus, such inconsistencies should not be relied on as indicating a lack of credibility.

this takes – like in the underlying case – several years.⁷⁵ While not denying that asylum seekers may not be able to raise the reasons for their flight due to psychological reasons (e.g. trauma), the *Raad van State* has nonetheless insisted that they should at least express their inability to do so during the interview on the motives for their flight, which takes places within 48 hours.⁷⁶

Human Rights Watch stated accordingly in its report that although the *Raad van State* did note that in very special circumstances based on facts relating to an individual case, an exception to the general rule could apply, the current policy may lead to a violation of the prohibition against refoulement because of the high threshold an applicant must meet before a court may disregard the procedural rule.⁷⁷

3.2.2 Jabari v. Turkey

In the case of *Jabari v. Turkey*⁷⁸, the European Court of Human Rights indicates that there are limits to the procedure as mentioned in the *Bahaddar* judgment, which states that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3 of the Convention, the formal requirements and time limits laid down in domestic law should normally be complied with.

Ms. Jabari was an Iranian national, who claimed asylum in Turkey in 1995. She alleged, inter alia, that her removal to Iran would expose her to treatment prohibited by Article 3 of the Convention.

Ms. Jabari stated that she had committed adultery in Iran and had to leave before criminal proceedings could be brought against her. She submitted that she would probably have been prosecuted and sentenced to a form of inhuman punishment. In support of her assertion Ms. Jabari relied on reports prepared by Amnesty International, which refer to cases of women in Iran having been stoned to death for having committed adultery. She stressed that she was granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution as she belonged to a particular social group, namely women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution.

She further claimed that, bearing in mind the established case law of the Court, stoning to death, flogging and whipping, which are penalties prescribed by Iranian law for the offence of adultery, must be considered forms of prohibited treatment within the meaning of Article 3 of the Convention.

⁷⁵ *Hoge Raad* 23 October 1998, *NJ* 2000, 15.

⁷⁶ *Raad van State* 16 July 2002, *JV* 2002/304 and *Raad van State* 28 June 2002, *JV* 2002/294.

⁷⁷ Human Rights Watch, p. 14.

⁷⁸ ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

Despite this, the police rejected her application, as it had been committed out of time. Ms. Jabari was informed that under section 4 of the Asylum Regulation 1994 she should have lodged her application for asylum within five days of her arrival in Turkey.

The Court, however, did not object to Ms. Jabari that she had not complied with this national procedural rule, but stated:

“The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant’s claim, including its arguability. It would appear that her failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran. In the Court’s opinion, the automatic and mechanical application of such a short time limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in article 3 of the Convention. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court on her application for judicial review limited itself to the issue of the formal legality of the applicant’s deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country or origin.”

Conclusion

Ms. Jabari alleged, inter alia, that she would be subjected to a real risk of ill treatment and death by stoning if she was expelled to Iran, as she had committed adultery there. She invoked Article 3 of the Convention in respect of this claim.

Her application was rejected as she failed to comply with the five-day registration requirement under the Asylum Regulation 1994. Due to that fact she was exposed to possible expulsion to Iran.

The Court, however, did not remonstrate that Ms. Jabari had not acted in accordance with this requirement, but objected to Turkey that it enforced the rule without a rigorous scrutiny and considered the automatic and mechanical application of such a short time limit at variance with Article 3 of the Convention.

The *Raad van State* rejects an appeal on Article 3 of the Convention without a rigorous scrutiny, but merely with a reference to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000. Through the automatic and mechanical application of these rules, the *Raad van State* can perpetrate the same serious error as the Ankara Administrative Court in the case of Ms. Jabari.

3.2.3 Hilal v. the United Kingdom

According to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, an applicant has to state new facts that have emerged or circumstances that have altered. The *Raad van State* reasons that Dutch courts may not assess information that theoretically could have been, but was not, brought to the attention of the IND at an earlier stage.

To find out whether strict application of these articles is compatible with Article 3 of the Convention, one should examine which material the Court itself uses to assess an issue.

According to established case law, the Court will, in determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 of the Convention, assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*.⁷⁹

Does this mean that the Court will take propositions into consideration that were not known during the national procedure or does the Court also assess the facts and circumstances that could have been produced at an earlier stage? The Court gives a relevant judgment in the case of *Hilal v. the United Kingdom*⁸⁰.

Mr. Hilal, a Tanzanian national, arrived in the United Kingdom on 9 February 1995, where he claimed asylum. At his full asylum interview he stated that he had been detained from August to November 1994 and that he had been tortured. He claimed that his brother had been arrested shortly before himself, and had died due to ill treatment in January 1995 after release from detention. When the police came to look for Mr. Hilal, they discovered he was out. They detained his wife overnight and questioned his friends. Hence Mr. Hilal decided to flee from Tanzania fearing for his safety.

On the 29th of June 1995 the British Secretary of State refused Mr. Hilal's asylum, finding his account implausible. Mr. Hilal's appeal to a Special Adjudicator was dismissed on 8 November 1996 on the basis of incredibility. The Special Adjudicator placed considerable weight on the fact that Mr. Hilal had not mentioned his arrest and torture at his first asylum interview, but only at his full asylum interview. Furthermore, he noted a lack of substantiating evidence.

Mr. Hilal, subsequently, provided the Secretary of State on the 30th of January 1997 with copies of his brother's death certificate and the summons from the police to his parents dated the 25th of November 1995 (so after the first refusal by the Secretary of State and before the

⁷⁹ See ECHR 2 May 1997, Reports 1997-III (*D. v. the United Kingdom*); ECHR 29 April 1997, Reports 1997-III (*H.L.R. v. France*); ECHR 17 December 1996, Reports 1996-VI (*Ahmed v. Austria*); ECHR 15 November 1996, Reports 1996-V (*Chahal v. the United Kingdom*); ECHR 30 October 1991, Series A no. 215 (*Vilvarajah v. the United Kingdom*) and ECHR 20 March 1991, Series A no. 201 (*Cruz Varas v. Sweden*).

⁸⁰ ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II.

decision of the Special Adjudicator) requesting their attendance to explain the unlawful conduct of their son in embarrassing the Government and country. By a letter of the 4th of February 1997, the Secretary of State refused to reverse his decision, as the documents did not prove its impropriety.

On the 29th of April 1997, Mr. Hilal submitted to the Secretary of State a medical report about his treatment following detention. The hospital medical report was dated 8 November 1994, shortly after his release and a considerable time before he fled to the United Kingdom.

By a letter dated 23 April 1998, the Secretary of State informed Mr. Hilal that he had considered the new material, but that this evidence did not cause him to reverse his decision to refuse asylum. He noted that the documents would have been available to the applicant at the time of his appeal hearing but were not produced, which cast doubt on their authenticity. Even if the medical certificate and police summons were authentic, the Secretary of State saw no reason why Mr. Hilal could not return and live safely and without harassment on the mainland of Tanzania.

Mr. Hilal produced an expert opinion confirming that the documents were genuine. Nevertheless, the Secretary of State submitted that the documents were irrelevant because Mr. Hilal could live safely on the mainland of Tanzania.

Finally, Mr. Hilal filed a complaint with the European Court of Human Rights on 5 January 1999.

Just like the *Raad van State* in cases with regard to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, the British authorities rejected the appeal of Mr. Hilal as all the documents could have been produced at an earlier stage (like the crucial medical report dated November 1994, shortly after his release). Only after Mr. Hilal's appeal to the Special Adjudicator was dismissed, he submitted evidence and even this evidence was not submitted all at once.

However, the Court set little store by the fact that the documents were produced at such a late stage and stated:

“The Court notes however that the Special Adjudicator’s decision relied, inter alia, on a lack of substantiating evidence. Since that decision, the applicant has produced further documentation. Furthermore, while this material was looked at by the Secretary of State and by the Courts in the judicial review proceedings, they did not reach any findings of fact in that regard but arrived at their decisions on a different basis – namely, that even if the allegations were true, the applicant could live safely in mainland Tanzania, the ‘internal flight’ solution. The Court has examined the materials provided by the applicant and the assessment of them by the various domestic authorities. It finds no basis to reject them as forged or fabricated. The applicant has provided an opinion from the Professor of Social Anthropology at All Souls College, Oxford, that they are genuine. Though the Government have expressed doubts on the

authenticity of the medical report, they have not provided any evidence to substantiate these doubts or to contradict the opinion provided by the applicant. Nor did they provide an opportunity for the report and the way in which the applicant obtained it to be tested in a procedure before the Special Adjudicator.”

The Court actually considers the material that could have been produced at an earlier stage, even though the Immigration Rules of the United Kingdom include a rule comparable to Article 4:6 of the Dutch Awb. The rule provides that the Secretary of State will treat representations as a fresh application if the claim advanced is sufficiently different from the earlier claim. He disregards, in considering whether to treat the representation as a fresh claim, material that is not significant, or is not credible, or was available to the applicant at the time when the previous application was refused or when any appeal was determined.

Moreover, the Court continues with its own assessment of the evidence of Mr. Hilal. It draws - obviously of its own accord - from reports of the US Department of State and Amnesty International that were released between January 1997 and February 2000. It takes notice of a document submitted by the British High Commission in Dar-es-Salaam of 8 April 1998 and documents submitted by Mr. Hilal of the 25th of May 1998 and the 16th of March 1999 (expert opinions about the human rights situation in Tanzania).

Conclusion

The main issue is whether the restriction on the possibility to adduce propositions and/or evidence at a later stage, is compatible with Article 3 of the Convention. The answer can, inter alia, be deduced from the judgment in the case of Hilal v. the United Kingdom in which one can see which material the Court itself uses to assess an issue.

According to established case law, the Court will assess a possible violation of Article 3 of the Convention in the light of *all* the material placed before it or, if necessary, material obtained *proprio motu*.

Furthermore, in the case of Hilal v. the United Kingdom it appears that the Court does not consider of overriding importance that material could have been produced in an earlier stage of the procedure. This is even the case when the national authorities argued during the national procedure, in accordance with national procedural law, that the material was produced too late.⁸¹ This judgment is imperative to cases in which the *Raad van State*,

⁸¹ See also the admissibility decision of the European Court in the case of Venkadajalasarma v. the Netherlands (ECHR 9 July 2002, application no. 58510/00). In this case, the Dutch government suggested that the European Court is precluded from taking a medical report of Amnesty International into account because the applicant failed to give the Dutch authorities an opportunity to examine his request for a residence permit in the light of the findings contained in that report. The Court decided otherwise. It stated: “In any event, the Court has previously accepted that in cases where an applicant alleges that Article 3 would be breached if he or she was expelled, it may have regard to material that has come to light after the final decision of the domestic authorities, by virtue of the fact that the material point in time for the assessment of a risk of treatment contrary to Article 3 of the Convention is the date of the Court’s consideration of the case.”

because of enforcement of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, refuses to do a rigorous scrutiny of the possible violation of the prohibition of refoulement solely because the facts theoretically could have been produced at an earlier stage.

In the case of Mr. Hilal, the United Kingdom was even confronted by the Court with the fact that it did not draw a factual conclusion on the basis of the material that was produced later on and that it had confined itself to a different basis for the refusal, namely the availability of an internal flight alternative.

The Court held, partly on the basis of evidence that was adduced later on, but also partly on the basis of facts that were already at the Special Adjudicator's disposal, a different opinion than the British authorities. In fact, the Court seems to proceed in Mr. Hilal's case to an assessment of its own, because the British Court failed to judge the decision of the British authorities that Mr. Hilal's account was not credible, in the light of all the relevant documents.

3.3 Conclusion

Is it possible that application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and/or Article 3.119 of the Aliens Decree 2000 results in a judgment allowing the expulsion in violation of the absolute prohibition of Article 3 of the Convention?

These articles, taken together, stipulate that after the letter of intention, only new facts and circumstances will be considered that could not possibly have been adduced at an earlier stage. This does not only concern statements, but also evidentiary documentation that an asylum seeker retrieved from his country of origin during the course of the procedure, but which arrived after the letter of intention. The same goes for documents that were drawn up in the Netherlands during the procedure, but were submitted after the letter of intention was sent. In many cases, this may effectively prevent substantive consideration of what could be very critical information about an asylum seeker's reasons for fearing return to his or her country of origin. Is this in breach of Article 3 of the Convention?

The *Raad van State* refers to the judgment of the Court in the case of Bahaddar, in which is stated that even in cases of expulsion to a country where there is an alleged risk of ill treatment contrary to Article 3 of the Convention, the formal requirements laid down in domestic law should normally be complied with. However, the Court also noted that these procedural rules should not contain time limits that are so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

Merely in case of special circumstances an alien can be absolved from the obligation to comply with national procedural rules. It is, however, not clear what is to be regarded as such circumstances. The only direction the Court gives is that these special circumstances are

considered to be absent when the procedural mistakes could easily have been prevented as well as corrected by lodging a new application for asylum.

Yet, an application or appeal, which is dismissed pursuant to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000, can certainly not be corrected. The appeal to this dismissal or the subsequent application will also be rejected as, just like in the initial procedure, only new facts or circumstances are considered that could not possibly have been adduced at an earlier stage. It is, furthermore, highly questionable whether an asylum seeker can easily prevent facts or circumstances from being adduced too late, when the delay is caused by e.g. language problems⁸², fear to endanger family members⁸³, shame or psychological problems⁸⁴.

Still, the *Raad van State* hardly ever considers these special circumstances to be present. Therefore, Human Right Watch states in its report that the current policy of the Dutch authorities may lead to a violation of the prohibition against refoulement because of the high threshold an applicant must meet before a court may disregard the procedural rule.⁸⁵

It is striking that the *Raad van State*, as a consequence of the strict application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, refuses to consider facts and circumstances that theoretically could have been adduced earlier in the procedure, whereas the Court itself assesses a possible violation of Article 3 of the Convention in the light of *all* the presented material and, if necessary, material obtained *proprio motu*.⁸⁶ The Court does not seem to consider it relevant that material could be submitted at an earlier stage. Not even if the authorities remonstrate it pursuant to national procedural rules.⁸⁷ The Hilal case even showed that when national authorities and national courts fail to judge further evidence of already adduced statements, the Court will proceed in an assessment of its own in the light of all the relevant documents placed before it.

The decisive factor seems to be that an appeal on Article 3 of the Convention should be considered with respect to its contents by an administrative authority and an independent court of appeal. The Court considers the refraining from such an independent and rigorous scrutiny by an automatic and mechanical application of short time limits at variance with Article 3 of the Convention.

Nevertheless, by the enforcement of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, the *Raad van State* prevents independent and

⁸² *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

⁸³ *Raad van State* 5 March 2002, *JV* 2002/124.

⁸⁴ *Raad van State* 28 June 2002, *JV* 2002/294 and *Raad van State* 16 July 2002, *JV* 2002/304.

⁸⁵ Human Rights Watch, p. 14.

⁸⁶ See ECHR 2 May 1997, Reports 1997-III (D. v. the United Kingdom); EHCR 29 April 1997, Reports 1997-III (H.L.R. v. France); ECHR 17 December 1996, Reports 1996-VI (Ahmed v. Austria); ECHR 15 November 1996, Reports 1996-V (Chahal v. the United Kingdom); ECHR 30 October 1991, Series A no. 215 (Vilvarajah v. the United Kingdom) and ECHR 20 March 1991, Series A no. 201 (Cruz Varas v. Sweden).

⁸⁷ ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II (Hilal v. the United Kingdom).

rigorous judicial scrutiny of what could be crucial information on the reasons for the alien to flee his country of origin. A breach of Article 3 of the Convention is therefore possible. Whether Article 3 of the Convention is indeed violated, will depend on the particular circumstances of each individual case.

4 VIOLATION OF ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

4.1 Introduction

Article 13 of the European Convention on Human Rights reads as follows:

“Everyone whose rights and freedoms as set forth in this 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 text of this article suggests that Article 13 of the Convention is only applicable when a violation of one of the rights and freedoms has occurred. This literal interpretation would deprive this article of almost every practical meaning. Thus the Court in *Klass and others v. Germany*⁸⁸ held that Article 13 of the Convention must be interpreted as guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated. The effect of Article 13 of the Convention is therefore to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.

In *Boyle and Rice v. the United Kingdom*, however, the Court confirms that an objective criterion should be used to mark out the relevance of Article 13 of the Convention:

*“ (...) Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention.”*⁸⁹

The ‘remedy’ needs not to be provided by a court, but the body in question providing the remedy must be capable of affording effective redress and must be sufficiently independent of the body being challenged. Remedies, which are discretionary or unenforceable, will not generally comply with Article 13 of the Convention.⁹⁰

The Court states in the case of *Aksoy v. Turkey* that the remedy required by Article 13 of the Convention must be ‘effective’ in practice as well as in law.⁹¹ This means a remedy that is accessible, that is capable of providing redress in respect of the applicant’s complaint and

⁸⁸ ECHR 6 September 1978, Series A no. 28.

⁸⁹ ECHR 27 April 1988, Series A no. 131.

⁹⁰ See e.g. ECHR 26 October 2000, Reports of Judgments and Decisions 2000-XI (*Hasan and Chaush v Bulgaria*); EcomHR 3 March 1994, application no. 20348/92 (*Buckley v. the United Kingdom*) and EcomHR 16 May 1985, application no. 10530/83, DR 42, 171 (*Temple v. the United Kingdom*).

⁹¹ ECHR 18 December 1996, Reports 1996-VI. In the case of *Conka v. Belgium*, the Court considered that the notion of an effective remedy under Article 13 of the Convention requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (ECHR 5 February 2002, application no. 51564/99).

offers reasonable prospects of success. Does a procedure, in which an appeal on Article 3 of the Convention is dismissed with merely a referral to a procedural rule, comply with these requirements?

This question will be answered in the following paragraphs. For this purpose it is necessary to start with an enunciation of the relation between the Articles 13 and 35 of the Convention.

4.2 Relation between Article 13 and Article 35 of the Convention

Article 35 of the Convention provides that the Court may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law. The rationale for this rule is the principle that the respondent State must first have an opportunity to redress by its own means, within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.⁹² If these domestic remedies have not been exhausted, the Court will declare the complaint inadmissible.

There is, however, no obligation to have recourse to remedies that are inadequate or ineffective. In addition, the Court has accepted the possibility that according to the generally recognised rules of international law there may even be special circumstances, which absolve the applicant from the obligation to exhaust effective and adequate remedies and with that to comply with the procedural rules.⁹³ When the applicant is not remonstrated with the fact that he made a procedural mistake, the complaint will be declared admissible and the Court can consider the merits of the case.

But should a national court be able to remonstrate against a procedural mistake made by the applicant, if the Court does not object to this same mistake? And with regard to the underlying issue: Should it be acceptable that the Court would also judge the complaint on the basis of facts and circumstances that were adduced after the letter of intention on one hand, but would agree with the situation that the national courts do not consider these facts and circumstances pursuant to procedural rules on the other hand?

This will occur if the *Raad van State* continues its course. The *Raad van State* assesses the issue on account of the facts and documents that were available at the time when the letter of intention was sent, while the Court assesses the issue in the light of *all* the material placed before it or, if necessary, material obtained *proprio motu*⁹⁴.

⁹² ECHR 2 September 1959, application no. 343/57, Yearbook II (1958/59), p. 412 (Schouw Nielsen v. Denmark).

⁹³ See ECHR 16 September 1996, Reports 1996-IV (Akdivar v. Turkey).

⁹⁴ See ECHR 2 May 1997, Reports 1997-III (D. v. the United Kingdom); ECHR 29 April 1997, Reports 1997-III (H.L.R. v. France); ECHR 17 December 1996, Reports 1996-VI (Ahmed v. Austria); ECHR 15 November 1996, Reports 1996-V (Chahal v. the United Kingdom); ECHR 30 October 1991, Series A no. 215 (Vilvarajah v. the United Kingdom) and ECHR 20 March 1991, Series A no. 201 (Cruz Varas v. Sweden). See also ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II (Hilal v. the United Kingdom). Although the national authorities argued during the national procedure, in accordance with national procedural law, that the material

An effective remedy, however, should comprise an assessment, which is at least as extensive as the Court's own assessment, since the Court otherwise would act as a court of first instance. This would be unacceptable as the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.⁹⁵ Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of domestic courts. As a general rule it is for those courts to assess the evidence before them.⁹⁶

Therefore the Court stated that the 'local remedies rule' is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity –, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law.⁹⁷

To exempt the possibility that the Court will have to act as a court of first instance, the national courts should not remonstrate against the applicant's possible procedural mistakes, if the Court does not object to these same mistakes pursuant to Article 35 of the Convention and declares the complaint admissible. If they do so, the procedure would not be in accordance with Article 13 of the Convention. The case law of Article 35 is therefore also relevant for the interpretation of Article 13 of the Convention.

4.3 Relevant case law

4.3.1 Bahaddar v. the Netherlands

The leading case with regard to the exhaustion of domestic remedies in cases of expulsion is the case of Bahaddar v. the Netherlands. In the instant case, Mr. Bahaddar failed to comply with the time limit for submitting grounds of appeal, without requesting for an extension of the time limit, because he was still waiting for documentary evidence from Bangladesh on which he intended to ground his appeal.

The Court stated the applicable principles as follows:

“The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 [now Article 35] must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor

was produced too late, the Court did not consider it of overriding importance that the material could have been produced at an earlier stage.

⁹⁵ ECHR 7 December 1976, Series A no. 24 (Handyside v. the United Kingdom). In his function of chairman of the Court, Mr. Wildhaber said during the 12th Conference of the European Constitutional Courts “*European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies.*” (in ‘The place of the European Court of Human Rights in the European Constitutional landscape’, 14 May 2002).

⁹⁶ ECHR, 21 February 2002, application no. 23423/94 (Matyar v. Turkey).

⁹⁷ ECHR 16 September 1996, Reports 1996-IV (Akdivar v. Turkey).

*capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.*⁹⁸

Subsequently, the Court does indicate that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3 of the Convention, the formal requirements and time limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their case-load in an orderly manner. There is, therefore, no exhaustion of domestic remedies where a domestic appeal is not admitted because of a procedural mistake.

Whether there are special circumstances, which absolve an applicant from the obligation to exhaust the domestic remedies and with that to comply with the procedural rules, will depend on the facts of each case.

The Court further states that it should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

The Court, however, stated that such considerations do not apply in the case of Mr. Bahaddar. Leaving aside the question whether it would not have been open to him to submit grounds of appeal within the time limit, in anticipation of the evidence, there was nothing to suggest that the *Raad van State* was bound to refuse a request for an extension of the time limit based on the fact that supporting documents were not yet available. It was further significant that Mr. Bahaddar was able to lodge fresh applications to the Netherlands authorities, either for refugee status or for a residence permit on humanitarian grounds, even after the expiry of the time limit. Finally the Court stated that it would be open to Mr. Bahaddar even now to lodge a further application, and if necessary to apply for an interim measure restraining the respondent Government from expelling him, pending the outcome of the ensuing proceedings.

Thus, the Court thought it decisive that the procedural mistake could easily have been prevented as well as corrected.

In a complaint about Article 3 of the Convention by a Tamil who was exposed to possible expulsion to Sri Lanka, the Commission considered as well that the domestic remedies were

⁹⁸ ECHR 19 February 1998, Reports 1998-I. See also ECHR 16 September 1996, Reports 1996-IV (Akdivar v. Turkey).

not exhausted, as there was still a remedy available to the applicant.⁹⁹ As in the case of Mr. Bahaddar, the Commission deemed it of overriding importance that the statements of the applicant could still be considered after the judgment of the Commission through lodging a new application.

However, when an application or appeal is dismissed pursuant to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000, the later adduced facts and circumstances cannot still be considered by a national court through other means and the procedural ‘mistake’ can therefore not be corrected. The appeal to this dismissal or a subsequent application will also be rejected as, just like in the initial procedure, only new facts and circumstances are judged that could not possibly have been adduced at an earlier stage.

Furthermore, as is already elaborated in chapter 3, it remains questionable whether an asylum seeker can easily prevent facts or circumstances from being adduced too late, when the delay is caused by e.g. language problems¹⁰⁰, fear to endanger family members¹⁰¹, shame or psychological problems¹⁰².

4.3.2 Jabari v. Turkey

In the case of *Jabari v. Turkey*¹⁰³, Mrs. Jabari alleged that she would be subjected to a real risk of ill treatment and death by stoning if expelled from Turkey, as she had committed adultery in Iran. Mrs. Jabari was granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution on account of membership of a particular social group, namely women who have transgressed social mores; this was in accordance with the UNHCR guidelines on gender-based persecution. Mrs. Jabari, however, was not granted a residence permit, as she failed to comply with the five-day registration requirement under the Asylum Regulation 1994. Because of that fact she was exposed to possible expulsion to Iran.

Mrs. Jabari complained that she did not have an effective remedy against her threatened expulsion to Iran, as the Ankara Administrative Court confined itself to the issue of the formal legality of the applicant’s deportation rather than the more compelling question of the substance of her fears. The European Court of Human Rights stated in this instance:

“The Court reiterates that there was no assessment made by the domestic authorities of the applicant’s claim to be at risk if removed to Iran. The refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action neither entitled her to suspend its implementation nor to have

⁹⁹ EComHR 4 December 1991, application no. 18079/91, DR 72, 263 (T. v. Switzerland).

¹⁰⁰ *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

¹⁰¹ *Raad van State* 5 March 2002, *JV* 2002/124.

¹⁰² *Raad van State* 28 June 2002, *JV* 2002/294 and *Raad van State* 16 July 2002, *JV* 2002/304.

¹⁰³ ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

an examination of the merits of her claim to be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint, even though it was arguable on the merits in view of the UNHCR's decision to recognize her as a refugee within the meaning of the Geneva Convention.

In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to article 3, the notion of an effective remedy under article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3 and the possibility of suspending the implementation of the measure impugned.

Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13. Accordingly, there has been a violation of Article 13."

Although the case of Mrs. Jabari is not completely similar to the Dutch asylum cases, in which the appeal is dismissed pursuant to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000 (as the Ankara Administrative Court did not give any judgment on the risk that Mrs Jabari would face if her deportation were to be implemented), it bears much resemblance. Even in case of a claim under Article 3 of the Convention, the judgments in these cases only concern a part of the appeal. The additional facts and documents that applicants adduce to underlie the appeal are not taken into consideration. Facts and documents that may form the essence of the appeal may be disregarded on formal grounds by the Court, like the fact that an asylum seeker is raped and battered¹⁰⁴ or the fact that an alien will not be able to evade female genital mutilation in the country of origin.¹⁰⁵

Following the Court's ruling in the case of Mrs. Jabari, the automatic and mechanical application of national procedural law should not result in the fact that a claim will not be judged or partially not judged with regard to its contents, as far as the facts that are left aside are potentially relevant for a proper judgment. In case of a claim under Article 3 of the Convention, Article 13 of the Convention demands an independent and rigorous scrutiny of the appeal itself.

¹⁰⁴ *Raad van State* 8 October 2001, *JV* 2002/168, *NAV* 2002/64 and *RV* 2001, 6. See also *Raad van State* 28 June 2002, *JV* 2002/294.

¹⁰⁵ *Raad van State* 5 March 2002, *JV* 2002/125, *NAV* 2002/129 and *AB* 2002, 169.

4.4 Conclusion

Is a procedure, in which an appeal on Article 3 of the Convention is dismissed with merely a referral to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000, an *effective* remedy within the meaning of Article 13 of the Convention?

Formal requirements and time limits laid down in domestic law should normally be complied with. However, the Court has indicated that this rule should be applied with some degree of flexibility and without excessive formalism as it is applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Moreover, this rule is not absolute, nor is it applied automatically. The circumstances of each case are always considered, including the general context in which the formal remedies operate and the personal circumstances of the applicant.¹⁰⁶

Besides that, there can be special circumstances that absolve asylum seekers from the obligation to comply with procedural rules. The Court stated in the case of *Bahaddar v. the Netherlands* that it should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time. Accordingly, time limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

The Court repeatedly considered that there are no special circumstances when the applicant could easily have prevented the procedural mistake and still is able to correct it. Yet in the Netherlands, the asylum seeker only has one chance, after which he or she will solely receive formally motivated judicial rejections. The later adduced facts cannot still be considered in appeal or in a subsequent procedure pursuant to Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000.

Moreover, the Court stated in the case of *Jabari v. Turkey* that the notion of an effective remedy under Article 13 of the Convention requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 of the Convention and the possibility of suspending the implementation of the measure impugned. However, with a simple reference to any of the aforesaid Dutch articles, the national courts refuse to execute such a scrutiny to the facts and circumstances, which the applicant adduced after the letter of intention, but theoretically could have produced at an earlier stage. Even when these facts and circumstances expound the actual reasons why the alien fled his or her country of origin. Consequently, the Dutch authorities may violate Article 13 of the Convention.

¹⁰⁶ ECHR 19 February 1998, Reports 1998-I (*Bahaddar v. the Netherlands*). See also ECHR 16 September 1996, Reports 1996-IV (*Akdivar v. Turkey*).

Furthermore, the strict application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000 in case of an appeal under Article 3 of the Convention, forces the Court to act as a court of first instance with regard to the facts and circumstances that are not considered by the national courts due to the automatic and mechanical application of these Dutch procedural rules. Article 13 of the Convention is therefore violated, insofar as these facts and circumstances contribute to the arguable claim under Article 3 of the Convention, as the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

CONCLUSION

The *Raad van State* strictly applies Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000, even in case of difficulties with gathering documentation from the country of origin or difficulties with stating the reasons for requesting asylum due to psychological barriers. An asylum seeker must state all the relevant facts for his or her case *before* the letter of intention has been sent. Facts that are submitted at a later stage, which *theoretically* could have been adduced earlier, will not be taken into consideration by domestic courts. Hence, the *Raad van State* prevents independent and rigorous judicial scrutiny of what could be crucial information about the asylum seeker's motives to flee his or her country of origin.

This paper focussed on whether such an application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 can result in a judgment allowing for an expulsion in violation of the absolute prohibition of Article 3 respectively Article 13 of the Convention.

The *Raad van State* has repeatedly been confronted with this question. Its response consists of a reference to the judgment of the European Court of Human Rights in the case of *Bahaddar v. the Netherlands*, in which is stated that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3 of the Convention, the formal requirements and time-limits laid down in domestic law should normally be complied with.

However, this justification is insufficient as the Court, in the same case, emphasised that the application of this rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, the Court has recognised that the rule must be applied with some degree of flexibility and without excessive formalism; and that the rule is neither absolute nor capable of being applied automatically. Besides, it is essential to have regard to the particular circumstances of each individual case.

According to the Court, there can be special circumstances that *absolve* the applicant from the obligation to comply with national procedural law. Unlike the *Raad van State*, the Court holds that it should be borne in mind that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

The Court has indicated that it does not deem this kind of special circumstances present when the procedural mistake could easily have been prevented as well as corrected. However, that is not the case when an application or appeal is dismissed pursuant to Article 4:6 of the Awb,

Article 83 of the Aliens Act 2000 or Article 3.119 of the Aliens Decree 2000. The national court cannot consider the facts and circumstances which were submitted later on by other means. The appeal against this rejection or a subsequent application will also be rejected as, just like in the initial procedure, only new facts and circumstances are to be judged, which could not possibly have been adduced at an earlier stage.

And when an asylum seeker is not able to mention certain relevant facts within the short period of time because of e.g. a trauma, it is not realistic to assume that this delay could easily have been prevented. This is, among others, confirmed by the UNHCR, the *Adviescommissie voor vreemdelingenzaken*, the *Hoge Raad* and Human Right Watch. Nevertheless, the *Raad van State* adheres to its strict course.

In the case of *Jabari v. Turkey*, the Court further demonstrates that it does not hold it against the applicant that he or she has not complied with a national procedural rule when the national authorities denied the applicant an independent and rigorous scrutiny of the factual basis of his or her fears. It considers the automatic and mechanical application of the national procedural law at variance with the protection of the fundamental value embodied in Article 3 of the Convention. Moreover, the Court states that Article 13 of the Convention requires an independent and rigorous scrutiny of the claim that expulsion would constitute refoulement. Yet, this is exactly what the *Raad van State* fails to do when dealing with cases concerning Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000. Without examining whether the facts and circumstances which were submitted later on indeed indicate that Article 3 of the Convention will be violated in case of expulsion, it rejects the application by simply referring to the previous negative decision.

Moreover, jurisprudence shows that the Court does not set store by the fact that materials could have been adduced at an earlier stage, not even if this is argued by the national authorities in accordance with national procedural law. The Court assesses the possible violation of Article 3 of the Convention in the light of *all* the material placed before it and, if necessary, material obtained *proprio motu*.

The Court is therefore forced to act as a court of first instance with regard to the facts that were not taken into consideration because of the automatic and mechanical application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 by the national authorities. This leads to a violation of Article 13 of the Convention, insofar as these facts and circumstances contribute to the arguable claim under Article 3 of the Convention, as the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

From the foregoing one can conclude that the application of Article 4:6 of the Awb, Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000 can indeed result in a violation of Article 3 of the Convention. Whether this is the case, depends on the particular

circumstance of each individual case. The appeal procedures allowing for such a violation themselves constitute violation of Article 13 of the Convention.

Such a case may more easily occur when an application is dealt with in the AC-procedure (over 60% of all the requests for asylum) as the asylum seeker has a maximum of forty-eight hours to bring forward all the relevant fact and documents. Hana`s case, which was cited in the introduction, shows that these national procedural rules are also strictly applied in this procedure.

ENDNOTES

ⁱ “Indien een bestuursorgaan na indiening van een verzoek om terug te komen van een in rechte onaanastbaar geworden besluit tot het oordeel komt dat daartoe geen termen zijn, kan niet door het instellen van beroep tegen dat besluit worden bereikt dat de rechter de zaak beoordeelt, als ware het gericht tegen het eerdere besluit. Het door appellant ingestelde beroep kon dan ook slechts leiden tot de beoordeling of zich na het eerdere in rechte onaanastbare besluit waarbij appellant toelating is geweigerd, feiten of omstandigheden hebben voorgedaan die de staatssecretaris noopten tot heroverweging.” See e.g. *Raad van State* 4 April 2003, *JV* 2003/219 and *NAV* 2003/165; *Raad van State* 21 October 2002, *JV* 2002/444 and *NAV* 2002/285; *Raad van State* 23 September 2002, *JV* 2002/391; *Raad van State* 23 August 2002, *JV* 2002/350; *Raad van State* 5 August 2002, *JV* 2002/339 and *NAV* 2002/263; *Raad van State* 9 July 2002, *JV* 2002/298; *Raad van State* 5 March 2002, *JV* 2002/124; *Raad van State* 16 May 2002, *JV* 2002/222 and *NAV* 2002/195; *Raad van State* 11 January 2002, *JV* 2002/128 and *NAV* 2002/194; *Raad van State* 13 December 2001, *JV* 2002/s63; *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

ⁱⁱ “Daargelaten dat de faxberichten niet op authenticiteit kunnen worden onderzocht, zijn deze niet gedateerd, zodat niet kan worden vastgesteld dat sprake is van feiten of omstandigheden, die na het nemen van het bestreden besluit zijn opgekomen. Reeds hierom zijn de faxberichten niet als feiten of omstandigheden in de zin van voormelde bepaling aan te merken.” *Raad van State* 15 January 2003, *JV* 2003/83. See also *Raad van State* 8 November 2002, *NAV* 2003/107; *Raad van State* 18 January 2002, *JV* 2002/120, *NAV* 2002/131 and *AB* 2002, 161; *Raad van State* 16 October 2001, *JV* 2002/6.

ⁱⁱⁱ “Dat de vreemdeling, naar hij stelt, wegens vertaalproblemen die littekens niet eerder heeft gemeld, maakt niet dat niettemin sprake is van feiten of omstandigheden in de zin van voormeld art. 4:6 lid 1 Awb. Overigens is hij tijdens het gehoor in verband met de eerste aanvraag in de gelegenheid gesteld de aanwezigheid van littekens kenbaar te maken.” *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

^{iv} “Dat appellante, naar zij stelt, onder druk van haar man bij haar eerdere aanvraag niet heeft gesproken over de gebeurtenissen die zij thans heeft aangevoerd, maakt niet dat sprake is van zodanige feiten of omstandigheden. De Afdeling wijst er in dit verband overigens op dat uit het verslag van het in het kader van de eerdere aanvraag afgenomen nader gehoor, blijkt dat de rapporteur voor dat gehoor aan appellante heeft meegedeeld dat zij in vrijheid kan spreken, dat al het besprokene vertrouwelijk zal worden behandeld en dat het belangrijk is dat zij geen gegevens betreffende haar asielaanvraag achterhoudt.” *Raad van State* 8 October 2001, *JV* 2002/168, *NAV* 2002/64 and *RV* 2001, 6.

^v “Het schrijven van 19 april 2002 ziet op gebeurtenissen die hebben plaatsgevonden vóór het vertrek van appellanten uit het land van herkomst. Deze gebeurtenissen hadden eerder in de procedure naar voren gebracht kunnen en derhalve behoren te worden en zijn mitsdien geen nieuw gebleken feiten of veranderde omstandigheden waarmee de rechtbank ingevolge artikel 83, eerste lid, van de Vw 2000 bij de beoordeling van het beroep rekening mocht houden. Dat appellante sub 1 vanwege schaamte jegens haar echtgenoot en psychische problemen niet eerder in staat zou zijn geweest om over deze gebeurtenissen te spreken, leidt niet tot een ander oordeel. Het lag op de weg van appellante sub 1 om in het kader van de besluitvorming - hoe summier ook - melding te doen van de eerst voor de rechtbank aangevoerde gebeurtenissen. De Afdeling wijst er in dit verband op dat uit het verslag van het afgenomen nader gehoor blijkt dat de vrouwelijke rapporteur voorafgaand aan dit gehoor aan appellante sub 1 heeft meegedeeld dat zij in vrijheid kan spreken, dat al het besprokene vertrouwelijk zal worden behandeld en dat het belangrijk is dat zij geen gegevens betreffende haar asielaanvraag achterhoudt.” *Raad van State* 28 June 2002, *JV* 2002/294. The *Raad van State* gave a similar judgment on 8 November 2002, decision no. 200205127/1.

^{vi} “(...) is de Afdeling van oordeel dat de vreemdeling de ter zitting van de voorzieningenrechter gedane verklaringen dat zij is gedwongen een besnijdenis te ondergaan, desnoods in summere bewoordingen, in het kader van het onderzoek naar de aanvraag naar voren had behoren te brengen. Derhalve is geen sprake van feiten en omstandigheden die na het nemen van het bestreden besluit zijn opgekomen, zoals bedoeld in voormeld artikel 83 van de Vw 2000.” *Raad van State* 16 July 2002, *JV* 2002/304.

^{vii} “Zelfs indien sprake is van gedwongen terugkeer naar een land waar, naar gesteld, een risico bestaat op een met art. 3 EVRM strijdige behandeling of bestraffing, moet in de regel worden voldaan aan de in het nationale recht neergelegde procedureregels, welke er toe strekken de nationale autoriteiten in staat te stellen aanvragen om een verblijfsvergunning op een ordelijke wijze af te doen. Slechts onder bijzondere, op de individuele zaak betrekking hebbende, feiten en omstandigheden, kan noodzaak bestaan om deze regels niet tegen te werpen (uitspraak Europees Hof voor de Rechten van de Mens van 19 februari 1998, in de zaak Bahaddar tegen Nederland ...). Artikel 4:6 van de Awb is een regel in voorbedoelde zin. De bepaling legt op de vreemdeling de

verantwoordelijkheid om direct bij zijn aanvraag al datgene aan te voeren, wat hem bekend is of redelijkerwijs bekend kon zijn en tot inwilliging van de aanvraag zou kunnen leiden. Aldus wordt voorkomen dat het bestuur zonder noodzaak wordt belast met de behandeling van herhaalde aanvragen en wordt een ordelijke besluitvorming binnen redelijke termijn gediend.

Aangezien naar zeggen van appellanten meisjes in hun land van herkomst besneden worden vanaf hun zevende jaar en overigens de dochter van appellanten deze leeftijd reeds voor de indiening van de eerste aanvraag had bereikt, heeft de Rechtbank het standpunt van de staatssecretaris dat de mogelijke besnijdenis van de dochter van appellanten niet als een nieuw feit in de zin van artikel 4:6 van de Awb kan worden beschouwd, nu dit in de eerste procedure had kunnen worden ingebracht, terecht als niet rechtens onjuist aangemerkt. Niet gebleken is van bijzondere omstandigheden, in verband waarmee zou kunnen worden geoordeeld dat artikel 4:6 van de Awb niet aan appellanten mag worden tegengeworpen.” *Raad van State* 5 March 2002, JV 2002/125, NAV 2002/129 and AB 2002, 169. See also *Raad van State* 24 June 2003, JV 2003/355 and NAV 2003/193; *Raad van State* 8 April 2003, JV 2003/221.

^{viii} “Zoals de Afdeling eerder heeft overwogen (uitspraak van 5 maart 2002 in zaak no. 200200237/1, gepubliceerd in JV 2002/125, NAV 2002/129 en AB 2002, 169) moet de vreemdeling die om bescherming vraagt in de regel voldoen aan de in het nationale recht neergelegde procedure-regels, welke er toe dienen de nationale autoriteiten in staat te stellen aanvragen om een verblijfsvergunning op een ordelijke wijze af te doen. Slechts onder bijzondere, op de individuele zaak betrekking hebbende, feiten en omstandigheden kan de noodzaak bestaan om deze regels niet tegen te werpen. Daarvan is in dit geval niet gebleken. De situatie van appellant is niet vergelijkbaar met die in de uitspraak van het Europees Hof voor de Rechten van de Mens van 19 februari 1998 in de zaak Bahaddar tegen Nederland, gepubliceerd in JV 1998/45, en van 11 juli 2000 in de zaak Jabari tegen Turkije, gepubliceerd in JV 2000/240 en RV 2000, 2. In deze zaak is geen sprake van een regel omtrent een in acht te nemen termijn, zodat het beroep van appellant op die uitspraken reeds hierom niet opgaat.” *Raad van State* 6 November 2002, JV 2002/448, NAV 2003/28 and RV 2002, 15. See also *Raad van State* 9 July 2002, JV 2002/298.

^{ix} “Toepassing van voormelde bepalingen is, mede gelet op het in het derde lid bepaalde, slechts aan de orde, indien sprake is van feiten en omstandigheden die na het nemen van het bestreden besluit zijn opgekomen en waarmee de rechtbank bij de beoordeling van het beroep rekening kon houden, doordat zij tijdig tegenover haar zijn ingeroepen. Appellant heeft de rechtbank niet om heropening van het ter zitting op 19 november 2001 gesloten onderzoek verzocht met verwijzing naar de brief van 28 november 2001. Reeds daarom is van een feit of omstandigheid, als bedoeld in voormeld artikel 83, eerste lid, van de Vw 2000 geen sprake. Voor het ambtshalve toepassen van de procedure van het derde lid was geen plaats. De grief faalt.” *Raad van State* 31 May 2002, JV 2002/267.

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TABLE OF ABBREVIATIONS

AB	Administratiefrechtelijke Beslissingen
AC	Aanmeldcentrum / Application Centre
Awb	Algemene wet bestuursrecht
CAT	Convention Against Torture
ECHR	European Court of Human Rights
EcomHR	European Commission of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IND	Immigratie- en Naturalisatiedienst / Immigration and Naturalization Department
Jub	Jurisprudentie bestuursrecht
JV	Jurisprudentie Vreemdelingenrecht
NAV	Nieuwsbrief Asiel- en Vluchtelingenrecht
OC	Onderzoeks- en opvangcentrum / Reception and Investigation Centre
RV	Rechtspraak Vreemdelingenrecht
UNHCR	United Nations High Commissioner for Refugees

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AFTERWORD

The paper published here, based on Joukje van Rooij's masters thesis, concerns the compatibility with the European Convention on Human Rights of a set of provisions of Dutch law limiting the possibility for asylum seekers to submit statements or evidence after the initial rejection of their asylum application. Van Rooij's paper is the first part of a broader project; other papers will subject other elements of Dutch asylum practice to an in depth analysis. The full implications of these elements can only be understood if one takes notice of their combined effect. In this afterword, I will sketch the broader picture and point out the tension which exists with the European Convention on Human Rights.

1. Four elements of Dutch practice

Since 1 April 2001, the highest Dutch court in immigration appeal cases, the Council of State, has developed a jurisprudence which restricts to the minimum judicial scrutiny of administrative acts in immigration and asylum matters. The main characteristics of this jurisprudence are a combination of restrictive positions about (a) the accelerated procedure, (b) undocumented asylum seekers, (c) a restricted judicial scrutiny, and (d) the possibility to submit statements or evidence after the initial decision, which is the topic of Van Rooij's paper. I will briefly introduce the four elements.

The accelerated procedure

About 50% of all asylum applications are now being processed in the accelerated procedure, which takes 48 working hours (i.e. hours between 8 AM and 10 PM).¹⁰⁷ In practice, these applications are turned down in three to five days after they have been submitted. Asylum applicants get two hours to prepare for the interview with a legal counsel, and three hours to discuss the report of the interview with their counsel, as well as the document in which the arguments are given for the proposed rejection the application. Translators are consulted by telephone, and these are replaced regularly (I have understood this happens every 45 minutes). Legal counsels work in shifts (two shifts per day). By consequence, the asylum seeker will not be assisted by one single counsel.

The Council of State has held that the accelerated procedure can be used for any asylum application; it is not only fit for manifestly unfounded or clearly abusive applications, but for any application which the administration can reject within 48 working hours.¹⁰⁸ The risk of accelerated procedures is that applicants may have insufficient time to come forward with

¹⁰⁷ See for more details about the accelerated procedure par. 1.2 of Van Rooij's paper.

¹⁰⁸ Afdeling bestuursrechtspraak van de Raad van State 7 August 2001, *Jurisprudentie Vreemdelingenrecht* 2001/259. This is contrary to case law from before 1 April 2001, see Rechtbank 's-Gravenhage (rechtseenheidskamer) 2 June 1999, *Jurisprudentie Vreemdelingenrecht* 1999/164. Additionally, it is contrary to ExCom Conclusion 30 (XXXIV, 1983). The European Commission proposal for a Directive on minimum norms for asylum procedures formally does not allow to apply the accelerated procedure to any asylum application, but makes it applicable on so many grounds that it does not meaningfully restrict its application, COM (2002) 326.

their statements, and may have insufficient time to collect evidence. This risk is exacerbated if the use of the accelerated procedure is not limited to manifestly unfounded or abusive cases. The time pressure, combined with the lack of a possibility to build a confidential relation with a legal counsel, makes it possible that essential elements of the flight motives, or essential evidence, will not be put forward.

Undocumented asylum seekers

Since 1999, Dutch aliens legislation contains a provision on undocumented asylum seekers. It initially held that an application will be considered as manifestly unfounded if an applicant has not submitted relevant documents, unless he can establish that the applicant cannot be blamed for this.¹⁰⁹ The apparent strictness of this provision was mitigated during the legislative process. Under heavy pressure from parliament¹¹⁰ the Government repeatedly and unambiguously stated that, even when the requirements for application of this provision were fulfilled, the flight motives of the applicant would still be examined substantively as well. This led to a practice in which incorrect application of the provision could lead to annulment of a negative decision, while correct application did not bar access to a meaningful examination of the asylum claim. In other words: the legislation backfired, and led to a better procedural position of applicants than they had before.¹¹¹

In the new Aliens Act 2000, basically the same provision appeared,¹¹² making a lack of documents a circumstance to be taken into account in the assessment of an asylum claim. This more careful wording seemed an improvement compared to the 1999 wording, because obviously it is a relevant factor whether or not an applicant has documents. Asylum applicants are required to have documents about (1) their identity, (2) nationality, (3) travel route and (4) their flight reasons.¹¹³

A lack of documentation will not be held against the applicant if the applicant cannot be blamed for being undocumented. However, the Council of State has held that asylum seekers are held responsible for being undocumented if they have destroyed documents at the advice of their smuggler, or if they have handed them over to him.¹¹⁴ This rule is applied even when the asylum seeker is an unaccompanied minor.¹¹⁵ It therefore hardly occurs that a lack of documentation is not held against an asylum seeker.

¹⁰⁹ Article 15c sub f Vreemdelingenwet.

¹¹⁰ Partly inspired by a rather critical UNHCR position, see *UNHCR's comments on the Dutch Bill on undocumented asylum-seekers*, 5 October 1998.

¹¹¹ See Pres. Rb. 's-Gravenhage 31 March 1999, *Rechtspraak Vreemdelingenrecht* 1999, 13, with my comments giving an overview of practice and case law.

¹¹² Article 31 par. 2 sub f Vreemdelingenwet 2000.

¹¹³ *Vreemdelingencirculaire* 2000, C1/5.8.2.

¹¹⁴ Afdeling bestuursrechtspraak van de Raad van State 28 december 2001, *Jurisprudentie Vreemdelingenrecht* 2002/73, *Rechtspraak Vreemdelingenrecht* 2001, 10; Afdeling bestuursrechtspraak van de Raad van State 3 July 2002, *Jurisprudentie Vreemdelingenrecht* 2002/296.

¹¹⁵ Afdeling bestuursrechtspraak van de Raad van State 25 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/292; Afdeling bestuursrechtspraak van de Raad van State 8 May 2003, *Jurisprudentie Vreemdelingenrecht* 2003/287; Afdeling bestuursrechtspraak van de Raad van State 10 oktober 2003, *Jurisprudentie Vreemdelingenrecht* 2003/539.

Marginal scrutiny

Notwithstanding the inflexible position about whether a lack of documentation can be held against asylum seekers, the provision in the Aliens Act 2000 would be relatively unproblematic if legal practice would conform to the wording of the provision: a lack of documentation is a circumstance to be taken into account. However, combined with the marginal scrutiny introduced by the Council of State, this provision turns out to be fatal for a substantial share of asylum applications submitted in The Netherlands. In Dutch administrative law, a distinction is made between full and marginal judicial scrutiny of administrative acts. Full scrutiny implies that the court can basically replace the decision of the administration by its own decision. The classical example of an issue subject to full scrutiny is the interpretation of law. Marginal scrutiny implies that the court will only annul an administrative act if it is unreasonable. Classical examples of administrative acts subject to a marginal scrutiny are acts based on 'policy freedom' (e.g., the law says that the administration *may* give a permit in a certain situation) or acts based on 'evaluation freedom' (e.g., the law says that the administration may give a permit if *in its opinion* not giving an opinion would be unduly harsh).

The Council of State has argued that the decision of the Minister of Aliens Affairs that flight motives are not credible, can be the subject of a marginal scrutiny only. At first sight, this seems an unlikely position. The statements of the applicant are true, or not; the administration's decision that they are not credible is either correct, or not. It is hard to imagine that the administration has policy space or evaluation space as to whether something happened.

The Council has argued that, normally, in asylum cases the question is not whether or not the facts the asylum seeker has stated have been established; normally, there will be no evidence, and evidence cannot reasonably be required, on crucial aspects of the statements.¹¹⁶ So if normal rules were to be applied, in the overwhelming majority of cases the outcome would be that the flight story is considered incredible, because the applicant has not established its veracity. In order to assist the asylum applicant on this point, the Council pursues, policy guidelines have been developed.¹¹⁷ They hold that the statements of the applicant will be held to be true, if

- the applicant has fully answered the questions, and
- the statements are consistent on main points, and
- the statements are not unlikely, and
- the statements are in conformity with what is generally known about the situation in the country of origin.

¹¹⁶ Afdeling bestuursrechtspraak van de Raad van State 27 January 2003, *Jurisprudentie Vreemdelingenrecht* 2003/103.

¹¹⁷ *Vreemdelingencirculaire* 2000, C1/1, 2; C1/3, 2.2 and 3.4.

If the applicant is undocumented and can be blamed for this, the statements should, in addition, also

- not contain gaps, vaguenesses, unlikely turns and inconsistencies on relevant details; and
- the flight motives must be positively convincing.

In applying this policy, the administration has 'evaluation space'.¹¹⁸ The administration is better equipped to evaluate the credibility of unsubstantiated flight motives, because it is more experienced in this than the judiciary.

The Council of State has given precise indications about the effects of the marginal scrutiny in combination with the fact that the applicant was undocumented. It held that, if the negative decision is not based on one of the factors mentioned in Article 31 par. 2 Vw 2000 (such as being undocumented), the issue to be addressed by the Minister is whether the flight motives are consistent on main points, not improbable, and in accordance with what is generally known about the country of origin.¹¹⁹ However, if the negative decision is based on one of these factors, of which being undocumented is the main one, in practice this leads to an absence of meaningful judicial scrutiny of the determination that the applicant's flight motives are not credible.

It should be noted that, in principle, asylum seekers are required to have documents on four points: his or her identity, nationality, travel route and flight motives.¹²⁰ The Council of State has ruled that it is up to the Minister to decide which documents should have been submitted in the particular case.¹²¹ This means that, even when an asylum seeker has submitted documents testifying to his or her identity, the lack of, for example, travel documents may be held against him or her.¹²²

In fact, it seems that the lack of documentation has become an independent ground for rejecting asylum application. It seems that the aim is giving future applicants an incentive not to destroy their documents, and to get the message to smugglers that if they advise or force their clients to do so, their applications will be rejected.

Obstacles to later statements or evidence

The final element is a formal obstacle to introduce further statements or evidence after the initial decision has been taken, even if it has been taken in the accelerated procedure. As Van

¹¹⁸ This term is usually used for evaluations of a factual nature about which debate is possible between reasonable persons, but which are nevertheless subject to a full judicial scrutiny. Apparently, the Council of State here holds that administrative acts deploying 'evaluation space' can be subject to a marginal scrutiny.

¹¹⁹ Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/451; vgl. Afdeling bestuursrechtspraak van de Raad van State 25 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/454

¹²⁰ *Vreemdelingen-circulaire* 2000, C1/5.8.2.

¹²¹ Afdeling bestuursrechtspraak van de Raad van State 31 October 2002, *Jurisprudentie Vreemdelingenrecht* 2003/2; Afdeling bestuursrechtspraak van de Raad van State 16 May 2003, *Jurisprudentie Vreemdelingenrecht* 2003/293.

¹²² Afdeling bestuursrechtspraak van de Raad van State 23 September 2003, *Jurisprudentie Vreemdelingenrecht* 2003/406

Rooij describes in her paper, the case is 'frozen' at the moment the applicant is interviewed; facts or evidence submitted after that moment will only be taken into account if it was impossible to introduce them at an earlier moment, most notably because the fact had not yet occurred or the evidence did not yet exist. Central in this respect is the Council's interpretation of Article 4:6 of the General act on administrative law (Awb), which holds (a) that a person applying for the same thing for the second time must submit new facts, and (b) that, if he fails to do so, the administration may dismiss the second application out of hand.

The Council of State holds that if the administration dismisses a second application out of hand, the court can only examine whether or not the applicant has submitted new facts. If the court concludes that no new facts have been submitted, the appeal must be rejected by the court. This means that the court is precluded from examining whether the administration could *reasonably* dismiss the application out of hand, notwithstanding the fact that Article 4:6 Awb stipulates that the administration *may* do so in the absence of new facts, and not that it *must* do so. This must be so, the Council argues, because if the court would examine whether it was reasonable to reject a second application in the absence of new facts, it would in fact examine the validity of the decision taken on the first application, and this first decision has become final.¹²³

The crucial question then is: what is new? The definition the Council gives is an extremely restrictive one. It qualifies as "new" only those facts that have occurred or evidence that has come into existence after the first decision was taken, or facts or evidence which could not possibly have been introduced before the first decision. For example, if a woman does not dare to disclose immediately that she has been the victim of sexual violence, or if an applicant has arrived without an arrest warrant but does submit one at a later stage, this fact or document may be taken into account by the administration, but regardless of whether the administration does so, the court can only examine whether new facts were submitted, and in the absence of new facts, must reject the appeal. This means that the administration has a discretionary power (will a fact or document which was submitted too late, and which does not constitute a new fact in the formal sense, be taken into account?) which is not subject to judicial review. This implies that the administration is free to reject these claims and to deport the applicants, even if the later statements or evidence do establish that this would be a violation of Article 3 ECHR.

The Council has introduced two nuances in this inflexible line of case law. First, if an applicant during the interview preceding the first decision mentions there are things she or he cannot express, or if an applicant mentions that evidence is underway, it may be unreasonable to take a first decision without waiting for further statements or evidence.¹²⁴ Until now, the Council has only referred to this possibility, but has never used it. Second, the Council has held that under special, individual circumstances it can be necessary not to apply the rules

¹²³ Afdeling bestuursrechtspraak van de Raad van State 4 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/219.

¹²⁴ Afdeling bestuursrechtspraak van de Raad van State 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/294

blocking the introduction of later statements or evidence.¹²⁵ Until now, these possibilities of mitigating the effects of the Council of State's case law are theoretical, and have little, if any relevance for legal practice.

Summing up

In an ultra-quick asylum procedure, in which the fact that an applicant is undocumented weighs heavily, it is quite conceivable that three kinds of substantive mistakes occur more often than would be the case in a normal procedure:

- the asylum applicant does not (fully) disclose relevant facts, due to trauma, disorientation or related factors;
- the asylum applicant does not submit documents, because they were either left at home (it was risky to bring them, or the applicant did not foresee that a birth certificate might come in handy) or were destroyed or handed over to the smuggler (obviously, smugglers put pressure applicants in order to leave no trace of the travel route)
- the administration makes mistakes due to time pressure.

It is less likely that errors on this point will be corrected by the judiciary if the decision of the administration on credibility is subject to a marginal (instead of a full) scrutiny. Thus, both the administrative and the judicial phase of the asylum procedure risk being flawed. The asylum procedure contains a formal obstacle to the introduction of facts and evidence in later stages of the procedure (when the applicant has recovered a bit, or when he or she has succeeded in obtaining evidence from the country of origin), which minimises the possibilities of repairing mistakes made in the initial procedure.

2. International criticism of Dutch practice

During the past year, both the United Nations High Commissioner for Refugees (UNHCR) and Human Rights Watch (HRW) have criticised Dutch immigration and asylum law, addressing the issues mentioned here. Human Rights Watch (HRW) published a report, a commentary and a letter to the Immigration Minister.¹²⁶ HRW wrote that the Council of State "has given a strikingly restrictive cast to Dutch asylum law", resulting in "routine infringement of asylum seekers' most basic rights."¹²⁷

¹²⁵ Afdeling bestuursrechtspraak van de Raad van State 5 March 2002, *Jurisprudentie Vreemdelingenrecht* 2002/125; Afdeling bestuursrechtspraak van de Raad van State 6 November 2002, *Jurisprudentie Vreemdelingenrecht* 2002/448. The Council may have applied this exception once, in Afdeling bestuursrechtspraak van de Raad van State 24 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/280, which however is so obscurely motivated that it does not give certainty about this.

¹²⁶ *Fleeting refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003; *Human Rights Watch Commentary on Dutch Asylum Policy*, 25 September 2003; *Netherlands: Safety of Failed Asylum Seekers at Risk; Letter to the Dutch Immigration Minister*, 13 February 2004. All available at www.hrw.org.

¹²⁷ Human Rights Watch: *Fleeting refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003.

In July 2003, UNHCR voiced its concerns about Dutch asylum practice.¹²⁸ It expressed concerns about the fact that the accelerated procedure has become the rule in Dutch practice; according to UNHCR, accelerated procedures should only be used for manifestly unfounded or abusive claims. It also expressed concerns about the fact that, in practice, claims by vulnerable and traumatised asylum seekers, including unaccompanied and separated children, have been processed in accelerated procedures. According to UNHCR, claims by such applicants should always be channeled into the regular procedure. HRW has urged the Dutch government to limit the use of accelerated procedures in general, and in any case to exempt from the accelerated procedure cases involving serious physical or psychological problems; cases involving possible survivors of torture or sexual violence; other cases involving symptoms of trauma; cases involving unaccompanied children; and cases raising complex legal issues. It has further recommended the Dutch government to explore ways in which asylum seekers' access to lawyers (preferably a single lawyer throughout the process) can be made more flexible so as to allow adequate time for the claim and the appeal to be prepared.

On the point of the burden of proof, UNHCR emphasised the shared nature of the burden of proof in asylum law, and has pointed out that asylum seekers may have valid reasons for the absence of, or reliance on fraudulent documents. This may be because they were forced to leave their countries without documents, or instructed by smugglers to hand them over to them or to destroy them. That should not be a ground for considering an asylum claim manifestly unfounded or abusive.

As to the de facto obligation to submit statements and documents immediately (the topic of Van Rooij's paper) UNHCR voiced its particular concern about cases of survivors of gender-related violence, torture as well as other vulnerable cases that are dealt with within the time-limited framework of an accelerated procedure. Particularly in cases where the sole reason that the documents or information could not be submitted in time was the strict 48-hour time limit for a first instance decision, UNHCR argues that no cases should be rejected solely on the basis that the relevant information was not raised or documents submitted earlier. HRW has urged the Dutch government to take into account the limited opportunity available to asylum seekers to present documentary proof and other relevant information.

On the issue of marginal review, UNHCR emphasises that asylum seekers should have the possibility for at least one appeal with full examination of both facts and points of law. HRW has recommended that the Dutch government take urgent steps to ensure that every asylum seeker is provided an adequate opportunity to present their claim for asylum, and that judicial review ensures that the merits of the case have been fairly examined. HRW has observed that the extensive use of the accelerated procedure raises a serious risk of error, against which the limited judicial review on appeal offers an inadequate check. In HRW's view, the result is an unnecessarily high risk that the procedure will result in violations of the Netherlands' non-refoulement obligations.

¹²⁸ UNHCR: *Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations*, July 2003, reprinted as an annex at pp. 71.

3. Compatibility with the European Convention on Human Rights

The present-day Dutch asylum procedure is debatable on the point of compatibility with human rights standards. I will shortly summarise the issues.

Rigorous scrutiny; undocumented asylum applicants

When evaluating claims holding that expulsion would be a violation of Article 3 ECHR, ever since the *Vilvarajah* decision the Court has held that

*The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.*¹²⁹

In its *Jabari* decision, the Court has made explicit the presumption implicit in this passage. It stated that it is not only the Court's examination that must necessarily be a rigorous one, but that the State party's examination of a claim also must be a rigorous one:

*The court further observes that, having regard to the fact that article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by article 3.*¹³⁰

At first sight, this seems contrary to the Court's case law on Article 13 ECHR in British immigration cases. In the *Soering* decision, the Court accepted the British judicial review procedure as an effective remedy in the sense of Article 13, although the applicable criteria in that procedure suggest a marginal scrutiny of acts of the administration. But, using a phrase which has been repeated in all later cases on the point, the Court took into consideration that *According to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take* (emphasis added).¹³¹

The Court added that in the judicial review procedure, *Soering's* claim under Article 3 would have been given the most anxious scrutiny in view of the fundamental nature of the human

¹²⁹ ECtHR 30 October 1991, *Soering v. United Kingdom*, A 161; comparable passages can be found in ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V, par. 96; ECtHR 2 May 1997, *D. v United Kingdom*, Reports 1997-III, par. 49; ECtHR 7 March 2000, *T.I. v. United Kingdom*, application 43844/98; ECtHR 6 February 2001, *Bensaid v. United Kingdom*, Reports 2001-I, par. 34.

¹³⁰ ECtHR 7 July 2000, *Jabari v. Turkey*, application 40035/98.

¹³¹ ECtHR 7 July 1989, *Soering v. United Kingdom*, A 161, par. 121. This phrase was repeated in ECtHR 30 October 1991, *Vilvarajah and others v. United Kingdom*, A 215, par. 123; ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V, par. 148; ECtHR 2 May 1997, *D. v United Kingdom*, Reports 1997-III, par. 70; ECtHR 6 February 2001, *Bensaid v. United Kingdom*, Reports 2001-I, par. 55; ECtHR 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II, par. 77.

right at stake.¹³² In fact, the Court's position is not that a marginal scrutiny of a claim under Article 3 is acceptable under Article 13 ECHR; instead, it accepts the construction that no reasonable State Secretary could decide to deport someone if it *has been established* before a national court (a formulation implying full scrutiny by the national court) that the deportation would be a violation of Article 3 ECHR. Thus, a rigorous scrutiny cloaked in marginal terms is acceptable because of the substance of this national test. It comes as no surprise then that in the Jabari decision the Court ruled that

*given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.*¹³³

There is no tension between, on the one hand, the Court's standing case law holding that a rigorous scrutiny must be applied on the basis of Article 3, and its considerations about Article 13 in the Jabari decision, and on the other hand its case law on Article 13 in British asylum cases, if one accepts that it requires a rigorous scrutiny there as well, but does not find it problematic that it takes place in the framework of something that in the domestic legal setting is considered to be a marginal scrutiny.

In sum, it is clear from the case law of the European Court of Human Rights that the claim by an alien that his or her deportation would result in a violation of Article 3 ECHR must be given a rigorous scrutiny by the domestic courts (or the quasi judicial body constituting the effective remedy) - provided of course that the applicant has an arguable claim under Article 3 ECHR. The Court has not excepted the issue of credibility in this respect. I think it is obvious that a marginal scrutiny of the kind practiced in the Netherlands cannot be considered a rigorous scrutiny. Hence, as a result of the case law of the Council of State on this point the Dutch asylum procedure is in violation of Article 13 ECHR.

The Council of State recently ruled that it does apply the rigorous scrutiny required by the European Court of Human Rights on the basis of Article 3 and 13 ECHR. It argues to this end that the Dutch courts subject the administration's decision about the credibility of the flight motives to the reasonableness test required in the Court's decisions about the compatibility of the British judicial review procedure with Article 13 ECHR. Furthermore, the Council of State points out that the Dutch courts do apply a full scrutiny to the interpretation and application of Article 3, on the basis of the credibility assessment of the administration.¹³⁴ Of course, the part of the decision subjected to full judicial scrutiny does conform to the requirement of a rigorous scrutiny. However, credibility assessment (in many, and possibly most asylum cases this is the crux of the appeal procedure) is subjected to marginal scrutiny, and marginal scrutiny simply cannot be considered as a rigorous scrutiny. Article 3 and 13 do

¹³² This phrase was repeated in *Vilvarajah*, par. 125, and in *D.* par. 71.

¹³³ ECtHR 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII, par. 50.

¹³⁴ Afdeling bestuursrechtspraak van de Raad van State 11 December 2003, *Jurisprudentie Vreemdelingenrecht* 2004/52.

not require that judicial scrutiny is partly rigorous, but that it is rigorous. In my view, the reference to the reasonableness test in the Court's case law about the British judicial review procedure indicates that a reasonableness test is acceptable as long as domestic courts *establish* whether or not a deportation is a violation of Article 3.

Obviously, it is relevant whether an applicant has documents, and if so which ones, and if not whether he has an explanation for this. However, the Court's Bahaddar decision (the relevant passage is quoted below) suggests that in the Court's view this can only play a role of some importance if an applicant has been granted a realistic opportunity to submit evidence. The Hilal decision is an example of how flexible the Court reacts to an applicant submitting evidence one by one at considerable intervals. In addition, a main requirement in Dutch practice is that the applicant submits documents concerning his or her travel to The Netherlands. Obviously, this is of great importance for the authorities (application of the Dublin system and of safe third country rules), but may well be immaterial to the asylum claim. The crux of the undocumented issue in Dutch law, however, is that being undocumented leads to an even more marginal judicial scrutiny of the administration's decision on credibility.

Accelerated Procedures and Obstacles to Later Statements and Evidence

The massive use of the accelerated procedure with its strict time limits creates tension with the European Convention on Human Rights. In its Bahaddar decision, the Court ruled that applicants in principle must comply with domestic procedural rules, because these enable the national jurisdictions to discharge their case-load in an orderly manner. But the Court added: *It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.*¹³⁵

In the Jabari decision, the Court ruled about the Turkish rule requiring asylum applicants to submit their claim within five days after entering the country:

*In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.*¹³⁶

Although these decisions are not about an accelerated procedure, one can draw the conclusion that it should not be a priori fatal to an asylum claim if an applicant has not come forward with a complete statement due to trauma or stress, or if he or she has not succeeded in collecting all evidence before the end of the (accelerated) procedure. However, in the Dutch context, such delay is usually fatal due to the case law of the Council of State on new

¹³⁵ ECtHR 19 February 1998, *Bahaddar v. The Netherlands*, Reports 1998-I.

¹³⁶ ECtHR 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII.

statements or evidence. It should be noted that, in fact, the obstacle rule in effect means the introduction of a concealed time limit for submitting facts. In the Turkish context of the Jabari decision, the application had to be made within five days after entry, but once that had been done facts could be introduced during a longer time. In the Dutch context, there is no formal time limit for submitting an asylum claim, but once it has been submitted there is a strict (and in 50% of all asylum cases: very short) time limit for submitting facts.

Domestic rules excluding later statements and later evidence are rules about the relevant moment in time for judicial assessment. On this point, the Court has been consistent and emphatic. In Article 3 cases, the relevant moment in time is the moment of expulsion or, if expulsion has not yet taken place, the moment of the Court's examination. The Court "will assess all the material placed before it and, if necessary, material obtained of its own motion."¹³⁷ The argument holding that the Court should disregard evidence which has only been submitted in the procedure before the Court itself while it could have been produced earlier (such as medical statements of Amnesty International), has been rejected.¹³⁸ Therefore, it is clear that the European Court of Human Rights will take into account later statements and later evidence (provided, of course, that they are considered credible) even when a domestic court does not.

However, it would be inconsistent with the mechanism of the European Convention on Human Rights if the Court were to be a court of first instance. This would be the case if the Court would accept that domestic courts do not take into account statements and evidence which the Court itself does have to take into account. However, it emerges from the Court's case law that it does require domestic courts to take into account later statements and evidence. This is clear in particular from the Court's Jabari judgement, where it held the automatic and mechanical application of formal procedural rules to be at variance with Article 3 ECHR. In the same judgement, the Court held that a procedure in which such procedural rules were applied to the expense of a substantive examination of the claim under Article 3 was not an effective remedy in the sense of Article 13 ECHR. In the Hilal decision, the Court had to decide about a case in which a domestic obstacle rule had been applied; it basically disregarded the domestic rule, examined evidence which had been submitted too late by domestic standards, and concluded that Hilal's expulsion would be a violation of Article 3.

4. Conclusion

The massive use of the accelerated procedure in Dutch asylum practice, in which the rejection of an asylum claim takes place in 48 working hours, enhances the risk that applicants are not in a position to give complete statements about their flight motives, and to submit the available evidence. The de facto impossibility to submit statements and evidence at a later stage imply that asylum claims may be turned down on the basis of automatic and mechanical

¹³⁷ E.g. ECtHR 20 March 1991, *Cruz Varas v. Sweden*, A 201; ECtHR30 October 1991, *Vilvarajah and others v. United Kingdom*, A 215; ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V; ECtHR29 April 1997, *H.L.R. v. France*, Reports 1997-III; 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II.

¹³⁸ E.g. ECtHR 9 July 2002, *Venkadajalarma v The Netherlands*, application 58510/00.

application of very short time limits and other formal rules. Rejection of asylum claims on that basis does not exclude the possibility that return of the applicant can constitute a violation of Article 3 ECHR. This risk is exacerbated by the fact that not submitting documents, or submitting only photocopies, before the first decision de facto leads to rejection of the asylum claim. Thus, decisions taken by the administration may be flawed

- because they have been taken too quickly and on the basis of insufficient investigations;
- because the fact that an applicant does not have the required documents (on identity, nationality, travel route and flight motives) de facto leads to rejection of the asylum claim;
- because in practice it is impossible to introduce further statements or evidence later on during the procedure.

These mistakes will most often concern the establishment of the facts of the individual case, because all three factors have especially adverse effects on that point. The possibility of these mistakes being corrected by means of judicial review are small, because precisely credibility assessment can only be subjected to marginal judicial review.

This means that the Dutch asylum procedure, by falling short of the standards set by the European Convention on Human Rights, does not contain sufficient guarantees to prevent violations of Article 3. This leads to a growing number of applications at the European Court of Human Rights. Obviously, it is most welcome that the Court can supervise the conformity of deportations with the Convention. However, the Court cannot solve the problem at the heart of many applications presently pending, being the flawed domestic judicial supervision in Dutch asylum cases. Therefore, I hope the Court will address the procedural issues raised by the many asylum cases before it, as well as the substantive issues.

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