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**Comparing European Union and Dutch asylum law
procedures: balancing efficiency and substantive
examination in asylum applications**

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I. Introduction

Under international law refugee status is granted to those who fall within the definition of a refugee under the Refugee Convention 1951.¹ The Convention, however, does not implement any mechanisms which directly implement its principles. It is therefore up to the State to ensure that refugee rights are implemented directly. James Hathaway suggests two mechanisms to implement the Convention, namely solution-oriented temporary protection and shared responsibility among states, in order to safeguard practical access to meaningful asylum, but acknowledging that any system must take into account the self-interests of states and so must establish effective control systems and to minimize risks.² Although discussion on such proposals is beyond the ambit of this work, it is important as it shows that in the absence of any implementing or remedial mechanisms under the Convention, it is important to have a system which effectively balances the access to asylum with the interests of the State in keeping the risks and numbers of asylum seekers low.

As there are no real mechanisms of enforceability, refugee law has fallen out of favour due to the lack of mechanisms which achieve its fundamental purpose of balancing the rights of asylum seekers and those of the state.³ An attempt was made with the adoption of the Procedures Directive on the minimum procedural guarantees pertaining to the granting and withdrawal of refugee status in Europe (“the Directive”).⁴ It was implemented in the Netherlands on 1 December 2007. The Directive is limited to the minimum standards for such guarantees afforded under the 1951 Geneva Convention on the status of refugees.⁵ It was enacted as part of an effort to create a Common European Asylum System envisioned in the Tampere Conclusions. It is the main enactment on asylum procedure. However, the Directive is not clear enough as it sets the standards too low or does not mention necessary safeguards, leaving most of the discretion with the Member State instead, and this has allowed national practices to diverge.

¹ Article 1(A)(2) Refugee Convention 1951.

² James C. Hathaway and R. Alexander Neve “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Journal* 115 at 151.

³ At 116.

⁴ Directive 2005/85 (OJ 2005 L 326/13).

⁵ Article 3.

The Dutch approach is one of the most restrictive in the European Union; a policy which is justified by the Dutch government by the volume of asylum seekers it receives each year. The number of asylum applications is very high – 14,465 applications per month were received in 2006, which was the lowest figure in ten years.⁶ However, that number has recently increased again from 1,000 in February and March 2014 to around 1,000 in a week in May 2014.⁷ With such high numbers of asylum seekers arriving at the borders, the Dutch population has also urged for tough asylum procedures with often strong Islamophobic undertones, since most asylum seekers to the Netherlands originate from Islamic countries. This was particularly the case after the assassinations of radical politician Pim Fortuyn and filmmaker Theo van Gogh, who were both very outspoken anti-Islam. This sentiment was very popular and in the aftermath of the assassinations, 63 per cent of Dutch citizens felt that radical Muslims should have been deported.⁸ It is therefore unsurprising the Dutch government have been able to enact such strict asylum procedures.

II. Article 3 European Convention on Human Rights

The Dutch policy is part of a wider EU trend of Member States to divert or deter asylum seekers from their borders. In particular, the use of summary exclusion procedures, such as a special procedure applicable at the border at reception centres as well as wide-ranging categories of exclusion procedures, are often used, often in addition to requiring refugees to repatriate while a risk of persecution remains in their home country. Such procedures risk a breach of the non-refoulement provision. Therefore, some analysis of Article 3 of the European Convention on Human Rights (ECHR) is appropriate here.

Article 3 of the ECHR restates the absolute prohibition of torture proviso into European Union law. It requires that no one must be subjected to torture or to inhuman or degrading treatment or punishment. In the context of asylum

⁶ Immigration and Naturalization Department (*Immigratie- en Naturalisatiedienst*) *Annual Report on Asylum and Migration Statistics in the Netherlands: Reference Period 2007* (September 2009) at 7.

⁷ Dutch News “Parliament Holds Emergency Debate over Surge in Asylum Seekers” *Dutch News* (online ed, the Netherlands, 15 May 2014).

⁸ Carl Levy “The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?” (2005) 40 *Government and Opposition* 26 at 38.

applications, a breach of Article 3 might be argued when a claim of asylum is rejected and expulsion of the asylum seeker risks their return to their home country where they are at risk of being subjected to such ill-treatment. Article 15 ECHR provides that Article 3 is an absolute prohibition and therefore there is no justification under international law or under the ECHR for breaching that provision.⁹ It is part of a wider obligation placed on Member States. In fact, it is long-established principle that liability is imposed on Member States when it is removing persons when there is a sufficiently high risk that treatment in the receiving state will fall short of ECHR standards.¹⁰ The leading case of *Soering v United Kingdom* has been held that Article 3 requires a ‘real risk’ of ill-treatment, which is not equivalent to certain or probable ill-treatment.¹¹ Instead even a small risk could suffice as long as it is a real risk.

The Procedures Directive acknowledges the inderogable character of Article 3 in its provision that all applications must be considered under its basic safeguards, which reduces the likelihood of *refoulement* or a possible breach of Article 3. One such safeguard is that Member States should not reject or exclude applications on the grounds that they were not made as soon as possible,¹² meaning that applications cannot *ipso facto* be thrown out due to time limits and thus requiring States to have regard to the reasons for an application as well as procedural matters. This Article is, however, “without prejudice” to Article 23(4)(i) which states that Member States can consider an application “unfounded”, in other words, the application would never have succeeded, if the applicant has failed without reasonable cause to make their application earlier, where he or she had the opportunity to do so. Such a provision clearly recognizes a State’s prerogative in enacting such procedures and requiring applicants to comply with them where possible. In order to ensure that such applications are not treated differently, or can be used by the State as a simply exclusionary category, even those applications deemed “unfounded” must be examined using the basic procedural

⁹ *Ireland v United Kingdom* EComHR 18 January 1978, Series B no.23-I.

¹⁰ *Soering v United Kingdom* (1989) 11 ECHR 439, Judgment of 7 July 1989.

¹¹ Judgment 7 July 1989, Series A, vol. 161 at [99].

¹² Procedures Directive, Article 6.

standards as set out in Chapter II of the Directive.¹³ This would then require most applications to be examined “individually, objectively and impartially”.¹⁴

However, it is regrettable that the Directive makes no explicit mention of the ECHR or any other instruments of international human rights law, and so it is unclear whether the Directive is subsidiary to those other instruments. Instead, it invites Member States to apply the Directive itself in procedures when deciding on applications for any kind of international protection.¹⁵ Peers and Rogers point out that notwithstanding this provision Member States would still be bound to ECHR standards when interpreting the Directive due to the status enjoyed by the ECHR and case law of the European Court of Human Rights as an important source of EU law.¹⁶ The Directive, however, would have benefitted from having this expressly stated.

III. The Interview

A. The interviewing process under EU law

The interview is of integral importance. This is particularly the case because the Directive does not provide any safeguards for an asylum seeker to provide their story or any information in the absence of that interview. As opposed to other areas of the asylum procedure, the Directive has set out some clear procedural requirements for the interview process for Member States to abide by. As general rules, the requirements contained in Article 8 of the directive apply during the interviewing process, which contain obligations to examine the applications “individually, objectively and impartially” and to ensure that decision makers have the appropriate expertise to examine applications in that manner. It is this requirement that is crucial to the conducting of any interview and guaranteeing the rights of the applicant.

The particular duties with regards to personal interviews are contained in Articles 12 and 13. Article 12 requires that all asylum applicants are to be

¹³ Steve Peers and Nicola Rogers (eds) *EU Asylum Law: Text and Commentary* (vol. 12, Martinus Nijhoff Publishers, Leiden, 2006) at 368.

¹⁴ Procedures Directive, Article 8.

¹⁵ Procedures Directive, Article 3(4).

¹⁶ Peers and Rogers, above n 13, at 381.

interviewed as part of the asylum application, albeit with a number of exceptions. Article 13 requires Member States to take appropriate steps to ensure the interview is conducted in a manner which allows an applicant to “present the grounds for their application in a comprehensive manner”, which obliges a Member State to ensure the interviewer is competent to take into account personal or general circumstances, including the applicant’s cultural origin or vulnerability, and to ensure that an interpreter is selected to allow “appropriate communication”. Article 13 does not require this communication to necessarily be in the applicant’s preferred language but may be a language which “he/she may reasonably be supposed to understand and in which he/she is able to communicate”. Additionally, Article 15 provides the right to legal assistance for those interviews. However, the requirement for legal representation to be present during the interview is noticeably absent from the Directive.

B. Interview in Dutch Asylum Law

In the Netherlands, the interview procedure is governed by the Aliens Act 2000 with some further regulations and decrees under that Act. Under both the quick and normal procedure for considering claims for asylum, there are only two interviews. There is also a rest period of six days afforded under both the normal and quicker procedure. These two interviews are undertaken by an official from the Immigration and Naturalization Department (IND) after that rest period. The first of the two interviews, which occurs on the first day of the process, is merely concerned with the asylum seeker’s identity, nationality and travel route.¹⁷ A legal adviser may be present during this interview, but rarely is.¹⁸ It is not entirely clear why this occurs, but could be due to the fact that legal representatives are able to attend the interview but cannot question the applicant or interfere during the meeting.¹⁹ Thus, the use of legal representation during the interview might be limited. This can be at odds with the importance of the first interview. Although it is often viewed by lawyers and judges as a short intake merely concerned with the

¹⁷ Aliens Regulation 2000, Article 3.44.

¹⁸ Joukje van Rooij *Asylum Procedure versus Human Rights* (Vrije Universiteit Amsterdam, Amsterdam, 2004) at 3.

¹⁹ Nienke Doornbos “On Being Heard in Asylum Cases: Evidentiary Assessment through Asylum Interviews” in Noll, Gregor (ed) *Proof: Evidentiary Assessment And Credibility In Asylum Procedures* (Martinus Nijhoff Publishers, Leiden/Boston, 2005) at 111.

formalities of the case, it practically plays a significant role in establishing the credibility of the claim and the statements made in that first interview are often referred to in subsequent decisions made on that claim.²⁰

In no fewer than three days after an application has been submitted, a second, more detailed interview is undertaken which forms the basis for the application as the asylum seeker can explain his or her reasons in detail for requesting asylum.²¹ This system allows for the speedy consideration of a claim, for the majority of claims are able to be resolved quickly where there is clear evidence that an asylum seeker has suffered a qualifying fear or trauma capable of the granting of refugee status or not. However, it has been suggested that this process is flawed in several ways because when this procedure is applied to cases which require individual consideration due to specific circumstances or difficulty presented by the asylum seeker's account, this procedure often fails to be able to bring out such concerns in the interview.

An asylum seeker is expected to present a coherent, reliable account of events within a short amount of time after arrival into the Netherlands which can be unrealistic in some cases. There can be significant factors which can prevent an asylum seeker feeling secure in providing their full story, mostly due to trauma, fear of endangering others by doing so or shame. As the asylum decision relies solely on the individual observation of the interviewing officer only, there is a real risk that if a person is prevented from telling their story fully, that this is instead classed as denial and will not be included in the officer's account of the interview.²² In fact, the very reason why a person is seeking asylum often falls within those categories and so having only two interviews given to the asylum seeker might not be sufficient to draw out the full story if the person is scared, traumatized or ashamed of doing so, especially when there are no exceptions to this rule. The rest period of six days cannot provide a sufficient buffer in such circumstances. Joukje van Rooij rightly points out that particularly in the case of sexual violence or other forms of trauma, subsequent interviews might be necessary to allow for a relationship of trust to be established and to gather all

²⁰ At 110.

²¹ Aliens Decree 2000, Article 3.111.

²² Janus Oomen "Torture Narratives and the Burden of Giving Evidence in the Dutch Asylum Procedure" 5(3) 2007 *Intervention* 250 at 251.

relevant information that might not be revealed during those two interviews.²³ This is a required requirement, as a subsequent application can only be made on new facts or circumstances which could not be adduced at an earlier stage.²⁴ The Council of State, the district court which deals with appeals from asylum applications, has expressly stated that it does not matter that those facts or circumstances could not be adduced due to language problems²⁵, fear to endanger family members²⁶, shame or psychological problems²⁷. Thus, an asylum seeker has no other avenue for redress if they do not state their full story during the two interviews when they were operating under the above circumstances.

C. Does Dutch interviewing procedure comply with EU law?

1. The Procedures Directive and Dutch interviewing procedure

In light of the requirements as stated by the Directive, the Dutch system of interviewing procedures can be criticized for not placing enough emphasis on any substantive individual examination in the interview under Article 8 of the Directive. This can be the case as a testimony may be inconsistent, incredible or even untruthful at times and the process marked with cultural and linguistic misunderstandings, but still have merit.²⁸ It is therefore unsatisfactory to merely claim a story is inconsistent and consequently reject it.

It is therefore a just recommendation to prevent victims of serious physical or psychological problems at the time of the interview, or other people exhibiting symptoms of trauma, to be admitted to the full procedure instead of the accelerated procedure.²⁹

Interviewing officers have been left with considerable discretion under the Directive and Dutch asylum procedure on how to conduct an interview. Article 13(3)(a) of the Directive merely provides that officers should be properly trained and should have the appropriate expertise required to undertake an individual

²³ Van Rooij, above n 18, at 24.

²⁴ General Administrative Law Act (*Algemene wet bestuursrecht; Awb*) 1994, Article 4:6(1).

²⁵ *Raad van State* 5 September 2001, *JV* 2001/285 and *NAV* 2001/315-kort.

²⁶ *Raad van State* 5 March 2002, *JV* 2002/124.

²⁷ *Raad van State* 28 June 2002, *JV* 2002/294 and *Raad van State* 16 July 2002, *JV* 2002/304.

²⁸ Cathryn Costello *The European Asylum Procedures Directive in Legal Context* (United Nations High Commissioner for Refugees, November 2006) at 2.

²⁹ Human Rights Watch *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy* (Human Rights Watch, April 2003), at 3.

assessment of each claim. The Netherlands has thus devised its own rules, but these have resulted in discrepancies between interviews. Nienke Doornbos has demonstrated the discrepancies which occur in Dutch interviews due to a lack of proper training of officers. She documents that an interviewing officer will usually start the second interview with a repetition of questions from the first interview or a confrontation of any contradictory or vague statements that were made by the asylum seeker, while the second interview is to be characterized by ‘free reproduction’, meaning that the asylum seeker should be given the opportunity to speak freely about their motives.³⁰ This means that in certain cases, some asylum seekers would be allowed more time and space to explain their story than others would. It also reveals that some officers might have pre-existing ideas about the genuineness of a claim for asylum before the interview begins, with some forming the view quite early on that the claim is not genuine or that the asylum seeker is an economic migrant instead, which means that the atmosphere in which that interview is conducted would differ. Indeed the lack of receptivity and responsibility taken for the situation or the individual’s needs due to preconceived frames of thought or stereotypical assumptions made by the interviewer means that an asylum seeker is reduced to a number, rather than an individual.³¹ Doornbos also notes serious communication problems during the interview, often in a combination of the role and behaviour of the officer, including a lack of experience, cultural or political knowledge on the part of the interviewing officer, questions did not connect with the asylum seeker’s knowledge, the speed of questioning was too fast or the officer was jumping from one subject to another.³²

2. The ECHR and Dutch interviewing procedure

Hatami v Sweden has held that the rejection of an asylum seeker’s application due to apparent inconsistencies in their story resulting from the interview conducted with inadequate interpretation and culminating in a short report without any detail and not explained to the applicant was a breach of Article 3 as it was an inadequate procedural safeguard.³³ Additionally, it is also clear that in order to avoid liability under Article 3 here the authorities are required to focus more on

³⁰ Nienke Doornbos, above n 19, at 114.

³¹ Suzanne Metselaar, “When Neighbours Become Numbers: Levinas and the Inhospitability of Dutch Asylum Policy” 11(1) *Parallax* 2005 61 at 65.

³² Nienke Doornbos, above n 19, at 119.

³³ Report, 23 April 1998 (unreported).

the applicant's statements about threat of torture from their history, political views or ill-treatment.³⁴ *Hatami* also contended that complete accuracy in an applicant's account is to be seldom expected with victims of torture.³⁵ This clearly suggests the ECHR will not rule against a lack of credibility of an applicant regarding their transit if there was still a sufficiently sound argument that a risk under Article 3 would occur if the person was to return to their home country.

IV. Subsequent Application

A. Subsequent application under EU law

Article 32 of the Directive makes it plain that Member States can make provision for special procedures to deal with subsequent applications. An important question that has come up is whether documents that could have been produced at the first hearing are appropriate grounds for appeal or a subsequent application.

This does not seem to be a determinative factor in of itself under European Union case law. The House of Lords in *Hilal v United Kingdom* has held that whether a document could have been produced at an earlier stage is not of overriding importance.³⁶ Mr. Hilal had not disclosed during his first interview that he had been arrested and tortured, but mentioned it in his full interview. After his application had been rejected, he provided supporting documentation for his application, namely his brother's death certificate and a medical report about his treatment while detained, but these documents were rejected by the Secretary of State as they could have been produced earlier and as such cast doubt over his application. However, the court placed little significance on the issue that it had been adduced later on and instead focused more on the documents and what they proved and so held that the documents should be admitted.

The Court will make its own judgement as to whether deportation would be contrary to Article 3, so it is only logical that the Court may consider evidence which was not known to the respondent State at the time it decided on deportation, and the Court's case law elucidates that it finds the moment at which

³⁴ Peers and Rogers, above n 13, at 382.

³⁵ Report, 23 April 1998 (unreported) at [96]-[109]. This is in line with the position held by the UN Committee Against Torture as held in decisions like *Haydin v Switzerland*, Communication no. 101/1997; or *Tala v Sweden*, Communication No. 43/1996.

³⁶ ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II.

evidence was submitted as immaterial as long as it is reliable.³⁷ However, this does not mean that the Court will not pay attention to the time a statement was made or when the evidence was submitted, but it considers it instead in an exclusively substantive, as opposed to formal, manner.³⁸ The automatic and mechanical application of domestic procedural rules should not deny the asylum seeker a realistic opportunity to prove their claim to asylum. As Thomas Spijkerboer suggests, the prohibition contained in Article 3, which is *jus cogens*, and this may have priority over any procedural autonomy of States where there might be concern that the decision to deport might be in contravention of Article 3.³⁹

B. Subsequent applications: the Dutch Approach

Under Dutch law, the court cannot reverse IND decisions but only judge, on the basis of ‘new’ documents, that the IND did not follow its own instructions and then allow a subsequent application for asylum. As such, the IND has the authority to simply dismiss a repeated application by referring to its earlier decision, when the asylum seeker does not make a reasonable case for new facts or circumstances.⁴⁰ However, the IND does not easily find that a document is ‘new’. The Council of State has held that information relating to trauma-related events, torture or other experiences connected to an asylum seeker’s fears of persecution are not to be adduced in appeal unless they were previously raised with the IND, as the Council can only review matters that were raised during that original assessment undertaken by the IND.⁴¹

The Raad van State has held that a medical report which is drawn up after a decision has been made but could have been drawn up earlier in the procedure is not new and will not be taken into account.⁴² This can be problematic when an asylum seeker has not disclosed traumatic events, such as torture, because they were traumatized and have thus had their application declined but could prove the

³⁷ Spijkerboer, above n 40, at 55-56.

³⁸ At 56.

³⁹ Thomas Spijkerboer “Subsidiarity and ‘Arguability’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases” 21 *IJRL* 2009 48 at 58.

⁴⁰ General Administrative Law Act, Article 4:6(2).

⁴¹ Council of State, decision no. 200202452/1, Decision of 16 July 2002.

⁴² 23 April 2002, 200201688/1.

existence of torture by way of medical examination. Janus Oomen suggests that a medical report, which can often be produced much after the asylum seeker has been interviewed, and is then needed for new documentation to have their claim re-examined, is too late and should be done when someone initially enters the country so that an asylum seeker does not have to give account of their trauma but that there is a medical report which can give independent proof of this.⁴³ He posits that ninety percent of those who had been refused asylum wrongly, a medical examination at the definite hearing, or second interview, would have contributed to the proper decision.⁴⁴

V. Special Procedure

A. EU law on accelerated or special procedure

The Procedure Directive permits the use of special or accelerated mechanisms for processing applications, and these mechanisms are governed by Articles 23-35 of the Directive. Articles 23, 24 and 28 allow accelerated procedures or special procedures for a wide range of applications such as manifestly unfounded claims or for applications made at the border. In fact, the Directive allows the use of accelerated procedures in fifteen specified cases, but leaves it open to Member States to apply those procedures in other cases if they should wish to which has made the Directive less precise in directing when such an accelerated procedure might be appropriate.⁴⁵ Member States are thus left with considerable discretion on when to use accelerated procedures.

The starting point is that all applications must be considered in accordance with the basic principles and guarantees of Chapter II of the Directive.⁴⁶ Chapter II provides the basic safeguards that a procedure must comply with. One such safeguard is that the procedure is to be concluded as early as possible but without prejudice to an adequate and complete examination.⁴⁷ Special procedures are allowed but this assessment still requires applications to be considered consistent

⁴³ Oomen, above n 22, at 255.

⁴⁴ At 253.

⁴⁵ Peers and Rogers, above n 13, at 376.

⁴⁶ Procedures Directive, Article 23(1).

⁴⁷ Procedures Directive, Article 23(2).

with the basic principles and guarantees of Chapter II, like Article 23(1).⁴⁸ Even though it is clear from the Procedures Directive that all procedures enacted by Member States must comply with the basic principles and guarantees of the Directive, it is less clear when it is appropriate for such special procedures to be used. Article 23 does not give an exhaustive list of when accelerated procedures might be used, but rather states that Member States may do so in *any* application.⁴⁹ This is due to the fact that the Directive is concerned for a great deal with enabling Member States to deal quickly and efficiently with inadmissible and unfounded cases. Such special procedures can indeed provide for more efficient and effective decision-making in asylum cases. However, to the extent that this is actually the case can be much inhibited by deficient national asylum procedures.⁵⁰

A noticeable absence from the Directive is also what would constitute a “regular” procedure. Rather, the lack of any guidance on this has meant that divergence in practice has surfaced, as is exemplified by the Dutch special procedures, which was something that the harmonization process specifically sought to eliminate. The Directive is therefore problematic in the extent to which it allows proceedings and appeals to be accelerated and standards in relation to procedure to be lowered in special circumstances.⁵¹ The Committee of Ministers, as part of the Council of Europe, have issued guidelines on accelerated procedure, but does not state any helpful guidance on what the time limit should look like. It simply states:

The time taken for considering an application shall be sufficient to allow a full and fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant.⁵²

Such an abstract statement is not particularly helpful in interpreting the Directive and provides no further guidance. It is a missed opportunity to set out well-defined standards and fails to exceed a simple restatement of existing procedure in

⁴⁸ Procedures Directive, Article 23(3) and (4).

⁴⁹ This is also in accordance with Preamble (11) to the Directive, which restates the proviso in Article 23.

⁵⁰ Peers and Rogers, above n 13, at 385.

⁵¹ At 393.

⁵² Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures* (Council of Europe, 1 July 2009) at IX(2).

a weaker form.⁵³ Thus, the Directive provides little guidance as to what constitutes an accelerated or special procedure or in which circumstances its use might be appropriate.

B. Special procedure in Dutch asylum law

Under Dutch law, there is a new asylum procedure which came into force on 1 July 2010. Now there is the AA procedure (*Algemene Asielprocedure*) under which a claim is decided in eight days, and can be prolonged for a maximum of six days if necessary.⁵⁴ Most claims will be processed under the AA procedure as it is the procedure used at the border at all reception centres. If the IND cannot make a decision within that timeframe, the asylum seeker is transferred to the extended procedure under which a decision can be given within six months of receipt of the application, which can be extended in some cases.⁵⁵ It has also instituted a rest period of six days before the asylum seeker is to be interviewed or the asylum procedure formally starts. This is a marked improvement from what the accelerated procedure prior to 2010 was which meant a case was decided within 48 procedural hours.⁵⁶

The special procedure usually means a determination on an application will be made after just four days from the start of the procedure, which starts after six rest days. On the first day, the asylum seeker undergoes their first interview, followed by a day to discuss with their lawyer, a further interview on the third day and another day allowed for consultation with a lawyer.⁵⁷ On the fourth day, the asylum seeker has to review a report of the interview, the letter of intention, which sets out any reasons for the refusal of the asylum claim, as well as file for any corrections or additional information or respond to the letter of intention.⁵⁸ This short timeframe becomes problematic, as Joukje van Rooij points out, when

⁵³ Nuala Mole and Catherine Meredith Asylum and the European Convention on Human Rights (Council of Europe, 2010) at 106.

⁵⁴ European Union Agency for Fundamental Rights “Country Factsheet Netherlands” (2010) EDZ Archi Dok Europäische Dokumentationszentren – Archivierung von EU-Onlinedokumenten <http://www.pedz.uni-mannheim.de/daten/edz-b/abr/10/asylum_factsheet_Netherlands_en.pdf> at 4.

⁵⁵ Aliens Act 2000, Article 42(1). For the exceptions to this Article, please see Articles 42(4) and 43 of the Act.

⁵⁶ Aliens Decree 2000, Article 3.110 [1.2].

⁵⁷ Dutch Council for Refugees, “General Asylum Procedure From Day to Day” (2014) Dutch Council for Refugees <<https://www.vluchtelingenwerk.nl/node/228259>>.

⁵⁸ Aliens Decree 2000, Article 3.118 [2].

establishing rapport or a relationship of confidence with a lawyer nor does it allow sufficient time for a proper review of the application.⁵⁹ Complex admissions cannot really be investigated further and there is also a real danger that the asylum seeker does not comprehend the significance of the interviews until they are over.⁶⁰ Consequently it becomes questionable whether the substantive quality of decisions is not compromised and instead more importance is attached to efficiency.⁶¹ At present, there is little information available about whether the quality of decision making and so it is uncertain whether the faster procedures have had a detrimental impact on the examination of asylum applications.⁶² However, as these procedures have become the norm rather than the exception, any substantial examination of a claim is most likely to be very limited.

C. Article 3 ECHR and time limits

The issue raised with such quick procedures for assessment is whether such a time limit can be strictly interpreted or whether the substantive merit of a claim may warrant further time to consider the claim. The Netherlands arguably has asylum processes which are very much focused on procedural compliance. As such, it is arguable that such an approach has the potential to dispel genuine asylum applications which could breach an individual's right under Article 3 of the ECHR.

The European Court of Human Rights initially placed more emphasis on the asylum seeker having followed the correct procedure. In 1998 the European Court of Human Rights took such a strictly procedural approach. In *Bahaddar v the Netherlands* it was held that the formal requirements and time-limits laid down in domestic law should normally be complied with as they allow the Member State to discharge their case load in an orderly manner and only where there are special circumstances may this obligation to comply with the rules be absolved, but this is

⁵⁹ Van Rooij, above n 18, at 6.

⁶⁰ Human Rights Watch, above n 29, at 10.

⁶¹ H.B. Winter and K.F. Bolt "Quality in Dutch Asylum Law: From 'Strict but Fair', to 'Fast but Good'?" in K.J. de Graaf, J.H. Jans, A.T. Marseille & J. de Ridder (eds) *Quality of Decision-Making in Public Law: Studies in Administrative Decision-Making in the Netherlands* (Europa Law Publishing, Groningen, 2007) at 136.

⁶² *Idem* at 149.

dependent on the individual facts of a case.⁶³ In the Netherlands, the Raad van State considers Article 4:6 of the Awb to be such a rule.⁶⁴

A more substantive approach has since been favoured the European Court of Human Rights. In 2000, the court in *Jabari v Turkey* held that the automatic and mechanical application of a very strict five-day registration period for an asylum claim as required by Turkey would be at odds with the protection of the fundamental principle contained in Article 3 of the Convention.⁶⁵ In that case, Ms. Jabari argued that her expulsion back to her home country would subject her to the possibility of being stoned to death for having committed adultery and that this would be contrary to Article 3 of the ECHR. Her claim had been rejected as she had not registered her claim within five days of arriving in Turkey, which she was procedurally required to do. The court upheld her claim under Article 13 which guarantees the right to an effective remedy. The Court considered that as expulsion is of such an irreversible nature given the harm that might occur if Ms Jabari was to return to Iran, combined with the importance afforded to Article 3, an effective remedy under Article 13 necessitates independent and rigorous scrutiny of a claim where there are substantial grounds of a real risk of treatment that are contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.⁶⁶ Thus, generally speaking, the European Court of Human Rights has prevented procedural deterioration and insists instead on vigilant factual assessment of individual cases.⁶⁷

Unfortunately, the Netherlands has refused to implement a more substantive approach to asylum claims. As Van Rooij points out, the Raad van State rejects an appeal on grounds of Article 3 ECHR without rigorous scrutiny but merely by way of reference to Article 4:6 of the Awb, Article 83 of the Aliens Act or Article 3.119 of the Aliens Decree and by doing so the Netherlands maintains the same erroneous position as the Turkish court in Ms. Jabari's case.⁶⁸ Instead, the reasoning as suggested in *Jabari* is of much more persuasive nature as the application of unduly strict time limits or procedure should constitute a breach of Article 3 in an individual case.

⁶³ ECHR 19 February 1998, Reports 1998-I at [45].

⁶⁴ Raad van State 5 March 2002, JV 2002/125, NAV 2002/129 and AB 2002, 169.

⁶⁵ ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII at [40].

⁶⁶ At [50].

⁶⁷ Costello, above n 28, at 5.

⁶⁸ Van Rooij, above n 18, at 26.

VI. Right to Appeal

A. Dutch review procedure for asylum applications

Administrative bodies are under the obligation to give reasons for a decision when that decision is communicated.⁶⁹ The General Administrative Law Act also requires that if a decision can be appealed, it must be mentioned when the decision is given, as well as any time limit within which the appeal must be lodged and with which authority or body it must be lodged.⁷⁰ For asylum applications, Article 69(1) of the Aliens Act states the time limit for filing a review of decision is four weeks for those applications which have been assessed under the extended procedure, and the right to submit for a review under the AC procedure is one week pursuant to Article 69(2) Aliens Act. As previously stated, most applications are dealt with under the AC procedure, and so it will be more likely that an asylum seeker will have only one week to file for review after a decision has been given. An asylum seeker can appeal under administrative law by way of judicial review – firstly to a district court followed by a subsequent right of review to the Council of State.⁷¹ The asylum seeker therefore does not have a right of appeal as such. Judicial review is only concerned with whether the correct processes were used, and whether they were used properly, rather than a review of the outcome of the matter.

There are also issues with the type of review that is applied to these types of applications. The type of review is, as stated, not an appeal and only a review of the applicable procedure, with little consideration of whether the claim to asylum is in fact genuine. In particular, it is established fact that judicial review by the Regional Court and the Administrative Jurisdiction Division in administrative law appeal proceedings under the Aliens Act 2000 only addresses whether the executive authority concerned has exercised its administrative powers in a reasonable manner and, in the light of the interests at stake, could reasonably have taken the impugned decision (*marginale toetsing*).⁷² This means only a marginal scrutiny will be applied when assessing the facts of the case, including the credibility of the claim.

⁶⁹ General Administrative Law Act 1994, Article 3:47(1).

⁷⁰ General Administrative Law Act, Article 3:45.

⁷¹ Aliens Act 2000 (Netherlands), s 71(1) and (5).

⁷² *Afif v The Netherlands* ECHR 24 May 2011, Application No. 60915/09 at [28].

Such narrow examination can become problematic in asylum applications where there is a real claim of asylum present, but procedural requirements have been abided by, which means that the claim could still be rejected. This means that claims can be dealt with quickly on appeal as the court or Council of State will not concern itself with the actual claim of asylum itself, but rather examines how the IND undertook its examination of the claim. However, such an approach clearly risks some legitimate claims to be rejected, leaving with the asylum seeker with no other avenue of redress at the national level. This means that the Council of State as a final resort of appeal presents a “strikingly restrictive cast to Dutch asylum law”.⁷³ Of particular concern is when an asylum seeker has also had to submit their application using the accelerated procedure. This has the potential for inappropriate determination of a claim if a claim involved complex legal or factual issues or severe trauma, which can only be given brief consideration in the accelerated procedure, and given the limited scope of judicial review; there is little hope of sufficient redress through this process.⁷⁴ This approach taken by the Dutch authorities to only apply marginal judicial review of a decision seems to go against the approach taken by the European Court of Human Rights in respect of Article 3 and 13, which focuses more on the substance of an application.

B. Article 13 ECHR

Article 13 of the ECHR provides for the right to an effective remedy at the national level by stating that if an individual’s rights under the Convention are violated, that person should have an effective remedy before a national authority. Of course, in the context of asylum claim, the asylum seeker will normally argue that the breach they require an effective remedy for is Article 3 of the ECHR. The two rights are thus very much linked in the context of asylum claims. As such, the Court in *Jabari v Turkey* has held that the same “rigorous scrutiny” that is required when examining a breach of Article 3 is also applicable to Article 13.⁷⁵

It must be noted that the European Court of Human Rights does not require the appeal process to necessarily be dealt with in the courts. The court in *Conka* held that such appeal does not need to be before the courts but can be before *national*

⁷³ Human Rights Watch, above n 29, at 2.

⁷⁴ *Idem*.

⁷⁵ *Jabari v Turkey*, above n 67, at [50].

authorities.⁷⁶ As such, the Dutch approach to refer any appeals to judicial review in the district court and to the Council of State appears to be compatible with EC case law. However, what is clear is that when appeals are not examined in the courts, it will be relevant what remedy they can provide and whether this is sufficient. It is clear from the case law that judicial review is considered to be an effective remedy.

However, is the Dutch system of marginal judicial review truly capable of satisfying the “rigorous scrutiny” as was prescribed in *Jabari*? The court appears to have allowed Member States to develop systems which would fall short of such a system. *Salah Sheekh v the Netherlands* has held that the remedies under Dutch judicial review were adequate as they were capable of providing the necessary remedy.⁷⁷ Similarly, the European Court of Human Rights has expressly accepted a system of judicial review that is used in the United Kingdom which applies a scrutiny that is less intense than that which the Court might use itself.⁷⁸

When the Court is concerned with determining any liability of a Member State under Article 13

Appeals procedures in regards to asylum applications are crucial to the safety and acceptability of any system purporting to provide protection. As Peers and Rogers state, the adequacy of procedures is key to a fair system of asylum procedure in Europe.⁷⁹ However, it has become part of a European trend on the part of Member States to avoid having to examine the substance of asylum applications by way of procedural sophistication, which restricts the scope of examination as much as possible and leaves the substantive examination to the European Court of Human Rights.⁸⁰ Yet the European Court of Human Rights, as it is an organ of appeal subsidiary to that of national systems, should not apply scrutiny that has not been raised at the national level or exceed such scrutiny – otherwise it is in danger of becoming a court of first instance.⁸¹ Such a state of affairs is unsatisfactory as States must take the responsibility for examining the substance of an application, and should not leave it in those cases that come to appeal at the European level. Indeed, the European Court of Human Rights cannot rewrite national law on

⁷⁶ *Conka v Belgium* ECHR 5 February 2002, Application No. 51564/99 at [13] and [79].

⁷⁷ ECHR 11 January 2007, Application No. 1948/04.

⁷⁸ Spijkerboer, above n 40, at 66.

⁷⁹ Peers and Rogers, above n 13, at 384.

⁸⁰ Spijkerboer, above n 40, at 49.

⁸¹ At 51.

administrative law in this regard as this would be contrary to its subsidiary role and instead can only scrutinize the way in which the procedure was applied in the Member State's decision to deport, and cannot occupy itself with the act of deportation itself.⁸² This leaves a considerable gap between case law of the European Court which cannot question the decision to repatriate and national practice which similarly does not look at the decision itself but applies only marginal review of the procedure. Therefore, in order to satisfy Article 13, the body considering the appeal of a claim must consider the merits of that claim, should provide for the possibility of suspending any deportation order and it should not be constrained by a restrictive time limit within which the application must be lodged.⁸³

C. Automatic suspensive effect

The Procedures Directive appears to allow for non-suspensive appeals which would allow an asylum seeker to be deported from the Member State before their appeal has been heard. Article 39(3)(b) provides that the possibility of legal remedy or protective measures does not necessarily have to have the effect of allowing applicants to remain in the Member State concerned pending its outcome. As such, there is no real right under the Directive providing for any suspensive effect of deportation if an asylum seeker has filed for an appeal of the refusal of their application.

1. Non-suspensive effect of deportation under the Aliens Act

Under Article 61 of the Aliens Act, the submission of a review of decision on an asylum application will not suspend the obligation on the asylum seeker to leave the Netherlands of their own volition. For the purposes of immigration, an asylum seeker has to leave the country within four weeks after their lawful residence has ended.⁸⁴ However, in the asylum context the asylum seeker must leave immediately upon the rejection of his or her application during the procedure at the application centre and when he or she has submitted a previous application for

⁸² At 68.

⁸³ Mole and Meredith, above 54, at 124.

⁸⁴ Aliens Act 2000, Article 62(1).

asylum.⁸⁵ Only if an application has been considered under the extended asylum procedure is the operation of an order on a residence permit suspended until the time limit under which an appeal must be lodged has expired, or if it has been lodged, until a judgement is given.⁸⁶ Under the AC procedure, however, no such automatic suspensive effect will take place which is provided under Article 82(2) of the Aliens Act. However, the asylum seeker does have a right to submit a request for an interim permit to suspend their removal until a decision has been made on appeal under Article 78 of the Aliens Act.

2. Non-suspensive effect and the European Court of Human Rights

In contrast to the Procedures Directive, the European Court of Human Rights has stated that in the review of rejection of an application for asylum, a non-suspensive effect is invoked in respect of any appeal against a decision of expulsion where Article 3 could be invoked.⁸⁷

The Court has held that a system of separate applications to the courts, meaning that suspension of an application of an expulsion order after a separate application to the courts, was in breach of Article 13.⁸⁸ However, it has now clearly been established that where the applicant seeks to appeal a decision on their expulsion, a remedy will only be effective if it has suspensive effect.⁸⁹ It is not sufficient to point to established practice that expulsion will only occur after a domestic court has decided whether or not to apply suspensive effect to an application.⁹⁰

Pending the examination of an application expulsion must not occur as otherwise their human rights could be irreparably violated, and thus that person has a right to temporary stay up to the first decision at issue.⁹¹

Conka v Belgium held that Article 13 of the ECHR will be breached if a national authority carries out an expulsion prior to any determination of whether that

⁸⁵ Article 62(3)(c).

⁸⁶ Article 82(1).

⁸⁷ For instance, see *Jabari v Turkey* at [50] or *Conka v Belgium* at [70]-[71]. For citation, please see above n. 67 and n. 78, respectively.

⁸⁸ *Conka v Belgium*, above n 78.

⁸⁹ *NA v United Kingdom* ECHR 17 July 2008, Application No. 25904/07 at [90].

⁹⁰ Spijkerboer, above n, at 72.

⁹¹ Ralf Alleweldt “Protection Against Expulsion Under Article 3 of the European Convention on Human Rights” (1993) 4 *EJIL* 360 at 375.

expulsion would be in breach of the ECHR and in this case the Belgian procedure which denied suspensive effect was in particular in breach of Article 13.⁹²

VII. Conclusion

Dutch asylum procedure highlights the serious discrepancies between State practice, EU law and EU case law; none of which align or complement each other where necessary. The current system has allowed national systems to emerge that enact legislation seemingly contrary to case law of the European Court of Human Rights. The Court arguably favour examining an application for its merits and substance, as opposed to asylum procedures such as that of the Netherlands, which requires its procedures to be followed strictly with little consideration of the substantive merit of a claim.

As previously stated, the Directive was enacted to provide minimum procedural safeguards and to provide a step in the direction of a common asylum procedure. However, due to a lack of guidelines and clarity on certain key issues, State practice has been allowed to diverge, making a uniform system unworkable as States have retained considerable discretion to enact legislation according to its own interpretation of the Directive. The Netherlands has used this discretion in an attempt to decrease the numbers of asylum seekers coming to its borders, so it enacted strict procedures with a focus on meeting procedural deadlines, with little room for exceptions or special circumstances, and this system can present a serious risk of a breach of Article 3 ECHR in individual cases where a person is deported to their home country where they still have a real risk of ill-treatment.

The procedure currently in place for interviews reveals what important gaps have been left by Member States to fill, such as how an interview is conducted and what officers are expected to be trained and experienced in. There can only be two interviews and in some cases, such as when an asylum seeker is scared, ashamed or too traumatized to be able to recount the full story so quickly upon arrival into the country, is problematic in itself. This area is one in which EU case law has been very different, notably with allowing contradictory statements. There are also very limited grounds for subsequent applications to be made and the

⁹² *Conka v Belgium*, above n 78.

‘new’ evidence test is too strictly applied and has the potential to exclude evidence which should rightly be considered in a determination. Furthermore there is the use of special procedures in most asylum applications, which allow for faster determination of a claim. Although this will surely be efficient and helpful in a large proportion of cases, there is not enough guidance on when that procedure is not suitable and instead it has become the procedure under which claims are nearly always automatically assessed. Most notably, however is the right to appeal. Under Dutch law there is only a marginal judicial review applied to these cases which stands in stark contrast to EU case law which calls for “rigorous scrutiny” to be applied to cases where Article 3 might be at risk of being breached. Furthermore, EU law has ruled that the decision of expulsion of an asylum seeker awaiting appeal is to have suspensive effect, yet the Netherlands has no such requirement in the majority of cases.

Therefore, there have been huge gaps left in what kind of procedure Member States should enact and what principles they should be based on. These are gaps that the Directive cannot fill as it is too ambiguous; nor can they be supplemented by EU case law and state practice as it is conflicting. Perhaps if there is a desire for a common European asylum system, an overhaul of current legislation is required to provide clearer guidelines.

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