



VU Migration Law Series No 2

## **Marginal judicial review in the Dutch asylum procedure**

**An assessment in light of article 3 and 13 of the European Convention on Human Rights**

with an afterword by Thomas Spijkerboer

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Migration Law Series



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## Working Paper Series

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- Migration law series 1: Joukje van Rooij, *Asylum Procedure versus Human Rights*, April 2004.
- Migration law series 2: Said Essakkili, *Marginal Judicial Review in the Dutch Asylum Procedure*, June 2005.

This publication was made possible by the generous support of the Dutch Refugee Council.  
The author wishes to thank Robert Barnidge jr. for his editorial assistance.

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## **Introduction**

This paper addresses whether the marginal judicial review imposed in the Dutch asylum procedure by the Administrative Jurisdiction Division of the Council of State (Council of State) in Dutch asylum cases results in judgments that violate article 3, article 13, or both articles 3 and 13 of the European Convention on Human Rights (ECHR).

Because an understanding of the background of limited judicial review and the jurisprudence of the Council of State in asylum cases is necessary to answer this question, the first chapter of this paper discusses Dutch asylum procedure generally. Chapter two examines marginal judicial review in Dutch administrative law.

An analysis of the Council of State's jurisprudence in asylum cases up to 1 January 2005 is presented in chapter three.

Finally, chapter four assesses the marginal judicial review applied by the Council of State in light of the case law of the European Court of Human Rights (Court) on articles 3 and 13 of the ECHR.

## **Chapter 1 The Dutch Asylum Procedure**

### **1.1. The Application**

The asylum procedure starts with the asylum seeker's application.

The procedure starts in the Aanmeldcentrum, or Application Centre (AC). After the application is filed, the asylum seeker must remain at an appointed place, usually at the AC.

### **1.2 The First Interview**

As soon as possible after the application has been filed, a first interview is held at the AC.<sup>1</sup> The asylum seeker must answer questions to determine his identity, nationality, and route of travel. No questions are asked about the reasons for his departure from his country of origin. The asylum seeker is then informed that he will have the opportunity to answer questions about his reasons for leaving his country of origin in another interview, the "nader gehoor."

After the first interview, an assessment is made to determine whether the application will be dealt with in the accelerated procedure or in the normal procedure, the Onderzoeks- en oriëntatiecentrum procedure (OC). This assessment stages is called the "procesbeslissing." In the accelerated procedure, the application will be dealt with within forty-eight procedural hours. In the normal procedure, the application will be dealt with, in principle, within six months.<sup>2</sup>

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<sup>1</sup> Art. 3.110 Aliens Decree.

<sup>2</sup> Art. 42 Aliens Act 2000.

In determining whether an application will be dealt with in the accelerated procedure, the decision maker carefully assesses whether a decision could be reached in a careful manner within forty-eight hours.<sup>3</sup> Thus, applications of minors, victims of torture, ill people, and people from countries with widespread human rights abuses are dealt with in the accelerated procedure.

### **1.3 The Accelerated Procedure**

After the Immigration and Naturalization Department (IND) has decided that the application will be dealt with in the accelerated procedure, a second detailed interview will be held with the asylum seeker.<sup>4</sup> The asylum seeker has two procedural hours to prepare for this. There normally have to be at least six days between the application and the second interview.<sup>5</sup> The asylum seeker can contact someone to provide him legal aid, discuss the first interview, and prepare for the second interview. In the second interview, he can tell the authorities why he has left his country of origin. A report is made of the second interview and handed over to the applicant as soon as possible.<sup>6</sup> After the transcript of the second interview has been provided to the asylum seeker, he can make corrections and additions as necessary. According to article 3.111(3) of the Aliens Decree, the asylum seeker must complete this within two days. However, if the asylum request is dealt with in the AC, the asylum seeker only has three procedural hours to make corrections and additions to the report of the second interview.<sup>7</sup> During these three hours, he can also discuss the second interview with his legal aid, who can give his view on the draft decision to reject the asylum application.<sup>8</sup> In many cases, however, there is little time available to formulate and present corrections and additions to the second interview report or submit a view on the draft decision to reject the asylum application.<sup>9</sup> Finally, it is important to mention that the asylum seeker's application can be transferred to the OC procedure at any time.

### **1.4 The Normal Procedure**

After the first phase in the application centre or later, when the IND decides not to deal with the application in the accelerated procedure, the asylum seeker is sent to a reception centre. Six days after the application is filed, but not before, the second interview is held.<sup>10</sup>

In this second interview, the asylum seeker can give information about his motives for leaving his country of origin.<sup>11</sup>

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<sup>3</sup> ABRvS, 29 June 2001, *JV* 2001/208.

<sup>4</sup> Arts. 3.111-3.112 Aliens Decree 2000.

<sup>5</sup> Art. 3.111 Aliens Decree 2000.

<sup>6</sup> Art. 3.111(2) Aliens Decree 2000.

<sup>7</sup> Art. 3.117(2) of the Aliens Decree 2000, C3/12.2.9 Aliens Circular 2000.

<sup>8</sup> C3/12.2.9 Aliens Circular 2000.

<sup>9</sup> Voorstel van Vluchtelingenwerk Nederland voor een nieuwe asielprocedure, 18 Juni 2004, (Bijlage 2 bij de brief van VluchtelingenWerk aan de woordvoerders inzake Integratie en Asielbeleid van de vaste commissie voor Justitie van de Tweede Kamer).

<sup>10</sup> Art. 3.111 Aliens Decree 2000.

<sup>11</sup> C3/13.4 Aliens Circular 2000.

After the second interview has been held, the public servant of the IND makes a report. As soon as this report is available, it is handed over to the asylum seeker and his legal aid. The asylum seeker is then given the opportunity to make corrections and additions to the report. In the normal procedure, the asylum seeker has this opportunity before a negative decision is drafted.

After the second interview has been held and after the asylum seeker has had the opportunity to make corrections and additions to the second interview report, the asylum seeker will then be given a draft negative decision if the IND intends to reject the application. This draft negative decision is usually sent to his counsellor.<sup>12</sup>

According to article 3.115 (2) of the Aliens Decree 2000, the asylum seeker has four weeks to give his written view of the draft negative decision.

After the asylum seeker has had an opportunity to express his view on the draft negative decision, the IND will give a final decision. This will then be sent to the asylum seeker's counsellor.<sup>13</sup> If there is no known counsellor, the final decision will be personally handed to the asylum seeker.

### **1.5 The Grounds on Which Asylum Can Be Granted**

Articles 29, 30, and 31 of the Aliens Act 2000 describe the cases in which an asylum seeker can be granted a residence permit, as well as the cases in which a residence permit must be denied. The grounds on which a residence permit may be granted are specified in article 29 of the Aliens Act 2000.

An asylum residence permit can be granted, according to article 29(1) of the Aliens Act 2000, when:

- a. The asylum seeker is a refugee in the sense of the Refugee Convention;
- b. The asylum seeker faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment;
- c. The minister believes that the asylum seeker cannot reasonably be asked to return to his country of origin for humanitarian reasons; or
- d. The minister believes that to return the asylum seeker to his country of origin would expose him to extreme hardship there.

A substantive assessment of the asylum seeker's application will only take place if there are no grounds under article 30 of the Aliens Act 2000 present to warrant the application's rejection.

Article 31(1) of the Aliens Act 2000 states that an application for a residence permit will be denied when the asylum seeker's case is not based on circumstances which, either of themselves or in connection with other facts, form legal grounds for a residence permit. This article makes clear that the application must be rejected if an assessment on the basis

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<sup>12</sup> Art. 39 Aliens Act 2000; art. 3.115 Aliens Decree 2000.

<sup>13</sup> Art. 3:41 Awb.

of articles 29 and 31(2) of the Aliens Act 2000 leads to the conclusion that there are no legal grounds for a residence permit. It must be stressed that the burden of proof in the asylum procedure lies primarily with the applicant. The asylum seeker does not have to prove his narrative but, rather, must simply make a reasonably convincing case.<sup>14</sup>

Article 31(2) of the Aliens Act 2000 mentions circumstances that will be taken into account in the assessment of an application. In fact, these circumstances are grounds for rejecting an asylum application. According to the article, an asylum application will be rejected when it is determined that:

- a. The alien has filed an application before under a different name;
- b. The alien has not, without a valid reason, remained available to the authorities;
- c. The alien has not reported himself immediately;
- d. The alien has submitted false or forged documents;
- e. The alien has submitted documents which do not concern him;
- f. The alien can be held responsible for having not submitted any or enough documents;
- g. The alien's country of origin is a safe country;
- h. The alien has come from a safe third country;
- i. There is a country where the alien has stayed before;
- j. The alien has an alternative residence; or
- k. The alien poses a threat to public order or national security.

One of the most important of these is the one under which an asylum seeker can be held responsible for the lack of proper documents.<sup>15</sup> In relation to this, three questions are relevant: whether the asylum seeker can be held responsible for having not submitted any or enough documents;

1. Which documents are unavailable?;
2. Is the asylum seeker responsible for the lack of proper documents?; and
3. Was the asylum seeker, partly due to the lack of proper documents, unable to show that his application for asylum was based on circumstances, either in themselves or in connection with other facts, that form the basis for asylum?

It will be determined whether the asylum seeker can be held responsible for the unavailability of documents relating to his identity, nationality, route of travel, and narrative. He can be held responsible for the lack of proper documents if his statements are inconsistent and not credible and if they do not match what is otherwise known. If the asylum seeker can be held responsible for the lack of proper documents, the assessment of the asylum request will take place. Article 31(2)(f) of the Aliens Act 2000 only applies after an assessment with respect to the content of the asylum request has taken place and after the following circumstances are present:

- a. The asylum seeker has not demonstrated that he cannot be held responsible for the lack of proper documents; and
- b. The asylum seeker has not shown that his asylum application is based on circumstances that form the basis for granting asylum.

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<sup>14</sup> C1/5.2 Aliens Circular 2000.

<sup>15</sup> Art. 31(2)(f) Aliens Act 2000.

If an assessment with respect to content takes place, it must first be assessed whether the asylum seeker qualifies as a refugee. If he does not so qualify, an assessment is made whether the asylum seeker falls under the other grounds mentioned in article 29(1) of the Aliens Act 2000.<sup>16</sup>

The asylum procedure attempts to assess whether the asylum seeker qualifies as a refugee under the Refugee Convention and whether there are reasons to believe that the asylum seeker fears inhuman or degrading treatment in violation of article 3 of the ECHR.

### **1.6 The Assessment of the Asylum Seeker's Narrative**

The first step in the assessment with respect to content is the evaluation of the credibility of the asylum seeker's narrative. This step is crucial and will be analyzed thoroughly in a subsequent chapter of this paper. After the evaluation of the asylum seeker's credibility, the responsible authorities, formally the Minister of Integration of Foreigner Affairs but in reality the IND, assesses whether the asylum seeker's application is justified in light of his narrative and all the information about the country of refuge that is available to the IND. This phase of the assessment of the asylum seeker's narrative is known as "qualification".

According to paragraph 1 of C1/3 of the Aliens Circular 2000, the following aspects are relevant when assessing the asylum seeker's application:

1. The asylum seeker's identity;
2. The asylum seeker's nationality;
3. The asylum seeker's route of travel;
4. The asylum seeker's history of residence; and
5. The asylum seeker's narrative.

However, this step is only taken after it has been established whether circumstances oblige the authorities to reject the application under article 30 of the Aliens Act 2000.

As mentioned before, the IND, in assessing the asylum seeker's narrative, first has to assess the credibility of the asylum seeker's statements. The IND will then investigate whether the asylum seeker falls within the criteria mentioned in article 29(1) of the Aliens Act 2000.<sup>17</sup>

The assessment of the credibility of the asylum seeker's statements considers whether the asylum seeker's narrative is consistent and credible as a whole and whether the asylum seeker's statements match what is otherwise known.

According to C1/3(2.1) of the Aliens Circular 2000, "otherwise known" means primarily information about the country of origin and all general information about the applicant's travels.

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<sup>16</sup> C1/1.1 Aliens Circular 2000.

<sup>17</sup> C1/3.1 Aliens Circular 2000.

It is the asylum seeker's responsibility to provide evidence to support his narrative.<sup>18</sup> The burden of proof lies primarily on him, but he does not carry this burden alone. Although the asylum seeker has to establish his narrative's credibility, he does not have to prove it. According to paragraphs 198 –219 of UNHCR's "Handbook on Procedures and Criteria for Determining Refugee Status," the asylum seeker must be given the benefit of the doubt if his narrative's credibility has been established. It is also important to mention that according to article 3:2 of the General Administrative Act, the administration also has a duty to gather relevant information.

The asylum seeker is obliged to tell the truth, to answer all relevant questions posed by the IND, and to share all pertinent evidence.<sup>19</sup> Furthermore, the asylum seeker must inform the IND of all facts and circumstances that are relevant to his application. If one of the circumstances mentioned in article 31(2) of the Aliens Act 2000 is present, this will have a negative effect on the asylum seeker's credibility. If this is the case, the IND can find his story not to be credible.

Although it is not always clear how inconsistencies arise in the written report of the asylum interview, research has shown that it is not always the asylum seeker's fault.<sup>20</sup> Many factors can account for these inconsistencies.

The Council of State requires that the asylum seeker must mention all relevant facts and circumstances and submit all relevant evidence immediately. The judge will not take into account facts and circumstances revealed later and will not give an opinion on such matters. The judge will not be able to give his opinion on these matters. This is because the Council of State applies the "trechtermodel."<sup>21</sup>

This assessment of credibility only applies to cases in which the asylum seeker is not confronted with one of the circumstances mentioned in Article 31(2) of the Aliens Act 2000<sup>22</sup>. One of the most frequently invoked of these circumstances is that the applicant does not have travel and identity papers. This is common when the asylum seeker travelled with an agent who confiscated the papers. In such cases, established case law shows that the applicant's credibility can already be considered questionable. The asylum seeker has the burden to then make a "positively convincing" impression. The Minister is entitled to disbelieve the asylum seeker when there are inconsistencies. Although this issue is frequently discussed in asylum proceedings, this paper concentrates on the "normal" credibility test.

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<sup>18</sup> *Kamerstukken II 1998/99*, 26732, no. 3, p. 40.

<sup>19</sup> Art. 3.114 Aliens Decree 2000.

<sup>20</sup> N. Doornbos, *De papieren asielzoeker institutionele communicatie in de asielprocedure*, Nijmegen: GNI 2003.

<sup>21</sup> T.P. Spijkerboer: *De mensenrechtentoets door de vreemdelingenrechter: het trechtermodel in asielzaken*, NJCM Bulletin, 28 (2003) pp. 549-62 and J. van Rooij, *"Asylum versus Human Rights" obstacles to later statements or evidence in the light of the European Convention on Human Rights*, Amsterdam: Vrije Universiteit Amsterdam, Faculty of Law, 2004

<sup>22</sup> see section 1.5

## Chapter 2 Relevant Dutch Law

### 2.1 Introduction

Now that the procedure in general has been explained, this chapter discusses marginal judicial review in Dutch administrative law. This is important for understanding the application of marginal judicial review in migration law.

### 2.2 Marginal Judicial Review in Dutch Administrative Law

A clear understanding of marginal judicial review in Dutch administrative law requires a general description of the doctrine and its background.

Grammatically, marginal judicial review can be described as:

*“a limited form of review by the judge, in which he assesses whether a decision of an administration is reasonable in the light of the interests that are at stake.”*<sup>23</sup>

This definition suggests that marginal judicial review is a simple subject, but such is not the case. Especially in migration law, where it seems that the doctrine is put in practice differently than in other areas of administrative law, marginal judicial review is a complicated matter.

### 2.3 Background

In different legal books on administrative law, the application of marginal judicial review is based on a margin of appreciation. If the administration has a margin of appreciation, then marginal judicial review should be applied. Therefore, it is useful to explore the margin of appreciation and its consequences for judicial review.

First, the legislature can leave the administration a certain margin of appreciation, or scope for judgment. This scope for judgment can be narrow, or alternatively, it can be very wide, in which case it will have the character of a freedom.

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<sup>23</sup> <http://www.rechtspraak.nl/flashed.asp>, 20 January 2004.

The margin of appreciation can be divided into two different types: “beoordelingsruimte” (scope of factual appreciation) and “beleidsruimte” (scope for policymaking).<sup>24</sup>

The scope of factual appreciation concerns the question of how accurately the legislature has described the conditions under which the administration can or must use a certain authority. The more accurate these conditions are described, the narrower the margin will be that is left to the administration. Essentially, this concerns the question whether the administration can or cannot use an authority.

The scope for policymaking, however, concerns another aspect, namely the question how the administration can use a given authority. The administration can take several decisions if its actions would not otherwise be prescribed by legislation.<sup>25</sup>

Both types of margins of appreciation can be wide enough to have the character of freedom.

### ***2.3.1. The Margin Has the Character of Freedom***

The margin of appreciation can sometimes be wide enough to have the character of freedom. If this is the case, one can speak of:

- “beleidsvrijheid,” or policy freedom; and
- “beoordelingsvrijheid,” or evaluation freedom

#### *“Beleidsvrijheid,” or Policy Freedom*

Policy freedom is described by Duk as “the freedom not to apply a competence even when the conditions for its legitimate use are fulfilled.”<sup>26</sup> Policy freedom primarily means the freedom to give a negative decision even when a positive decision would be legally possible.<sup>27</sup> One can speak of policy freedom when the legislature has provided the administration with an authority which it can use in its discretion after having balanced all relevant interests.<sup>28</sup>

Policy freedom is unproblematic as a margin of appreciation when it comes to judicial review. In these cases, the judge has to review the administration’s decision in a limited, or marginal, manner. An example of policy freedom can be found in the opening words of article 29(1) of the Aliens Act 2000, in which it is stated that a residence permit can be granted to an alien. This formulation shows that the minister has the freedom to deny a residence permit to an asylum seeker even if the criteria are fulfilled. This is a clear example of policy freedom in asylum law. If the minister decides to deny an alien a residence permit on the basis of such authority, the judge must review this decision in a limited manner. If the minister denies a residence permit even when the criteria are fulfilled, he still must give good reasons for his decision and make sure that it is taken

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<sup>24</sup> W. Duk, Beoordelingsvrijheid en beleidsvrijheid, *RM Themis* 1988-4.

<sup>25</sup> H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van Bestuursrecht*, Den Haag: Elsevier Juridisch, 2002, p. 138.

<sup>26</sup> W. Duk, *Recht en slecht, Beginselen van een algemene rechtsleer*, Nijmegen: AAL 1999.

<sup>27</sup> L.J.A.Damen e.a., *Bestuursrecht deel 1*, Den Haag: Boom Juridische Uitgevers, 2002-2003 p. 293.

<sup>28</sup> J.B.M.J Ten Berge en F.C.M.A. Michiels, *Besturen door de Overheid*, 4e druk, Deventer: W.E.J. Tjeenk Willink, 2001 p. 250.

after careful preparation. It is also important to realize that it might be very difficult to give sufficient reasons for such decisions in light of the fact that they will probably lead to unequal treatment or contradict the *vertrouwensbeginsel*.

*“Beoordelingsvrijheid,” or Evaluation Freedom*

As mentioned earlier, there are cases in which the legislature deliberately leaves to the administration the decision whether the conditions for using an authority have been met. The margin of appreciation in such cases has the character of freedom because the margin that is left to the administration is very wide. As a matter of law, it is for the administration alone to decide this.<sup>29</sup> In such cases, one can speak of “*beoordelingsvrijheid*,” or evaluation freedom.

According to Van Wijk, Konijnenbelt, & van Male,<sup>30</sup> one can speak of evaluation freedom in those cases in which the legislature has expressly pronounced its intention about the matter in such terms as “in the opinion of,” “according to the assessment of,” and “to the satisfaction of.” There are also cases in which one can determine through interpreting the law the legislature’s intention to provide the administration with scope for factual evaluation. If, however, the legislature did not intend to lay down an objective standard, then there would not be evaluation freedom. In the absence of evaluation freedom, there can only be one “correct” evaluation. This does not mean, however, that the objective standard is always clear; of course, it can be given in vague terms. It is, therefore, difficult to determine when the legislature has laid down an objective standard and when the administration has evaluation freedom. Eventually, it is the judge himself who decides the extent of judicial review. It is important to bear in mind here that the area between margin of factual appreciation and evaluation freedom is often contested.

The attribution of evaluation freedom has consequences for judicial review. As a result of it, the judge can only set aside decisions when in his opinion the administration could not reasonably have come to its decision. In asylum law, evaluation freedom is provided to the minister in article 29(1)(c)-(d) of the Aliens Act 2000. These articles state that a residence permit can be granted if the minister is of the opinion that certain circumstances are present.

Because in cases of policy freedom and evaluation freedom the judge must apply marginal review, this paper does not focus on these types of margins left to the administration. Instead, this paper primarily discusses the scope of factual appreciation. First, however, it focuses on the scope for policymaking.

### ***2.3.2 The Margin Does Not Have the Character of Freedom***

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<sup>29</sup> L.J.A.Damen e.a., *Bestuursrecht deel I*, Den Haag: Boom Juridische Uitgevers, 2002-2003 p. 290.

<sup>30</sup> H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van Bestuursrecht*, Den Haag: Elsevier Juridisch, 2002, p. 140.

*“Beleidsruimte,” or Scope for Policymaking*

One of the two types of margins that does not have the character of freedom is the scope for policymaking. One can speak of scope for policymaking when the administration has a margin to decide whether and how it will use a certain authority that is attributed to it. The administration has a certain scope for “beleidsruimte,” or policymaking, when the legislature has not dictated the content of the decision to be taken. Because the scope for policymaking is unimportant when it comes to the scope of judicial review in asylum law, this type of margin will not be discussed.

*“Beoordelingsruimte,” or Scope for Factual Appreciation*

When the administration has a certain margin to decide whether the criteria for using a certain authority have been fulfilled, one can speak of a margin of factual appreciation. Thus, the margin for factual appreciation concerns the question how precisely the legislature has described the conditions under which an administration can or must use a certain attributed power or authority.<sup>31</sup> The administration must decide whether the conditions under which it can use a provided authority are fulfilled. It is, however, not always easy to determine whether the administration has this margin of factual appreciation.

*How can the legislature leave the administration a scope for factual appreciation?*

The legislature can leave the administration a margin for factual appreciation by:

- Not specifying conditions or criteria for applying a certain authority;
- Deliberately specifying the conditions or criteria for applying an authority in vague terms; or
- By leaving it up to the appointed administration to decide whether there are reasons for using a certain authority.<sup>32</sup>

Furthermore, it is important to mention that if the administration has a certain scope for factual appreciation that it must make policy rules to ensure that this margin is used consistently. When interpreting the law, the administration must give an interpretation that the judge would give, consistent with the law. The judge can then assess this interpretation fully and can annul or ignore it if it is inconsistent with the interpretation that he would have given.<sup>33</sup> The administration also has a certain margin in the qualification of facts, in assessing whether they are of consequence according to the law or regulation. In the literature about administrative law, the general opinion is that such cases require the judge to assess this qualification fully unless the legislature has made clear that the administration has the freedom to independently qualify facts.<sup>34</sup>

According to some authors, when the administration possesses a scope for factual appreciation, whether the judge must review the decision fully or in a limited manner

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<sup>31</sup> H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van Bestuursrecht*, Den Haag: Elsevier Juridisch, 2002, p. 138.

<sup>32</sup> H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van Bestuursrecht*, Den Haag: Elsevier Juridisch, 2002, p. 139.

<sup>33</sup> L.J.A Damen e.a., *Bestuursrecht deel 1*, Den Haag: Boom Juridische Uitgevers, 2002-2003 p. 287.

<sup>34</sup> L.J.A. Damen e.a., *Bestuursrecht deel 1*, Den Haag: Boom Juridische Uitgevers, 2002-2003 p. 288-289.

depends on the circumstances of the case. Van Wijk, Konijnnebelt, and Van Male, for example, argue that this depends on whether an objective standard has been laid down in the regulations.<sup>35</sup> Others, however, assert that the judge must always fully review the decision.<sup>36</sup>

### **Summary**

This chapter has discussed the doctrine of marginal judicial review in Dutch administrative law. This doctrine describes the relationship between the margin that is left to the authorities and the consequences of this for the scope of judicial review. A distinction between the two types of margins, namely the margins that do and do not have the character of freedom, has been made. In those cases in which the administration is provided with an authority that has the character of freedom, namely evaluation freedom and policy freedom, the judge should apply limited judicial review. To say this, however, says nothing about how limited must be the judicial review. Even if it is determined that limited judicial review must be applied, the circumstances of the case dictate how limited must be this judicial review.

This chapter has also asserted that it can be difficult to determine whether an administration has evaluation freedom. This is because the legislature implicitly provides this freedom in many cases. Therefore, it is important to look at the legislature's intention. The scope for factual appreciation can be described as the authority to decide whether the requirements for using a particular authority have been met. When it comes to the margin for factual appreciation, there is no consensus about the review that must take place. Some authors contend that the judge must apply full judicial review, while others find the objective character of the standard decisive for the application of full judicial review.

## **Chapter 3 Limited Judicial Review in Migration Law**

What is meant by the marginal judicial review of the credibility of the asylum seeker's narrative and the stated facts? Marginal judicial review means that the judge can only assess whether the administration, in this case the Minister of Alien Affairs and Integration, could reasonably have decided that the asylum seeker's narrative was not credible.

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<sup>35</sup> H.D. van Wijk, W. Konijnnebelt & R.M. van Male, *Hoofdstukken van Bestuursrecht*, Den Haag: Elsevier Juridisch, 2002, p. 140.

<sup>36</sup> J.B.M.J Ten Berge en F.C.M.A. Michiels, *Besturen door de Overheid*, 4<sup>e</sup> druk, Deventer: Tjeenk Willink, 2001 p. 250-251; L.J.A. Damen e.a., *Bestuursrecht dl. 1*, Den Haag: Boom Juridische Uitgevers 2002-2003, p. 281.

### ***The Council of State's Jurisprudence***

Since the implementation of the Aliens Act 2000 on 1 of April 2001, there has been much confusion about marginal judicial review. Questions that arose included:

1. In which cases must the judge apply marginal judicial review?;
2. How does he have to apply marginal judicial review?; and
3. What is the main reason for applying marginal judicial review when it comes to the Minister's opinion concerning the credibility of the asylum seeker's narrative?

A clear understanding of these issues requires an overview of the Council of State's jurisprudence, in which it is specified what has to be assessed in accordance with limited judicial review and what must be subject to full judicial review. Subsequently, this chapter addresses the issue of what marginal judicial scrutiny means. Finally, it deals with the justifications given by the Council of State for marginal judicial review and argues that Dutch administrative law does not require marginal review in asylum law cases.

### **3.1 The Applicability of Article 29(2)(c)-(d) of the Aliens Act 2000**

Marginal judicial review is unquestionably applicable in cases in which the minister has evaluation freedom under article 29(2)(c)-(d) of the Aliens Act 2000. According to national law and the doctrine of marginal judicial review, the judge must apply marginal review in such cases.

According to the decision of the Council of State of 25 March 2002,<sup>37</sup> the minister's opinion to return an asylum seeker to his country of origin must be marginally reviewed. The minister can be of the opinion that it could not in reasonableness be asked from the asylum seeker to return to his country of origin because of serious reasons of humanitarian nature that are connected with his reasons for departing from his country of origin (Article 29 pr. 1 sub c Aliens Act 2000). The minister's opinion about this has to be reviewed marginally.

There is no confusion about the application of marginal judicial review when it comes to assessing a minister's opinion in such cases.

The term "in the opinion of" clearly indicates that the minister has a margin of factual appreciation when it comes to the application of article 29(2)(c) of the Aliens Act 2000.

The same applies to article 29(2)(d) of the Aliens Act 2000,<sup>38</sup> which concerns situations in which "return to the country of origin in the opinion of the minister would be of extreme harshness in connection with the general situation at that place."

Although in such cases the Council of State applies marginal judicial review, such review of the minister's opinion in cases of article 29(2)(c)-(d) of the Aliens Act 2000 is consistent with the doctrine of marginal judicial review. Thus, the legislature clearly intended that the minister's opinion in such cases would be marginally reviewed by the judge.

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<sup>37</sup> ABRvS 25 March 2002, *JV* 2002/151.

<sup>38</sup> ABRvS 24 June 2003, *JV* 2003/352.

Thus, the analysis here restricts itself to those cases in which applying marginal judicial review is a matter for debate, namely as relates to article 29(2)(a)-(b) of the Aliens Act 2000.

To avoid confusion, it should be emphasized that the analysis of the various aspects of judicial review that are discussed below only applies to article 29(2)(a)-(b) of the Aliens Act 2000.

### **3.2 Assessment of the Credibility of Stated Facts and Circumstances**

A clear understanding of the Council of State's jurisprudence requires one to bear in mind that the Council of State apparently does not apply limited judicial review to all aspects of the minister's decision. This, however, has not been clear from the beginning. One of the reasons for this confusion is because the Council of State initially did not explain why judges had to apply marginal review. Also, the Council of State did not initially explain that all aspects did not have to be marginally reviewed.

According to some authors, it is important to distinguish between factual determinations, interpretations of norms, and qualifications of facts. Others only distinguish between factual determinations and qualifications of facts.<sup>39</sup> This paper's analysis of the Council of State's jurisprudence bears in mind these theoretical distinctions and tries to determine whether they are correct and what exactly is the Council of State's point of view.

First, this section discusses the Council of State's position on the scope of judicial review when it comes to factual determinations. Section 3.2.1, therefore, examines the Council of State's factual determinations. Section 3.2.2 focuses on judicial review of the minister's opinion on credibility and analyses what exactly is the Council of State's opinion on judicial review of credibility. The same section also focuses on the relevant distinction between substantiated and verifiable statements and stated but unsubstantiated facts and circumstances. Section 3.2.3 explores the corrections and additions made to the narrative after the second interview has been held. Finally, section 3.2.4 summarizes the aspects analysed and gives an opinion.

#### **3.2.1. Factual Determinations**

Contrary to what some authors initially thought,<sup>40</sup> the Council of State does not apply marginal review when assessing all facts. The Council of State has a more nuanced approach, which is illustrated by some of its decisions.

In its decision of 17 September 2003,<sup>41</sup> for example, the Council of State stated that the determination whether an asylum seeker has submitted documents that do not concern

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<sup>39</sup> B.P. Vermeulen in his note with the judgement of 3 July 2002, ABRvS 3 July 2002, *JV* 2002/242 and R.J.L. van Bokhoven, De omvang van de rechterlijke toetsing van asielaanvragen, *Journaal Vreemdelingenrecht* (2) 2003-2, p. 52-63.

<sup>40</sup> T.P. Spijkerboer, *Het hoger beroep in vreemdelingenzaken*, 's-Gravenhage: SDU Uitgevers 2002, p. 23 and Y. Schuurmans in her note with the judgement of 15 November 2002, AB 2003/96.

<sup>41</sup> ABRvS 17 September 2003, *JV* 2003/487.

him in the sense of article 31(2)(e) of the Aliens Act 2000 is of a factual nature that can be fully reviewed by the judge. The Council of State stated the following:

*“2.3.2 The determination that the asylum seeker has put forward travelling documents or identity documents that do not concern him, as mentioned in article 31(2)e) of the Aliens Act 2000, is of a factual nature. The judge can, without limitation, answer the question whether the determination of the Secretary of State, in light of the reasons given in the letter of intention and the challenged decision, is correct.*

*The assessment whether an alien has intentionally put forward documents that do not concern him, and the meaning that the Secretary of State could have given to this, is the responsibility of the Secretary of State. The judge has to review this point of view marginally.”<sup>i</sup>*

This decision reveals that judges can fully review whether factual determinations relating to the authenticity of documents and their relevance to the asylum seeker are correct. The consequences of these determinations for the minister, however, must only be reviewed marginally by the judge. Also, the assessment whether the asylum seeker has intentionally submitted false or misleading documents can only be reviewed marginally. Thus, the question that arises is when one can speak of factual determinations. It is important to ask why the assessment whether an asylum seeker has intentionally submitted false or misleading documents can only be marginally reviewed.

Judges can fully review facts that are substantiated and verifiable. Put differently, the judge can only apply full judicial review about facts that can be objectively determined. This means that only those facts that can be independently verified from the asylum seeker's statements can be fully reviewed. Facts that the asylum seeker cannot provide evidence for and which cannot be independently verified, however, must be reviewed marginally. This distinction most likely lies in the fact that objectively verifiable facts can be determined, whereas unsubstantiated, or stated, facts and circumstances can only be assessed for their credibility.

In the aforementioned decision, for example, it can be established objectively and independently from the asylum seeker's statements whether the documents concern him. The documents do or do not concern him, there is no margin in this determination, and this can be objectively and independently determined. Thus, this determination must be fully reviewed.<sup>42</sup>

The assessment whether the asylum seeker has intentionally put forward documents that cannot be determined objectively and independently must be reviewed marginally according to the Council of State.

It seems that the Council of State distinguishes between assessments of credibility, namely the credibility of statements about facts that are only stated and which cannot be independently verified, and facts that are substantiated and can be determined independently of the asylum seeker's narrative. This is evident from the aforementioned

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<sup>42</sup> This is in accordance with the review in administrative law as described by Y. Schuurmans in her note with ABRvS 15 November 2002, AB 2003/96.

decision and from other decisions of the Council of State. In its decision of 27 January 2003,<sup>43</sup> for example, the Council of State wrote:

*“2.4.3. In the minister’s assessment of the asylum narrative, it is usually not about the question whether and to what extent the statements about the facts that the asylum seeker puts forward at his asylum request have to be recognized. The asylum seeker is, after all, in a lot of cases unable, and it could not reasonably be asked of him, to back up his narrative with evidence.*

*2.4.4. To be fair to the asylum seeker in such situations, the minister, according to paragraph C1/1(2) and paragraphs C1/3(2.2) and 3.4 of the Aliens Circular 2000, must find the stated facts credible if the asylum seeker has answered all questions posed in as comprehensive a manner as possible and if the narrative generally is consistent, not implausible, and is in accordance with what is known about the general situation of the applicant’s country of origin. Moreover, there must not have been any circumstances as mentioned in article 31(2)(a)-(f), of the Aliens Act 2000 that detract from the credibility of the asylum seeker’s statements.”<sup>iii</sup>*

Another decision that is consistent with this point of view is the decision of 11 July 2002,<sup>44</sup> in which the Council of State stated;

*“Furthermore, it was not the court’s task to decide which facts stated by the alien but that were not substantiated should be taken into account. It had to investigate whether it had to judge that the Secretary of State could not have reasonably come to the aforementioned point of view.”<sup>iii</sup>*

One can also imagine that the asylum seeker has substantiated facts but that these facts cannot be independently verified and objectively determined. It remains unclear what the Council of State’s point of view is of this category of facts.

Thus, when it comes to factual determinations, the Council of State is of the opinion that judges can apply full judicial review. The Council of State has not clarified what it means by factual determinations. An analysis of the jurisprudence leads one to conclude that the Council of State most likely believes that judges must apply full judicial review when it comes to substantiated facts which can be verified objectively and independently. The Council of State seems to distinguish between substantiated and independently verifiable statements and unsubstantiated statements which cannot be independently verified.

### **3.2.2. Credibility**

In several other judgments, the Council of State has made clear that determinations of whether and which facts have to be taken into account must be reviewed marginally.<sup>45</sup>

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<sup>43</sup> ABRvS 27 January 2003, *JV* 2003/103.

<sup>44</sup> ABRvS 11 July 2002, *JV* 2002/299.

<sup>45</sup> ABRvS 9 July 2002, *JV* 2002/275, ABRvS 28 June 2002, *JV* 2002/293, ABRvS 13 September 2002, *JV* 2002/387, ABRvS 25 November 2002, *JV* 2002/469, ABRvS 31 October 2002, *JV* 2003/2, ABRvS 26 April 2003, *JV* 2002/266, ABRvS 12 March 2003, *JV* 2003/242, ABRvS 24 March 2003, *JV* 2003/206, ABRvS 27 November 2002, *JV* 2003/23, ABRvS 15 April 2003, *JV* 2003/249, ABRvS 8 May 2003, *JV* 2003/287, ABRvS 22 May 2003, *JV* 2003/294, ABRvS 27 June 2003, *JV* 2003/359, ABRvS 11 July 2003,

According to the Council of State, marginal judicial review must also be applied in assessing the credibility of all stated facts and circumstances together, in other words the credibility of the narrative as a whole.

One of the first judgments in which the Council of State put forward its opinion about limited judicial review for the selection and assessment of the credibility of stated facts and circumstances was the judgment of 9 July 2002:<sup>46</sup>

*“2.4 In the second appeal, the Secretary of State argues that he could reasonably have found the asylum seeker’s narrative sub 1 was not credible.*

*2.4.1. In consideration 4.3, the court has determined that the Secretary of State held the asylum seeker’s narrative to be not credible on incorrect grounds. The court has erred in concluding that the determination whether and to what extent the facts that have been put forward by the asylum seeker must be taken into account in assessing the request for asylum is the responsibility of the Secretary of State and that this can only be reviewed marginally by the judge.*

*The court should have, in assessing the credibility of the narrative of the alien sub 1, limited itself to the judgement whether the Secretary of State could reasonably have come to the point of view that the asylum narrative of the alien sub 1 was not credible.”<sup>iv</sup>*

The Council of State further clarified this opinion in another judgement:<sup>47</sup>

*“2.2.1. The appeal is successful. In the letter of intention, which lies at the essence of the rejection of the request, it has been stated that the submission of a driver’s license by the alien outweighs the fact that the applicant’s failure to submit documents that substantiate his travel story and leave out crucial travel and identity documents, such as a passport or birth certificate, can be attributed to him. It follows from the opening words of article 31(2) of the Aliens Act 2000 that these circumstances must be taken into consideration in investigating the request for a residence permit.*

*Furthermore, it is, as the Council of State has considered before ( judgement of 9 July 2002, nr 200202328/1, published in “JV” 2002/275), primarily the responsibility of the minister to decide whether or to what extent the facts that have been stated in his asylum narrative but have not been substantiated will be taken into account. The decision which documents are necessary for the assessment of the request and which could have and should have been submitted to substantiate the request is part of the aforementioned assessment. There is no ground for the opinion that the minister reasonably could not have been of the opinion that the alien was responsible for having not submitted the travel or identity documents that are necessary for assessing the request.”<sup>v</sup>*

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*JV* 2003/370, ABRvS 31 July 2003, *JV* 2003/403, ABRvS 1 August 2003, *JV* 2003/406, ABRvS 7 August 2003, *JV* 2003/435, ABRvS 8 August 2003, *JV* 2003/438, ABRvS 11 August 2003, *JV* 2003/441, ABRvS 22 August 2003, *JV* 2003/451, ABRvS 26 August 2003, *JV* 2003/455.

<sup>46</sup> ABRvS 9 July 2002, *JV* 2002/275.

<sup>47</sup> ABRvS 31 October 2002, *JV* 2003/2.

It can be deduced from these decisions that the Council of State is not of the opinion that factual determinations must be reviewed marginally but rather that the minister's opinion on the credibility of the narrative must be reviewed marginally. More precisely, the Council of State is of the opinion that judges should apply marginal judicial review when it comes to the minister's decision on which stated but unsubstantiated facts will be taken into account as credible. Furthermore, the Council of State has made clear that the minister's decision on which documents are necessary for the assessment and which documents should have been submitted is also subject to marginal judicial review.

A question that remains unanswered, however, is whether stated and substantiated facts that cannot be verified must be fully reviewed. Examples of such cases include documents of which the military police cannot verify the authenticity.<sup>48</sup> An explicit consideration of the Council of State on this matter has not been found, but one can consider the following from a judgment of the Court of Amsterdam:<sup>49</sup>

*“7. In light of this, the court is of the opinion that the facts and events stated by the applicant find support in objective sources that can be used as evidence.*

*From this information, it can be concluded that it can be accepted assumed that the events stated by the applicant have occurred. The court considers, however, that the information is not in keeping with the facts that have been stated by the applicant. The time and place of the murder of his grandfather conflict in the separate accounts of the Ministry of Foreign Affairs and the applicant.*

*8. The court is of the opinion that if the facts stated in the narrative are established by objective and impartial sources that allow for an easy determination whether the narrative is based on truth, then there is no ground for the application of the marginal judicial review mentioned under III.5.*

*In such a case, the judge, as well as the defendant, are able to assess whether the facts stated by the asylum seeker are right or wrong. In light of the above, the court is of the opinion that the defendant could reasonably have come to the point of view that it is not credible that the applicant has drawn the negative attention of any party because he should be ‘chief’ of the royal house of Damango.*<sup>vi</sup>

This consideration clearly supports the analysis about full judicial review for substantiated and verifiable facts and circumstances. In this case, the court fully reviewed the minister's opinion about credibility and came to the conclusion that the minister had correctly found the narrative not to be credible. The stated facts and circumstances were substantiated and verifiable. It remains unclear, however, how judges should review credibility if the asylum seeker submits substantiated facts that cannot be verified. It is also unclear what the judge should do if only the asylum seeker provides some evidence. Should, for instance, only the parts of the narrative that are not substantiated be subjected to marginal judicial review? While the jurisprudence of the Council of State does not provide an answer, if an asylum seeker substantiates his statements about facts and

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<sup>48</sup> Rechtbank 's Gravenhage, zp Leewarden 27 February 2004 (zaaknummer AWB 04/5880, AWB 04/5885), in which case the military police could not verify the authenticity of an arrest warrant.

<sup>49</sup> Rechtbank 's-Gravenhage, zp Amsterdam 16 October 2003 (zaaknummer AWB 03/52191, 03/52189), NAV 2004/15 p. 50.

circumstances that have occurred and these statements can be verified independently from the asylum seeker's narrative, it seems best for the judge to apply full judicial review of the minister's opinion on these aspects of the narrative.

To summarize, according to the Council of State, the Minister can determine which stated but unsubstantiated facts have to be taken into account. The judge can only review whether the minister reasonably could have put aside the stated facts because he was of the opinion that they were not credible. Furthermore, the judge can only assess the asylum request in light of the facts selected by the minister, not in light of all possible facts. Finally, the Council of State is of the opinion that the minister's decision concerning the necessity of documents for assessment and the minister's decision that the asylum seeker has culpably not submitted documents must also be reviewed marginally. I will discuss the asylum seeker's responsibility for the lack of documents and other circumstances in more detail later in this chapter.

A careful analysis of the jurisprudence shows that the Council of State does not qualify credibility assessment as *the determination of the facts*, but as; *the determination of whether and in how far the facts put forward by the alien have to be taken into account in the assessment of the asylum request* (de vaststelling of en in hoeverre bij de beoordeling van de asielaanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten),

If this analysis is correct, then the Council of State distinguishes between two things. On the one hand Factual determinations that can be objectively determined must be reviewed fully. On the other hand the minister's opinion about the credibility of stated facts and circumstances which the asylum seeker cannot provide evidence for must be reviewed marginally.

### ***3.2.3. Corrections and Additions Made to the Narrative by the Asylum Seeker***

Chapter one made clear that after the second interview, a report will be made by an IND officer. According to article 3.111(3) of the Aliens Decree, the asylum seeker has at least two days after the transcript is made known to him in which to make corrections and additions. If the asylum request is dealt with in the accelerated procedure, however, the asylum seeker only has three procedural hours for this.<sup>50</sup>

The corrections and additions made to the report also relate to the selection of stated facts and circumstances. According to the Council of State, which corrections and additions have to be taken into account by the administration must be reviewed marginally:<sup>51</sup>

*“The applicant has given no explanation for why she has retracted previous statements in the corrections and supplements, on which ground the court should have judged that the Secretary of State could not reasonably have failed to follow her in this. Under these circumstances, the court rightly has seen no reason that the Secretary of State could not have expressed the point of view that was put forward in the decision.”<sup>vii</sup>*

<sup>50</sup> Art. 3.117(2) Aliens Decree 2000; C3/12.2.9 Aliens Circular 2000.

<sup>51</sup> ABRvS 28 August 2002, *JV* 2002/355.

### **3.2.4 Summary**

This section has attempted to analyse marginal review of the credibility assessments. The first nuance discovered has been the distinction between verifiable, or substantiated, statements and unsubstantiated statements.

The minister will not determine whether unsubstantiated facts and circumstances are true. He will, however, determine which and to what extent stated facts and circumstances will be taken into account in the assessment of the asylum request. Thus, the minister assesses the credibility of unsubstantiated stated facts and circumstances and selects which facts and circumstances will be taken into account as credible. According to the Council of State, the judge must review this assessment and selection of stated unsubstantiated facts marginally.

When it comes to corrections and additions made by the asylum seeker, marginal review also must be applied.

Not all facts and circumstances must be reviewed marginally. According to the Council of State, only facts and circumstances that cannot be independently verified and objectively determined must be reviewed marginally. If this is not possible, the minister will have to assess the credibility of the stated facts and circumstances, which assessment must be reviewed marginally.

The cited passages in this section also demonstrate that according to the Council of State it is the assessment of the credibility of unsubstantiated facts and circumstances that must be reviewed marginally. The Council of State makes a distinction between full judicial review of the objective determination of substantiated verifiable facts and circumstances and marginal judicial review of the assessment of the credibility of unsubstantiated facts and circumstances.<sup>52</sup> Only in the highly unlikely case of an asylum seeker's presentation of facts and circumstances that are all verifiable may the judge fully review the credibility of the narrative.

The distinction between unsubstantiated facts and substantiated facts is, to some extent at least, in accordance with judicial review in administrative law generally. After all, in administrative law, the judge can fully review factual determinations. The administrative judge, for example, can review fully a determination that a fence is three meters high, or a determination that someone has lodged an objection too late. These are facts that can be verified independently and objectively.

In migration law, however, the asylum seeker cannot always provide all relevant evidence. The Council of State acknowledges this. In most cases, the asylum seeker only states facts and does not submit evidence for all facts and circumstances. The asylum seeker often cannot provide evidence for all of his statements. This creates a certain margin when it comes to the assessment of credibility, and it often cannot be independently established that certain stated but not substantiated facts are true. Also, the

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<sup>52</sup> Notice that the Council of State is very consequent; it always speaks of "assessment of the credibility" and not "determination of the credibility."

credibility of the narrative cannot be independently established. There will always be uncertainty when it comes to unsubstantiated facts and the credibility of the asylum seeker's narrative taken as a whole. It seems that this uncertainty or margin is the reason why the Council of State dictates full judicial review for factual determinations of stated facts and circumstances and marginal judicial review for assessments and selections of stated facts and circumstances. The judge has to review these assessment and selections of stated but unsubstantiated facts and circumstances marginally. He will have to do this by reviewing the minister's opinion of the credibility of the asylum seeker's narrative taken as a whole. A question that remains unanswered is whether stated and substantiated but unverifiable facts must be reviewed fully. An analysis of the jurisprudence does not reveal any explicit consideration or motivation of the Council of State on this point. It is, however, clear that stated and substantiated facts are, to some extent at least, verifiable. It seems that the determination whether a particular substantiated fact is credible is an essentially factual determination. Therefore, it seems logical that the judge would apply full judicial review to such matters. The Council of State has still not explicitly considered this.

### 3.3 Interpretation of International Norms

Another aspect that is relevant in assessing the extent of judicial review is the interpretation of international norms by ministers. The Council of State is of the opinion that the interpretation of international norms is an aspect in which it is inappropriate to apply marginal judicial review.<sup>53</sup>

In its judgment of 4 September 2002,<sup>54</sup> the Council of State stated:

*“2.2. In complaint 1, the applicant argues, among other things, that the court in assessing whether the alien had to have been considered a refugee by the Secretary of State because of the discrimination that he had experienced has erred in not taking into account his appeal on paragraph 65 of the “Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (hereafter: Handbook) of the United Nations High Commissioner for Refugees and the mentioned judgments of the Court of Amsterdam of 16 March 1998 and 17 January 2000 (JV 1998/92 and JV 2000, S99).*

*2.2.1. This complaint fails. The court has correctly found no ground to conclude that the Secretary of State applied an incorrect standard in assessing whether applicant had to have been considered a refugee because of the discrimination that he had experienced. The Handbook does not consist of rules that bind the Secretary of State in his assessment whether an alien faces a real risk of persecution. The fact that the Court of Amsterdam,*

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<sup>53</sup> Mr. R.J.L. van Bokhoven, De omvang van de rechterlijke toetsing van asielaanvragen, *Journal Vreemdelingenrecht* (2) 2003-2, p. 57.

<sup>54</sup> ABRvS 4 September 2002, *JV* 2002/358.

*as the applicant argues, in the aforementioned judgments has considered otherwise, does not change this.*<sup>viii</sup>

From this judgment, it can be concluded that the Council of State is of the opinion that the judge must apply full judicial review when it comes to interpreting international norms. The applicant argued that the Secretary of State had wrongly heard his appeal on paragraph 65 of the “Handbook.” The Council of State explicitly stated that the court had rightly found no basis for the Secretary of State’s having acted in error. This indicates full judicial review of an interpretation of an international norm, the interpretation of the refugee definition.

### **3.4 Qualification of An Asylum Seeker As a Refugee In the Sense of the Refugee Convention and the applicability of the Standard Set in Article 3 of the European Convention on Human Rights**

As mentioned at the beginning of this chapter, judicial review of the minister’s decision can be divided into several stages. Section 3.2 discussed factual determinations and assessments of credibility, and section 3.3 dealt with the interpretation of international norms. This section explores the qualification of facts and circumstances in light of the refugee definition and article 3 of the ECHR.

According to article 29(1)(a) of the Aliens Act 2000, a residence permit can be granted to an asylum seeker if he is a refugee in the sense of the Refugee Convention. Article 29(1)( b) states that a residence permit can also be granted if the asylum seeker faces a real risk of inhuman treatment when he returns to his country of origin.

Some very important questions arise after the application of marginal judicial review by the Council of State. A first question is whether the qualification of an asylum seeker as a refugee has to be reviewed marginally. The second question is whether the assessment of the presence of a real risk of inhuman treatment must be reviewed marginally. Although the determination of the credibility of the statements in almost all cases has to be reviewed marginally according to the Council of State, the qualification of an asylum seeker as a refugee and assessment whether he faces a real risk of inhuman treatment if he returns must be reviewed fully in some cases and marginally in other cases.

#### ***3.4.1 The Minister Finds the Asylum Seeker’s Narrative Credible***

Some authors argue that the Council of State distinguishes between those cases in which the minister finds at least part of the asylum seeker’s narrative credible and those cases in which the minister finds the narrative implausible. According to these authors,<sup>55</sup> the Council of state applies full judicial review in the first category and limited judicial review in the second category. At first glance, this seems to be a correct analysis because in one of its judgments<sup>56</sup> the Council of State stated:

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<sup>55</sup> Mr. R.J.L. van Bokhoven, De omvang van de rechterlijke toetsing van asielaanvragen, *Journal Vreemdelingenrecht* (2) 2003-2, p. 52-63.

<sup>56</sup> ABRvS 25 November 2002, *JV* 2002/469.

*“2.3.1. As the Council of State already stated (decision of 9 July 2002, published in “JV” 2002/275 and NAV 2002/234), determining how and to what extent facts that have been stated by the alien in his narrative are taken into account in the assessment of the asylum request is part of the minister’s responsibility. That determination can only be marginally reviewed by the judge.*

*If the Minister, after having taken into account the stated facts, believes that the alien has not made a reasonably convincing case that he has a well founded fear of persecution or that there is a real risk that he will be exposed to inhuman treatment in violation of article 3 of the European Convention on Human Rights, then the judge must assess whether the minister has correctly come to that point of view, and there is no room for limited judicial review.*

*The appeal lacks a factual basis because it is based on an incorrect reading of the challenged judgment. The court’s consideration of the applicant’s argument that the Secretary of State has incorrectly come to the point of view that the applicant has not made a reasonably convincing case that she has a well founded fear of persecution does not trigger limited judicial review, as has been assumed in the appeal.”<sup>ix</sup>*

One might conclude from this that the decisive aspect in determining scope of judicial review for qualifications of facts is the fact that the minister has found at least part of the narrative not credible. If the minister finds the narrative to be credible, then the qualification of facts by the minister must be reviewed fully. However, is this the case? If at least parts of the narrative have not been found credible, does limited judicial review for qualifications of facts take place, or does no review take place at all? This matter will be discussed later in this paper. It is now necessary to discuss cases in which the minister has found the narrative credible.

In another judgment of 27 November 2003,<sup>57</sup> the Council of State considered the following:

*“2.3 Neither considerations of the decision of 21 November 2001 nor the letter of intention inserted in that decision permit the conclusion that the Secretary of State had come to the point of view that the asylum narrative as a whole or partially is not credible. The court, therefore, has correctly considered that the Secretary of State, assuming the narrative to be credible, has assessed whether the alien has made a reasonably convincing case that he has drawn the negative attention of the Turkish authorities and that he has a well founded fear of persecution and faces a real risk of undergoing treatment in violation of article 3 of the European Convention on Human rights (hereafter: ECHR). The court, therefore, has correctly not reviewed the Secretary of State’s opinion on this matter marginally.”<sup>x</sup>*

### **3.4.2 Application of International Norms**

The Council of State stated in its decision of 16 August 2002<sup>58</sup>:

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<sup>57</sup> ABRvS 27 November 2003, *JV* 2004/46.

<sup>58</sup> ABRvS 16 August 2002, *JV* 2002/345.

*“The Secretary of State rightly has come to the point of view that applicants, with what they have presented in the essence of their applications, have not made a reasonably convincing case that if they are sent back to their country of origin that they have a well founded fear of persecution from the Turkish authorities or that they face a real risk of falling victim of a violation of article 3 of the ECHR”<sup>xi</sup>*

These judgments illustrate the Council of State’s acceptance of full judicial review when applying international norms. The Council of State itself applies full review, this being indicated by the term “rightly.”

Thus, the Council of State applies a two phased approach if the minister finds the asylum seeker’s narrative credible.

The first phase is the assessment of which stated facts are credible, the assessment of credibility phase, which has to be reviewed marginally.

After this, the Council of State dictates that full judicial review applies to questions of the refugee definition and whether there exists a real risk for inhuman treatment if the asylum seeker returns to his country of origin.<sup>59</sup>

It is important to make clear that this only applies to article 29(1)(a)-(b).

If the minister does not find the asylum seeker’s narrative credible, it seems that the qualification phase will not be reviewed. The judge in such cases will only marginally review whether the minister reasonably could have concluded that the statements were not credible.

### **3.4.3 The Connection between Stated Facts**

In migration law, it is not sufficient to make a reasonable case that your narrative is credible. For instance it is not sufficient to make a reasonable case that a) you have drawn the negative attention of the government because of your political activities and b) that soldiers of the government have shot you and tried to kill you. You will have to make a reasonable case that the soldiers have tried to kill you because of your political activities and that there is a connection between the two events.

Section 3.4.1 illustrated that the Council of State seems to apply full judicial review for qualifications of stated facts and circumstances which have been found credible. There are, however, certain aspects which can be seen as part of the qualification phase but which, nevertheless, must be reviewed marginally according to the Council of State. For instance, the administration’s assessment whether there exists a nexus to a persecution ground, the connection between persecution and persecution grounds, also must be reviewed marginally:<sup>60</sup>

*“It can be admitted to the applicant that no more than presenting a reasonably convincing narrative can be expected from him. The Secretary of state State could have, in the decision that has been challenged in the court, however, been of the opinion that the letter, of which no authorized translation has been put forward, and the pictures by*

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<sup>59</sup> ABRvS 16 August 2002, *JV* 2002/345, ABRvS 29 Augustus 2002, *JV* 2002/356, ABRvS 25 November 2002, *JV* 2002/469.

<sup>60</sup> ABRvS 28 June 2002, *JV* 2002/293.

*no means show a connection between the incidents that have been put forward by the applicant and the refusal to comply with the propositions of the Pasdaran. There is no ground for the opinion that the Secretary of State could not have had the point of view that the requirement set in article 31(1) of the Aliens Act 2000 has still not been met.*<sup>xii</sup>

The connection between stated facts has to be seen as part of the qualification of facts. As shown in section 3.4.1, this would mean that the connection between stated facts must be reviewed fully. The Council of State, however, seems to be of the opinion that this aspect must be reviewed marginally, although its reason for so insisting remains unclear.

#### ***3.4.4 The Interpretation of Statements Has to Be Reviewed Marginally***

A second aspect which can be seen to be part of the qualification phase is the interpretation of credible statements. This section, therefore, continues by analyzing the jurisprudence of the Council of State on the aspect of the interpretation of statements and circumstances.

In its decision of 21 August 2003,<sup>61</sup> the Council of State gave the following view:

*“The interpretation of the statements given by the alien as well as the assessment of the credibility of the facts according to the alien are primarily the responsibility of the Secretary of State, and the manner in which those statements are interpreted by the Secretary of State has to be assessed by the judge in a limited manner. The standard, thus, is not whether the interpretation of those statements is the same as that of the court, but whether there is a basis for the opinion that the Secretary of State could not reasonably have come to that interpretation of the statements. The court, in assessing the decision, insofar as it has decided how the statements of the alien are to be read and interpreted, has incorrectly not complied with the aforementioned scope of assessment.”<sup>xiii</sup>*

Besides reviewing assessments of the credibility of stated facts and circumstances, judges must review the minister’s interpretation of stated facts and circumstances. The Council of State is clearly of the opinion that such interpretation must only be reviewed marginally.

Just like in cases of connections between stated facts, this aspect can be seen as part of the qualification phase. Again, one can only guess why the Council of State is of the opinion that marginal judicial review must be applied.

#### ***3.4.5. The Assessment of Well-Founded Fear or Real Risk***

After the establishment of facts and the assessment of the credibility of the narrative, the minister and judge determine whether the facts indicate a well founded fear of persecution or a real risk of inhuman or degrading treatment. The Council of State does not apply a very clear or consistent method of judicial review for these aspects of the

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<sup>61</sup> ABRvS 21 August 2003, *JV* 2003/448.

qualification of facts. As clarification of this statement, one may refer to the Council of State's judgment of 9 February 2004<sup>62</sup>:

*“There is no ground for the opinion that the Secretary of State could not have concluded that the alien, who belongs to the Reer Hamar, became the victim of banditry but has not made a reasonably convincing case that he has a well-founded fear of persecution for the reasons mentioned in the Refugee Treaty because it is unclear from the asylum narrative that he has drawn negative attention because of his ethnic background or for other reasons mentioned in the Refugee Treaty.”<sup>xiv</sup>*

The question that is marginally reviewed is whether the asylum seeker has made a reasonably convincing case that he has a well-founded fear of persecution (*There is no ground for the opinion that the Secretary of State could not have concluded that the alien . . . has not made a reasonably convincing case that he has a well-founded fear of persecution.*)

In Dutch asylum law, it is not sufficient that the asylum seeker makes reasonably convincing that his story is credible. If his story has been found reasonably convincing, then he has to make reasonably convincing that because of what has happened he is not able to return to his country. This might be the case because he either has a well founded fear of persecution or he runs a real risk of being subjected to a treatment that is in violation of article 3 ECHR. A very strong indication that an asylum seeker runs such a risk is the fact that it is made reasonably convincing that he has drawn the negative attention of the authorities.

The Council of State sometimes applies marginal judicial review for qualifications of facts and in particular the question whether the alien has drawn the negative attention of the authority because of one of the persecution grounds mentioned in the Refugee Convention. In its judgment of 15 November 2002,<sup>63</sup> it wrote:

*“In that judgement of 21 May 2002, it is considered that the asylum seeker has not made sufficiently convincing that the husband has drawn the special negative attention of the White-Russian authorities. The minister has in the decision concerning the applicant explained that, besides the fact that she can be held responsible for having provided insufficient documents that are necessary for assessing the application, the applicant has not made a reasonably convincing case that she has drawn the negative attention of those authorities.*

*The court has correctly found no ground for the opinion that the minister could not reasonably have come to that point of view.*<sup>xv</sup>

In this judgement, the question whether the asylum seeker has drawn the negative attention of the authorities was reviewed marginally.

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<sup>62</sup>ABRvS 9 February 2004, *JV* 2004/228.

<sup>63</sup>ABRvS 15 November 2002, *JV* 2003/13.

In other judgments,<sup>64</sup> the Council of State considered the following;

*“Furthermore, the judge has correctly found no ground for the view that the Secretary of State could not reasonably have come to the point of view that the applicant has not made a reasonably convincing case that the discrimination that he was exposed to was that serious.”<sup>xvi</sup>*

This judgement illustrates that the Council of State marginally reviews assessments of the seriousness of discrimination.

*“2.1.1. These complaints fail. The court has determined on sufficient grounds that the Secretary of State, on the basis of the information that has been provided in the country report, did not have to find that the applicant has made a reasonably convincing case that if she were returned to or stayed in (Northern) Iraq that she would face a real risk of becoming the victim of treatment in violation of article 3 of the European Convention on Human Rights.”<sup>xvii</sup>*

In the aforementioned consideration,<sup>65</sup> the term did not have to find made reasonably convincing, indicates a marginal judicial review. The question whether the asylum seeker faces a real risk of treatment in violation of article 3 of the ECHR is marginally reviewed.

In the following judgment,<sup>66</sup> the Council of State makes clear that the minister’s opinion about assumptions derived by the asylum seeker from the facts must be marginally reviewed:

*“In addition to assessing the credibility of the facts as stated by the alien, the assessment of the reality of the assumptions derived by the alien from those facts is also primarily the responsibility of the minister. The judge must review this opinion in a limited manner. The court, thus, has incorrectly substituted its own opinion for the Secretary of State’s opinion.”<sup>xviii</sup>*

One of the most crucial elements in the asylum procedure is the qualification of facts and, in particular, the question of negative attention. The essence of rejection or grant of the (credible and plausible) asylum request lies in the qualification of facts.

If the minister finds the narrative of the asylum seeker credible, he will assess whether the asylum seeker with what he has put forward qualifies as a refugee or falls within the protection given by article 3 ECHR.

As illustrated earlier in this chapter,<sup>67</sup> the Council of State is of the opinion that judges should use full judicial review for qualifications of facts. On the basis of previous

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<sup>64</sup> ABRvS 20 August 2002, *JV* 2002/380.

<sup>65</sup> ABRvS 21 May 2002, *JV* 2002/224.

<sup>66</sup> ABRvS 8 October 2004, *JV* 2004/286.

<sup>67</sup> ABRvS 25 November 2002, *JV* 2002/469; ABRvS 7 November 2003, *JV* 2004/46.

mentioned judgments, the Council of State seems to see the question of negative attention as part of the qualification phase. These passages are based on an assumption that the statements are credible. The Council of State however applies a marginal judicial review to the minister's opinion on the negative attention of the authorities.

If the minister finds that the facts and circumstances are credible and gives an opinion that they qualify an applicant for refugee status or indicate a case for inhuman or degrading treatment as mentioned in article 3 of the ECHR, it would seem logical that the judge would apply full judicial review. However, the reality is that even when the minister finds that the facts and circumstances are credible, thus meaning that the judge is beyond the point at which he would assess the credibility of the facts, the judge still in some cases must apply marginal judicial review when it comes to qualifications of facts. Why marginal judicial review must be applied is unclear. Although the Council of State has given reasons why marginal judicial review should take place when it comes to the credibility of the asylum narrative, it has failed to explain why marginal judicial review should be applied when the judge is beyond this point and must review the qualification. For the sake of clarity and transparency, the Council of State should explain why it applies marginal judicial review when it comes to the qualification of facts in some cases and why the aspect that it reviews in a limited manner does not belong to the qualification phase.

### **3.5 How Should the Minister's Opinion on Credibility Be Reviewed?**

Previous sections discussed the aspects of the narrative that must be reviewed marginally, namely unsubstantiated statements, the credibility of the narrative, and the imputability/culpability of the lack of proper documents. Qualification of facts and judicial review of this aspect were also discussed. This section sheds more light on the question how, according to the Council of State, the judge has to review the minister's opinion on credibility.

#### ***3.5.1 Careful Preparation and an Explanation***

In a few decisions,<sup>68</sup> the Council of State has made clear which aspects judges must take into account when assessing credibility and has made clear that despite the fact that the minister has a certain margin when assessing the credibility of the refugee's story, the minister's opinion still has to meet the standards of careful preparation and has to give reasons as required by law.

The Council of State wrote in its judgment of 8 August 2003:

*"The Council of State considers in her official capacity as follows. As she has considered before (among others "JV" 2003/103), the standard for assessment is not the judge's own opinion about the credibility of the asylum seeker's narrative but, rather, the question whether there are reasonable grounds for the minister's opinion on the narrative's credibility in light of the reports of the interviews held, the corrections and supplements made to it, and the statements made. This leaves untouched the additional*

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<sup>68</sup> ABRvS 8 August 2003, *JV* 2003/438; ABRvS 27 Januari 2003, *JV* 2003/103.

*requirement that the decision-making process must meet the demands of carefulness and that the decisionmaker must give reasons as required by law. The judge must then assess the decision on the basis of these standards.*

*Thus, judicial review takes place, but without the judge's substitution of his own assessment for the minister's assessment.* <sup>”xix</sup>

This last passage is crucial because the Council of State explicitly says that when assessing the reasons for a decision, this aspect is not one that is the minister's responsibility.

### **3.5.2 Assessment of the Narrative as a Whole**

According to the Council of State,<sup>69</sup> the court cannot distinguish between the credibility of the asylum seeker's narrative and the credibility of his story related to his travels when assessing credibility:

*“2.1.3 Given the asylum seeker's obligation to cooperate fully in the investigation and to all information that he possesses or could reasonably have possessed, there is no rule of law that requires the Secretary of State to distinguish between the story related to the applicant's travel and the judge's account of the story of applicant*

*2.1.4 The judge's opinion that the story related to the applicant's travel is completely implausible is not disputed on appeal. There is no basis for position that the Secretary of State under the circumstances could not reasonably have found that the applicant had not presented a reasonably convincing case.* <sup>”xx</sup>

The Council of State has stated in some of its judgments that the judge cannot separately review each of the elements that have been found to be not credible or improbable by the minister.<sup>70</sup> The Council of State has given the following opinion<sup>71</sup>:

*“By assessing each of these elements individually and valuing them outside the related scope of judicial review (“JV” 2003/103), the court has not reviewed the Secretary of State's opinion on credibility but, instead, has incorrectly substituted its own opinion.* <sup>”xxi</sup>

The judge is also not permitted to distinguish between those elements that concern the essence of the asylum seeker's story and those elements that do not<sup>72</sup>:

*“Given the asylum seeker's obligation to fully cooperate with the investigation and to provide all relevant information that he possesses or could reasonably have possessed, there are, in the assessment of the credibility of his statements, no grounds for the president's distinction between elements that do and do not concern the essence of the motives for fleeing.* <sup>”xxii</sup>

In the same judgement,<sup>73</sup> it held:

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<sup>69</sup> ABRvS 8 April 2002, *JV* 2002/172.

<sup>70</sup> ABRvS 27 January 2003, *JV* 2003/103; ABRvS 11 Augustus 2003 *JV* 2003/441.

<sup>71</sup> ABRvS 11 August 2003 *JV* 2003/441.

<sup>72</sup> ABRvS 28 December 2001, *JV* 2002/73.

*“The aliens, furthermore, have appeared to be unable to give verifiable statements about their stated travels that took several months from Iran, via Turkey, Singapore, and Japan to the Netherlands. The Secretary of State could have concluded that this has negatively affected the aliens’ obligation to present a reasonably convincing case, as far as it is consistent and not implausible and insofar as it could reasonably have been expected of the applicants.*

*Having taken this into consideration, there are also no ground for the position that the Secretary of State could not have concluded that the aliens’ established inconsistent statements must lead to the conclusion that the asylum narrative was not credible.”<sup>xxiii</sup>*

In summary, the Council of State has made clear that marginal judicial review means that judges must review the minister’s opinion on credibility in general. It is not possible to give more weight to certain credibility aspects than to others because they do not concern the essence of the asylum narrative. The judge for instance cannot ignore certain aspects that have been found not credible, only because he finds them not that relevant/important.

### **3.6 Circumstances That Can Be Attributed to the Asylum Seeker**

Chapter one mentioned the applicable procedure and policy and also mentioned the fact that the asylum seeker can be held responsible for certain circumstances. The Council of State finds it relevant for the applicable scope of judicial review whether the asylum seeker can be held responsible for circumstances in article 31(2)(a)-(f) of the Aliens Act 2000. The circumstances mentioned in article 31(2)(a)-(f) will be discussed in more detail, with particular attention being paid to the question of the lack of proper documents. If the lack of proper documents can be attributed to the asylum seeker, then this negatively affects the credibility of his narrative. The lack of documents can also be attributed to the asylum seeker if he cannot provide documents concerning his identity, nationality, route of travel, or narrative.<sup>74</sup>

The rules that apply to the asylum seeker’s responsibility for the lack of proper documents also apply to other circumstances that can be attributed to the asylum seeker. It is also important to mention that the minister has a fair degree of discretion in deciding whether the asylum seeker has submitted sufficient documents. For example, a minister may find that an asylum seeker who has submitted ten documents has not submitted a sufficient number of documents.

#### ***3.6.1 The Attribution to the Asylum Seeker of the Lack of Proper Documents Must be Reviewed in a Limited Manner***

As to whether the minister’s opinion on whether the asylum seeker lacks proper documentation must be reviewed marginally, the Council of State has stated<sup>75</sup>:

*“In the decision of 8 November 2003, the minister also said that the alien does not qualify for a residence permit under article 3.4(1)(w) of the Aliens Decree 2000 because*

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<sup>73</sup> ABRvS 28 December 2001, *JV* 2002/73.

<sup>74</sup> C1/5.8.2 en C1/5.8.3 Aliens Circular 2000.

<sup>75</sup> ABRvS 12 February 2004, *JV* 2004/141.

*he was responsible for having not submitted any documents to substantiate his stated identity and nationality. Therefore, the alien has not made a reasonably convincing case that he could not have been held responsible for the alleged theft of his documents after arriving at Schiphol Airport because he stated during the first interview that he left his luggage, which included his documents, unattended at Schiphol.*

*2.3.2 When it comes to assessing whether an alien can be held responsible for failing to submit documents as mentioned in paragraph C2/8.4 of the Aliens Circular 2000, the minister possesses a very wide margin of factual appreciation. As such, there are no grounds for concluding that the minister could not reasonably have concluded that the lack of documents could be attributed to the alien.*”<sup>xxiv</sup>

The Council of State’s reason for applying marginal judicial review when it comes to whether the asylum applicant is undocumented is that the minister has a wide margin of factual appreciation.

The burden of proof for making the narrative plausible primarily lies with the asylum seeker.<sup>76</sup>

Therefore, the asylum seeker must answer the questions posed by the IND as fully as possible and must submit as much evidence as possible to substantiate his narrative. By evidence is primarily meant documents, official documents as well as documents that give an indication of his narrative, for example, travel tickets.

If the lack of sufficient documents is not attributable to the asylum seeker, the standard for giving reasons why the minister finds the narrative not to be credible is a normal one. The minister has to point out the elements that he finds not to be credible and why they lead to the conclusion that the narrative is not credible. In that case, the minister will explicitly make clear that he finds the narrative not to be credible. The minister has to point out the elements that he finds not credible and why they lead to the conclusion that the narrative is not credible. If he does not do so, the judge will assume that the narrative is credible and will proceed to the next phase of judicial review, which is the qualification of the narrative and facts. The judge will analyze whether the stated facts lead to the conclusion that the asylum seeker qualifies as a refugee and whether there is a real risk of inhuman treatment if he returns to his country of origin. The lack of proper documents harms the credibility of the asylum narrative. If the asylum seeker believes that he needs protection, more will be expected from him in making a reasonably convincing case here.<sup>77</sup> The narrative can positively impact the asylum seeker’s application if he has been found responsible for lack of proper documents. Effectively, this means that there can be no inconsistencies in the narrative’s details. If this is the case, the minister will find the narrative not credible by simply referring to these inconsistencies in the narrative.

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<sup>76</sup> Art. 4:2 Awb; arts. 30(1), 37(c) Aliens Act 2000; art. 3.114 Aliens Decree.

<sup>77</sup> C1/5.8 Aliens Circular 2000.

### **3.6.2 Assessment With Respect to the Content of the Individual Narrative**

According to the Council of State, a request for asylum can only be found not credible or implausible if there has been a certain assessment of the content of the asylum seeker's narrative. The Council of State has stated:<sup>78</sup>

*"Based on the opening words of article 31(2) of the Aliens Act 2000 and how this article has been interpreted and applied, it follows that the circumstances that must be taken into account in investigating an application for a residence permit are in themselves not sufficient enough to reject an application. The Secretary of State has in this decision rejected the application exclusively on the grounds mentioned in paragraphs d and f and, therefore, has not concretely and in detail assessed the asylum seeker's narrative. Taking this into account, the Secretary of State has erred by rejecting the application solely on the grounds of article 31(2)-(d)-(f) of the Aliens Act 2000. The court has failed to properly appreciate this."<sup>xxv</sup>*

This makes clear that the asylum seeker's application cannot be rejected on the mere existence of a circumstance mentioned in article 31(2) of the Aliens Act 2000. The Minister must always assess a concrete, detailed, and individual narrative of the asylum seeker before he can find the narrative not credible. The circumstances mentioned in article 31(2) of the Aliens Act 2000 do, however, have an effect on the requirement of proper motivation. I will explain this in the following section.

### **3.6.3 Stronger Reasons for the Decision Are Required if No Circumstance Has Been Attributed to the Asylum Seeker**

The Council of State has made clear that if no circumstances under article 31(2)(a)-(f) of the Aliens Act 2000 have been attributed to the asylum seeker, more extensive reasons are required for a minister's labelling of a narrative as implausible.

The general rule is that the asylum seeker's narrative must be in general consistent and not improbable and consistent with what is otherwise known about the general situation in the applicant's country of origin. The minister has to determine whether this is the case and must state why he is of the opinion that the narrative is not credible by pointing out inconsistencies and drawing conclusions from them. Apparently, it is not enough to simply point out inconsistencies or remarkable elements if there are no circumstance under article 31(2)(a)-(f) of the Aliens Act 2000 for which the asylum seeker can be held responsible.

If a circumstance under article 31(2)(a)-(f) is attributed to the asylum seeker, then he must make further efforts to make his narrative plausible. In such cases, there can be no gaps, vagueness, inexplicable turns, or inconsistencies at the level of relevant details because the narrative has to be positively persuasive. This also means that it is easier for the minister to give proper reasons if the asylum seeker can be held responsible for such a circumstance.

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<sup>78</sup> ABRvS 29 July 2002, *JV* 2002/314.

The Council of State has given the following considerations in a case<sup>79</sup> in which the asylum seeker could not be held responsible for such a circumstance:

*“2.1.9. The Secretary of State has not, either in the letters of intention to reject the applications or in the decisions of 31 August 2001, concluded that there are circumstances under article 31(2)(a)-(f) of the Aliens Act 2000 which would undermine the credibility of the asylum seekers’ statements. In view of this, the Secretary of State should have assessed whether the asylum seekers’ narrative was generally consistent and not improbable and whether it was consistent with what was otherwise known about the general situation of the country of origin. Contrary to what the minister argues, neither the decisions nor the intentions to reject the applications that have been inserted in the decisions qualify as the Secretary of State’s point of view, based on such assessment, that the narrative generally must be considered not credible.*

*The scattered considerations in the decisions and the letters of intention in which a few elements of the narrative are considered to be curious or remarkable are not brought in relation to each other, nor is any conclusion drawn from them. Furthermore, considerations of content do not support the minister’s position that the Secretary of State has explicitly stated and supported the conclusion that the narrative of the aliens is not credible .*

*In light of this, the court has correctly concluded that the Secretary of State has assessed the narrative only on weight. Therefore, the appeal fails.*<sup>xxvi</sup>

In another judgement,<sup>80</sup> the Council of State gave a similar view:

*“2.1.3. Because the Secretary of State has not found any circumstances under article 31(2)-(a)-(f) of the Aliens Act 2000 in the decision of 1 July 2002, the starting point is, according to the applicable policy, that he must presume that the asylum seeker’s narrative and the stated facts are credible, insofar as the requirements mentioned in paragraphs C1/1(2), C1/3(2.2) and (3.4) of the Aliens Circular 2000 (hereafter: the Vc 2000) have been met.*

*The applicant has challenged the position that his statements are not credible. In this context, he has sketched his political and artistic background, including his fame as a singer and speeches and protest songs at protest meetings. He has, furthermore, considered the local situation, at which he clarified his story with information from other sources. With reference to these personal circumstances and the local situation, the applicant has clarified the statements that have been found to be credible by the Secretary of State.*

*In light of this and the fact that the applicant has related a local situation in Nigeria that is not inconsistent with what is known about Nigeria, which the Secretary of State acknowledges in the decision, the Secretary of State could not simply state that he still finds the statements to be not credible. He could, in light of what the applicant has presented, the earlier statements of the applicant, and the above mentioned paragraphs of the Vc 2000, not reject the application without giving detailed reasons for why he did not find the asylum seeker’s narrative to be credible.*<sup>xxvii</sup>

<sup>79</sup> ABRvS 22 August 2003, JV 2003/451.

<sup>80</sup> ABRvS 25 August 2003, JV 2003/454.

In conclusion, the minister's assessment of credibility must be more carefully supported if no circumstances under article 31(2) can be attributed to the asylum seeker. Even in the absence of proper documentation under article 31(2)(a)-(f) of the Aliens Act 2000, the Council of State demands that reasons be given, based on the narrative's content, stating why the minister finds the asylum seeker's narrative not credible.

### **3.6.4 Analysis**

The aspects mentioned in article 31(2) of the Aliens Act 2000 seem to affect the extent of judicial review. It seems that the lack of documents or the presence of another circumstance under article 31(2) of the Aliens Act 2000 leads to judicial review that is more marginal if the lack of documents or other applicable circumstances can be attributed to the asylum seeker. If the circumstance is attributable to the asylum seeker, the minister must explain why he finds the narrative not credible. The judge will then review whether the minister reasonably could have come to its opinion that the asylum narrative is not credible, reviewing this opinion marginally. If the lack of proper documents is attributable to the asylum seeker by the minister, the requirement of giving reasons and preparing the decision carefully seems to be lower. It is then sufficient that he points out inconsistencies and improbable elements and draws the conclusion that the narrative is not credible. The lack of documents can, thus, have an effect on the minimum requirements for giving reasons for the decision and indirectly also on the extent of judicial review. If the lack of documents is attributed to the asylum seeker, a more marginal form of judicial review will take place than if the lack of documents cannot be attributed to the asylum seeker. After all, the minister will meet the requirement of giving an explanation much more easily if he can attribute the lack of documents to the asylum seeker. The minister then has to state that the lack of documents harms the credibility of the narrative, then point out inconsistencies or vague or improbable statements, and then conclude that the narrative is not credible. The judge will accept this opinion in most cases because the minister could reasonably have come to this point of view.

This is very peculiar and disturbing because the decision to hold an asylum seeker responsible for such a circumstance must be reviewed marginally and because of the fact that if an asylum seeker can be so held responsible then an even more marginal form of judicial review must take place. In this way, the administration can determine to some extent the scope of judicial review. This is very undesirable and is a negative consequence of the rules applied by the Council of State.

## **3.7 Summary of the Jurisprudence**

*What should be reviewed marginally?*

The previous sections analyzed the Council of State's jurisprudence on the aspect of marginal review. I began by analysing what aspects, according to the Council of State, the judge must review marginally.

As to the distinction made by the Council of State between factual determinations and the credibility of stated but unsubstantiated facts, it should be noted that the Council of State does not make clear what exactly it means by factual determinations. Most likely, however, it means that facts that can be objectively determined or verified should be reviewed fully. The Council of State appears to have a more nuanced view when it comes to review of facts than has been assumed by some authors. According to the Council of State, the assessment of substantiated facts that can be verified, or factual determinations, must be fully assessed fully. The assessment of which stated but unsubstantiated facts, or facts that cannot be determined, are credible and, thus, which stated facts should be taken into account must always be reviewed marginally. The minister's opinion on which documents must be submitted and the asylum seeker's responsibility for the lack of proper documents must also be marginally reviewed.

The minister's opinion on the causal connection between stated facts also must be reviewed marginally, as must corrections and additions to the narrative by the asylum seeker. An aspect that also must be reviewed marginally is the question whether the asylum seeker will face persecution if he returns to his country of origin.

Section 3.4 discussed judicial review of qualifications of facts. There is here a distinction between marginal judicial review of the minister's opinion on credibility and full judicial review of the qualification of facts that have been found credible by the minister. The Council of State's considerations indicate that qualifications of facts depend on whether the minister accepts the stated facts that have been put forward by the asylum seeker. If the minister has not found these stated facts and circumstances implausible, the judge can fully assess the qualification of facts by the minister. If, however, the minister does not find that the stated facts the asylum seeker has brought forward are credible, then no review of the qualification takes place at all. This seems logical because there are no facts that can be qualified if the narrative has been found not credible.

Section 3.4 concluded that the Council of State dictates full judicial review when interpreting international norms.

Section 3.5 noted that the jurisprudence of the Council of State has inconsistencies that concern the aspect of qualification of facts, an aspect which, according to the Council of State, has to be fully reviewed. A category that has to be reviewed marginally, however, is the causal connection between stated facts. This connection also cannot be established independently and objectively and is most likely why the Council of State finds marginal judicial review appropriate here. Although the narrative has been found credible and although it concerns aspects which can be seen as qualifications of facts, the Council of State still applies marginal judicial review. The inconsistencies in the considerations of the Council of State have been noted in section 3.5.5.

*How should marginal review take place?*

This chapter has also analysed the Council of State's opinion on how marginal judicial review should be applied. The Council of State makes clear that the judge must not substitute his own opinion on credibility in place of the minister's opinion. The judge must review whether the minister reasonably could have come to his opinion on credibility in light of the reasons given by her, in light of the interviews held, and in light of all other available information. In particular, the judge must review the minister's opinion as to the reasons given for the decision. These reasons must be prepared carefully.

Furthermore, the judge must assess the credibility of the narrative as a whole and cannot distinguish between elements of the asylum seeker's narrative that concern the essence and elements that do not concern its essence.

The existence of at least one of the circumstances mentioned in article 31(2)(a)-(f) of the Aliens Act 2000 plays a role in determining which type of judicial review of the minister's decision in asylum law will apply. The most important circumstance mentioned in this article is the lack of proper documents. As I illustrated in section 3.6.4, the question of the attribution to the asylum seeker of the lack of proper documents can affect marginal judicial review. The Council of State is of the opinion that the minister cannot on the mere presence of such a circumstance reject the asylum seeker's application and, instead, must assess the credibility of the concrete, detailed, and individual narrative. When a circumstance under article 31(2) of the Aliens Act is attributable to the asylum seeker, the reality is that more than marginal judicial review takes place. Two factors lead to this conclusion. First, if the lack of proper documents has been attributed to the asylum seeker, then this objection must be reviewed marginally. Second, that the minister can meet the standards of carefulness and giving reasons easier, he can simply point out inconsistencies and conclude that the narrative is not credible.

The following schedule of judicial review according to the Council of State summarizes these findings. As this schedule makes clear, the judge has little space to review both credibility or plausibility of the stated fear or risk.

## **Schedule of Judicial Review According to the Council of State**

### **1. Credibility**

- a. Substantiated and verifiable facts and circumstances → Full judicial review
- b. Unsubstantiated stated facts and circumstances → Marginal judicial review
- c. The minister's opinion on the necessity of documents for the assessment of the narrative → Marginal judicial review
- d. The asylum seeker's responsibility for the lack of documents → Marginal judicial review

## 2. “Plausibility” of the stated fear of persecution or real risk of treatment in violation of article 3 of the ECHR

The minister finds the narrative credible:

- a. The connection between stated facts and circumstances → Marginal judicial review
- b. Interpretation of stated facts and circumstances → Marginal judicial review
- c. Upon return, is it expected that there will be specific attention paid to the applicant? → Marginal judicial review
- d. If so, does the applicant qualify under articles 1A-2 or 3 of the ECHR? → Full judicial review

## 3. Purely legal aspects:

Interpretation of international norms → Full judicial review

### 3.8 Reasons Given By the Council of State

Having analyzed the limited judicial review applied by the Council of State to certain aspects of the minister’s opinion, it is necessary to shed some light on the reasons given by the Council of State for applying such review.

The Council of State gave the following considerations in its decision of 27 January 2003<sup>81</sup>:

*“As the Council of State has considered before, among others in its decision of 9 July 2002, assessing the credibility of the facts that have been put forward by the alien in his story of refuge is the responsibility of the Minister, and the assessment can only be marginally reviewed by the judge.*

*2.4.2. In administrative law, of which migration law forms a part, the administration, in this case the minister, implements the law. It is the judge’s task to assess the lawfulness of this decision and, in her official capacity, on rules of public order, as well as on the basis of complaints that have been put forward. Besides this, the minister has to give full account to the State’s General about implementation.*

*2.4.3. The assessment by the minister usually does not concern the question whether and to what extent the statements about the facts that the asylum seeker has put forward have been established. The asylum seeker is, after all, in most case not able to, and it reasonably cannot be asked of him, to prove his narrative with evidence.*

*2.4.4. To assist the asylum seeker where this difficulty arises and still be able to make an appropriate assessment of the request in light of the applicable prescriptions, the minister, according to paragraph C1/1(2) and paragraphs C1/3(2.2) and (3.4) of the Aliens Circular 2000, has to assume that the stated facts are credible if the asylum seeker has answered all posed questions as comprehensively as possible and if the narrative in general is intrinsically consistent and not implausible and is in accordance with what is known about the general situation of the country of origin. Moreover, there cannot be*

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<sup>81</sup> ABRvS 27 January 2003, *JV* 2003/103.

*any circumstances as mentioned in article 31(2)(a)-(f) of the Aliens Act 2000 to harm the credibility of the asylum seeker's statements.*

*2.4.5 If this has not been met, there can also be no gaps, vagueness, inexplicable turns, or inconsistencies at the level of relevant details; the asylum seeker's narrative has to be positively persuasive.*<sup>xxviii</sup>

In this part of the decision, the Council of State explained how the Minister assesses a narrative's credibility and what factors influence the establishment of facts and assessments of credibility. However, it has not yet explained why judges should apply limited judicial review. The following considerations make this clear:

*"When applying this policy in individual cases, the Minister has a certain margin of appreciation and scope for policymaking. He assesses the credibility of the asylum seeker's narrative on the basis of detailed interviews and by comparing the narrative with all that he knows about the situation in the country of refuge from country reports, other objective sources, and what he has considered as a result of interviews with other asylum seekers in similar situations. This overview makes possible a comparative assessment and, thus, "objectivity." The judge is incapable of assessing credibility in a similar fashion.*

*This does not mean that there is no legal review of the Minister's assessment. The standard, however, is not the judge's own opinion on the credibility but whether there is a reasonable basis for the Minister's opinion in light of the reasons laid down in the letter of intention and the opposed decision, the reports of the interviews held, and the supplementations and corrections made to them and the aspects put forth in the view.*

*This is in addition to the requirement that the decision must meet standards of carefulness and must give a reason and that the judge must assess the decision on these aspects.*<sup>xxix</sup>

To summarize, the Council of State has put forward three arguments in favour of marginal judicial review. First, there is the special role of the administrative judge in assessing the lawfulness of executive decisions and on rules of public order. The Council of State also mentions that assessing credibility is the primary task of the executive, which is responsible to Parliament for applying the law.

Finally, the Council of State believes that the minister can objectively assess credibility on the basis of interview reports and by comparing the narrative to available information about the country of origin. According to the Council of State, the minister is better able to assess credibility objectively than the judges. Review, however, does take place of whether the minister reasonably could have come to his view on credibility, although it is important to note that this review does not assess whether the minister's opinion is the same as the judge's own opinion on credibility.

### **3.9 Assessment of the Reasons Given by the Council of State**

The Council of State has given several justifications for limited judicial review of assessments of credibility and factual determinations.

The following sections discuss these justifications, assess them, and present an alternative.

### ***3.9.1 The Margin of Factual Appreciation Does Not Necessarily Prohibit a Judge from Fully Reviewing the Decision***

The Council of State's argument of the presence of a scope of factual appreciation is presented as if there is consent about the application of limited judicial review in cases of a scope of factual appreciation. To reiterate, the margin of factual appreciation means that the administration has a certain discretion in determining whether it will use an authority or not. One can also speak of evaluation space in those cases in which the administration must determine whether certain criteria have been fulfilled. As mentioned above, there is not consensus in the literature on the extent of judicial review to be given in such situations. Some authors argue that cases of evaluation space require the judge to fully review the decision, while others believe that the scope of judicial review depends on certain factors. According to the latter authors, one of the most important of these factors is the presence of an objective standard. If an objective standard is present, full judicial review is possible.

### ***3.9.2 Which Body Should Make Factual Determinations?***

Is the fact that the asylum seeker has to make his narrative plausible an argument favouring limited judicial review? An argument that supports the Council of State's view is that credibility is not an objective standard, and thus, the administration has been provided with a margin of factual appreciation, or *beoordelingsruimte*.

On the other hand, one could argue that the criterion is establishing a reasonably convincing narrative and that this is an objective standard. The narrative is about facts that have or have not taken place in the country of origin. This can be considered as an objective standard because these stated facts either took place or did not take place. Such a consideration is prevented by labelling the object of judicial scrutiny as an assessment of credibility, not an establishment of facts. Such a semantic manoeuvre, however, should not have such important consequences for the scope of judicial review. If one follows this line of reasoning, limited judicial review would only be appropriate if the criterion was making the facts plausible in the opinion of the minister. In this respect, the Council of State's opinion here is rather peculiar.

It should also be stressed that the Council of State seems to act in a way that is different than in other areas of administrative law. Factual determinations are usually fully reviewed by the judge, and qualifications of facts are possibly reviewed marginally.<sup>82</sup> At first glance, the Council of State seems to act contrary to what is usual in other areas of administrative law because it fully reviews qualifications of facts and only reviews factual determinations in a limited manner. The imposed limited judicial review of factual determinations is not common in other areas of administrative law and, thus, its legitimacy and appropriateness can be questioned.

### ***3.9.3 The Minister's Accountability***

The Council of State argues that the minister must account to the Dutch parliament.

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<sup>82</sup> Y. Schuurmans in her note with ABRvS 15 November 2002, *AB* 2003/96.

This, however, is not a very strong argument because the Parliament cannot and does not verify factual determinations or assessments of credibility in individual cases. In other areas of administrative law where the judge applies full judicial review when it comes to factual determinations, furthermore, the responsible minister also has to give account to the Dutch parliament about the policy and the way in which it is put into practice.

Another problem is that if the judge can only assess whether the administration reasonably could have assessed credibility as it did, it seems that almost every such determination must be found reasonable. The judge cannot search for the most reasonable determination or the determination that is most likely. With this I mean that when it comes to reviewing whether a decision is reasonable, the decision is either reasonable or not. However this does not mean that other decisions wouldn't be reasonable. It is for instance possible that the rejection of an asylum request has been found reasonable, but at the same time it would have also been possible that asylum was granted. It would also had been reasonable if another decision was taken.

What if the administration could have reasonably determined facts or assessed credibility in a way that would have been more advantageous to the asylum seeker?<sup>83</sup>

#### ***3.9.4 The Judge's Capacity to Assess Credibility and Determine Stated Facts***

The minister argues that it is more capable of determining the facts than judges. This is not a constitutional argument but, rather, is a mere practical argument. It is, however, questionable whether the minister is better able to determine facts than judges. Both the minister<sup>84</sup> and the judge use information that the Ministry of Foreign Affairs gathers and puts in a report, the "ambtsbericht." The argument that the minister (read: IND) can assess the asylum seeker's story better because he assesses more applications for asylum than the judge reviews and that he is better able because he is specialized in assessments of credibility is not wholly convincing. The fact that an IND officer reviews many applications does not mean that he will not make mistakes. Also, judges assess many appeals. This requires a certain degree of skill or affinity in determining facts and assessing credibility. Furthermore, the Council of State does not state why it has applied limited judicial review of factual qualifications or the interpretation of statements in some cases.

Finally, it is clear that some European countries apply limited judicial review for factual determinations. Other countries, however, apply full judicial review to facts. For instance, in Luxemburg, the judge can review facts fully in the normal procedure. In Ireland, the Refugee Appeals Tribunal can make a new assessment of facts and can make a recommendation to the minister. In Austria, appeal is possible against negative asylum decisions with the Independent Asylum Review Board. This body has full jurisdiction over facts and other relevant issues. In Finland and Germany, appeal to the administrative judge is possible against a decision adverse to the asylum seeker. The investigation of facts is not limited on appeal.<sup>85</sup> Why are courts in these countries able to carry out full review of credibility determinations while Dutch courts are unable to do this?

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<sup>83</sup> See also P.B in his note with ABRvS 22 August 2003, *JV* 2003/451.

<sup>84</sup> Formally the Minister but in reality a public servant of the IND.

<sup>85</sup> Geannoteerde agenda voor de bijeenkomst van de ministers van Justitie en van Binnenlandse Zaken, 25 en 26 October 2004 te Luxemburg, pp. 3-4.

### ***3.9.5 Necessary Documents Should Be Fully Reviewed By the Judge***

In the previously-cited judgement, the Council of State mentions the attribution to the asylum seeker of the circumstances in article 31(2)(a)-(f) of the Aliens Act 2000. As was previously mentioned, the lack of proper documents is one of the most important circumstances that can be held against the asylum seeker. Section 3.2.2 of this paper mentioned the fact that the determination which documents are necessary should be, according to the Council of State, marginally reviewed. On this, one should refer to article 4:2(2) of the General Administrative Law Act:

“De aanvrager verschafft voorts de gegevens en bescheiden die voor de beslissing op de aanvraag nodig zijn en waarover hij redelijkerwijs de beschikking kan krijgen.”

“The applicant, furthermore, provides the information and documents which are necessary for the application and which he can reasonably be expected to have”

Based on this, it can be argued that the formulation of article 4:2(2) of the General Administrative Law Act and the formulation of article 31(2)(a)-(f) of the Aliens Act 2000 lead to the conclusion that judges have to fully review whether certain documents are necessary.

### ***3.9.6 The Application Centre Procedure***

Finally, another aspect is the fact that a large number of asylum requests are treated in the “aanmeldcentra.” The Council of State did not consider this aspect in the previously-cited judgment. In the application centre procedure, the asylum seeker’s request is dealt with within forty-eight procedural hours.<sup>86</sup> Because this is such a short time, there is a very high risk that the assessment of credibility or the determination of facts will not be correctly.<sup>87</sup> According to the Council of State, however, the judge cannot review whether this is done correctly, only whether the opinion of the minister (read: IND) is reasonable.

## **Chapter 4 Marginal Judicial Review and the Requirement of an Effective Remedy**

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<sup>86</sup> Only the hours between 08.00 and 22.00 are counted.

<sup>87</sup> Nederlands Juristen Comité voor de Mensenrechten, *De AC-procedure: De achilleshiel van het asielbeleid, een commentaar van het Nederlands Juristen Comité voor de Mensenrechten op het gebruik van de versnelde asielprocedure in de aanmeldcentra*, November 2003.

The previous chapter discussed the marginal judicial review that is applied by the Council of State. This chapter asks whether the marginal judicial review that is applied by Dutch Courts provides the asylum seeker an effective remedy as required by article 13 of the ECHR. To answer this question, it is necessary to examine the Court's jurisprudence. Although the Court has given several judgments about limited judicial review as applied by English courts, it has not given judgments on Dutch marginal judicial review. Thus, it is necessary to explore Court judgments on English limited judicial review. From this, this chapter asks which requirements Dutch marginal judicial review must meet in order to provide an effective remedy. Therefore, the question is not in which way Dutch marginal judicial review and English judicial review relate to one another but, rather, which standard must be met in order to provide an effective remedy as required by the ECHR.

#### **4.1 The European Court of Human Rights Applies Rigorous Scrutiny**

It is important to note that the Court rigorously examines the risk of ill treatment. In all cases where the complaint alleges a violation of article 3 of the ECHR, the Court assesses whether there exists a real risk of treatment contrary to article 3 of the ECHR. The Court reasoned as follows in *Vilvarajah v. United Kingdom*:

*“The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 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 (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 88).”<sup>88</sup>*

##### **4.1.1 Does the European Court of Human Rights Fully Review Credibility?**

In order to determine whether the Court fully reviews credibility, it is necessary to review the Court's jurisprudence on the matter. The following cases are illustrative:

##### ***Nasimi versus Sweden*<sup>89</sup>**

*“.. While aware of the occurrence of reports of serious rights violations in Iran, including the persecution of people advocating rights for the Kurdish minority, the Court has to establish whether the applicant's personal situation is such that his return to Iran would contravene Article 3 of the Convention. In this respect, it is of importance to assess the general credibility of the statements made by him before the Swedish authorities and during the present proceedings.*

*The Court reiterates that the Swedish Migration Board conducted two interviews with the applicant and that both the Migration Board and the Aliens Appeals Board, on the basis of all the evidence before them, concluded that the applicant was not credible. They gave*

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<sup>88</sup> EHRM 30 October 1991, Series A no. 215 (*Vilvarajah v. United Kingdom*), par. 108.

<sup>89</sup> ECHR 16 March 2004, application no. 38865/02 (*Nasimi v. Sweden*).

*detailed reasons as to why they reached that conclusion. Under chapter 8, section 1 of the Aliens Act (Utlänningslagen, 1989:529), the authorities are obliged to consider essentially the same factors as are relevant the Court's assessment under Article 3 of the Convention.*

*In the present case, the Court, like the Swedish immigration authorities, finds it remarkable that the applicant was issued with a passport in 1996 and was allowed to leave Iran on at least two occasions, given his allegations that he was working for the Komala organization and belonged to a family of well-known political activists. The applicant claimed that the Iranian authorities did not have any evidence against him until they found the subversive journals in his home in October 2000. However he also claimed that he had been imprisoned for two years in the early 1990's and had been tortured while imprisoned. Furthermore, he had been dismissed from his teaching job and had, after his release, been beaten up and interrogated by the authorities on several occasions. Also, his home had been searched. If these allegations were true, it appears evident that the Iranian authorities were well aware of his activities and it is not credible that they would have authorized his leaving the country. Moreover, although it recognizes that it may be an ordeal to talk about experiences of torture, the Court is struck by the fact that the applicant did not make any specific allegations of torture until December 2001, more than a year after he applied for asylum, although he must have been aware that such information would be of importance to the immigration authorities. Similarly, a copy of the purported revolutionary court summons was submitted to the Aliens Appeals Board in June 2002, one year eight months after its date of issuance. Notwithstanding the difficulties of obtaining a copy of such a document in Iran, the applicant has acknowledged, in his submissions to the Court, that he was aware of the existence of the summons long before he received a copy of it. In these circumstances, the Court finds it remarkable that he apparently failed to even mention the document to the immigration authorities before June 2002. It notes, moreover, that he submitted the summons at a time when he had already had two asylum applications rejected.*

*Having regard to the above, the Court considers that there are strong reasons to call into question the veracity of his statements. He has offered no reliable evidence in support of his claims. For these reasons, the Court finds that it has not been established that there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment contrary to Article 3 of the Convention in Iran."*

This seems to suggest that the Court assesses facts and credibility on its own. The Court, however, is not always consistent on this matter. For instance, in *Damla v. Finland*, it stated that the review of facts and the gathering and evaluation of evidence and evaluation of evidence is necessarily a matter for the national judge and can only be reviewed by the Court if "*the judges have drawn grossly unfair or arbitrary conclusions from the facts before them.*"

This is remarkable in light of considerations given by the Court in other cases. In *Aktas v. Turkey*, which was decided on 24 April 2003, the Court stated:

*"The Court is sensitive to the subsidiary nature of its role and recognizes that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example,*

*McKerr v. the United Kingdom (dec.) no 28883/95, 4 april 2000). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particular thorough scrutiny ( see, mutatis mutandis, the Ribitsch v. Austria judgement of 4 December 1995, Series A no. 336, § 32, and Avşar v. Turkey, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.”*

This might indicate that the Court fully reviews credibility. In *Aktas*, the Court noted that the administration concluded that the asylum seeker had not presented a credible case. Although the Court stated that the administration must consider the same factors that the Court’s assesses under article 3 of the ECHR, it assesses for itself all evidence that has been put forward and does not simply ask whether the administration’s opinion on the asylum seeker’s credibility was reasonable. The Court assesses credibility by analyzing each aspect of the asylum seeker’s narrative and explains why it finds a particular aspect not credible (e.g., “*If these allegations were true, it appears evident that the Iranian authorities were well aware of his activities and it is not credible that they would have authorized his leaving the country.*” and “*He has offered no reliable evidence in support of his claims.*”). After analyzing all the relevant factors, the Court finally gives its own opinion about credibility.

Other evidence, however, suggests that the Court might apply limited review of facts and credibility. For instance, the Court noted the following:

*“The Court also attaches importance to the fact that the Swedish authorities had particular knowledge and experience in evaluating claims of the present nature by virtue of the large number of Chilean asylum-seekers who had arrived in Sweden since 1973. The final decision to expel the applicant was taken after thorough examinations of his case by the National Immigration Board and by the Government.”*<sup>90</sup>

In another case, the Court stated:

*“The Court also attaches importance to the knowledge and experience that the United Kingdom authorities had in dealing with large numbers of asylum seekers from Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it.”*<sup>91</sup>

Although these considerations might indicate limited judicial review, it seems that the Court does not actually apply limited judicial review. The Court presented these considerations after it had established that returning the asylum seeker would not violate article 3 of the ECHR. It presented these considerations after conducting its own full judicial review. The Court actually applies a full judicial review.<sup>92</sup>

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<sup>90</sup> ECHR 20 March 1991, application no. 15576/89 (*Cruz Varas v. United Kingdom*).

<sup>91</sup> EHRM 30 October 1991, Series A no. 215 (*Vilvarajah v. United Kingdom*).

<sup>92</sup> T.P. Spijkerboer, *Het hogere beroep in vreemdelingenzaken*, ‘s-Gravenhage: SDU Uitgevers 2002, p. 34.

This section has shown that the way in which the Court assesses credibility does not correspond to the way that the Council of State assesses credibility.

This leads to a number of questions. For instance, if the Court, contrary to the Council of State, does give its opinion on credibility, does this mean that the Council of State's method of judicial review is too limited and restrictive?

If the Court does give its own opinion on credibility, does this cause a problem? For instance, if Dutch courts and the Council of State only assess credibility on the basis of reasonableness and if the case were to be brought before the Court, would not the Court fully assess credibility?

These questions will be discussed later in this chapter.

#### **4.1.2 The European Court of Human Rights Fully Assesses Factual Determinations**

In addition to the asylum seeker's credibility, the Court gives its own opinion on factual determinations. Consider *Hilal v. United Kingdom*<sup>93</sup>:

*"63. 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.*

*...While it is correct that the medical notes and death certificate of his brother do not indicate that torture or ill-treatment was a contributory factor in his death, they did give further corroboration to the applicant's account which the special adjudicator had found so lacking in substantiation. They showed that his brother, who was also a CUF supporter, had been detained in prison and that he had been taken from the prison to hospital, where he died. This is not inconsistent with the applicant's allegation that his brother had been ill treated in prison.*

*65. The question remains whether, having sought asylum abroad, the applicant is at risk of ill treatment if he returns home. The Government have queried the authenticity of the police summons, pointing out that it was dated 25 November 1995, while the package to his parents intercepted by the authorities was sent on 27 November 1995. It may be observed however that the special adjudicator's summary of the applicant's evidence referred to his claim that his parents had not been receiving any of his letters. Nevertheless, his only proof of postage related to a registered package with money concerning which he had entered into correspondence with the Royal Mail. He provided this correspondence to prove that his mail had been interfered with; it does not appear from the documents that he claimed that it was from interception of this particular item that the police first knew that he was in the United Kingdom. His account is therefore not inconsistent on this point.*

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<sup>93</sup> ECHR 6 March 2001, Reports of Judgments and Decisions 2001-II (Case of *Hilal v. United Kingdom*).

*...The situation has improved to some extent, but the latest reports cast doubt on the seriousness of reform efforts and refer to continued problems faced by CUF members (see paragraph 46 above). The Court concludes that the applicant would be at risk of being arrested and detained, and of suffering a recurrence of ill-treatment if returned to Zanzibar.”*

The Court clearly considers all evidence and circumstances when assessing complaints about treatment contrary to article 3 of the ECHR. Again, there are some striking differences between the way in which the Council of State assesses facts and the way in which the Court assesses facts. For instance, the Court considers reports given about the country of origin published by Amnesty International, the United Nations Special Rapporteur, and the United States Department of State. The Council of State usually does not take these reports into account but, rather, only looks at the information that is provided in the “*Ambtsberichten*.”<sup>94</sup> Also, the Court does not only fully review the question whether there is a real risk of fearing inhuman and degrading treatment but also whether the asylum seeker has made his narrative plausible. The Court does not only assess factual determinations by the administration on the basis of reasonableness but also looks at facts and circumstances and then draws its own conclusion. It has done this in several cases.<sup>95</sup>

## **4.2 Article 13 of the European Convention on Human Rights**

Besides assessments of credibility or facts, the Court has also assessed whether national asylum procedures provide the asylum seeker with an effective remedy when his application has been denied.

### **4.2.1 What is an Effective Remedy?**

For a clear understanding of the term “effective remedy,” it is necessary to first discuss *Jabari v. Turkey*,<sup>96</sup> in which the Court explained what is meant by an “effective remedy.”

The Court stated:

*“given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized 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.”*

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<sup>94</sup> ABRvS 12 October 2001, *JV* 2001/325.

<sup>95</sup> See also Cruz-varas, ECHR, 20 March 1991, Ahmed, ECHR 17 December 1996, Chahal, ECHR, 15 November 1996, H.L.R., ECHR 29 April 1997, and St. Kitts, ECHR, 2 May 1997.

<sup>96</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII (*Jabari v. Turkey*).

The Court clearly acknowledges the importance of an effective remedy when an asylum seeker complains about the risk of treatment contrary to article 3 of the ECHR. That the Court is of the opinion that there has to be rigorous scrutiny and that this scrutiny must be independent are important. Also, there must be the possibility of suspending the implementation of the measure, which typically involves transfer to country of origin.

Now that it has become clearer what the Court means by an effective remedy, it is helpful to examine a few cases in which the Court assessed whether there was an effective remedy available.

#### **4.2.2 Relevant Case Law**

One of the first and most important cases in which the Court assessed whether there was an effective remedy available was *Vilvarajah*. In *Vilvarajah*, the Court said that although there were limitations on the powers of English courts in judicial review proceedings, these powers provided an effective degree of control over decisions of administrative courts in asylum cases and were sufficient to satisfy the requirements of article 13. The Court showed in detail how judicial review by English courts takes place. In other cases, the Court has referred to the considerations given in *Vilvarajah*. It is useful to look at the limited judicial review applied by the English courts in these cases. The next section gives the most important considerations of the Court and analyzes them.

The Court stated in *Vilvarajah*<sup>97</sup>:

*“90. The courts will examine whether the Home Secretary has correctly interpreted the law in relation to the grant or refusal of asylum. If the courts are satisfied that he has made no error of law they may nevertheless review the refusal of asylum in the light of the "Wednesbury principles" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 Kings Bench 223), namely, an examination of the exercise of discretion by the Secretary of State to determine whether he left out of account a factor that should have been taken into account or took into account a factor he should have ignored, or whether he came to a conclusion so unreasonable that no reasonable authority could have reached it. According to the Government a court would, in application of these principles, 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 which no reasonable Secretary of State could take. The applicants, on the other hand, contest the scope of judicial control of the merits of the Secretary of State's decision (see paragraph 118 below).*

*91. The extent and effect of judicial review was demonstrated by the House of Lords in the Bugdaycay case (R v. Home Secretary, ex parte Bugdaycay and Others [1987] 1 All England Law Reports 940) when it was held that the Home Secretary had indeed failed to*

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<sup>97</sup> ECHR, 30 October 1991, Series A no. 215 (*Vilvarajah v. United Kingdom*).

appreciate a factor which he should have specifically dealt with. Lord Bridge stated (at 945 and 952):

*" ... all questions of fact on which the discretionary decision whether to grant or withhold leave to enter or remain depends must necessarily be determined by the Immigration Officer or the Secretary of State ... The question whether an applicant for leave to enter or remain is or is not a refugee is only one, even if a particularly important one ... of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine ... determination of such questions is only open to challenge in the courts on well-known Wednesbury principles ... there is no ground for treating the question raised by a claim to refugee status as an exception to this rule ...*

*Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."*

Lord Templeman added (at page 956):

*"In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process."*

*In that case, following a careful review of the evidence the House quashed the removal orders in regard to one of the applicants on the ground that relevant facts had not been taken into account.*

*The Secretary of State's refusal of asylum was also quashed by the courts following judicial review proceedings in R v. Secretary of State, ex parte Jeyakumaran (High Court decision of 28 June 1985), R v. Secretary of State, ex parte Yemoh (High Court decision of 14 July 1988), and Gaima v. Secretary of State ([1989] Immigration Appeals Reports). In the Jeyakumaran case the court reviewed the decision of the Secretary of State on "Wednesbury principles". In his judgment, Mr Justice Taylor said "I am ... disturbed by some of the factors which do seem to have been taken into account and others which have not. It is, therefore, necessary to look at the respondent's evidence in some detail". He concluded that the Secretary of State's rejection of the claim for asylum should be quashed on the ground that "in reaching his decision he took into account matters which ought not to have been taken into account and failed to take into account matters he should". A similar approach was adopted by the High Court in the Yemoh case. In the Gaima case it was more a matter of the fairness of the procedures followed in reaching the decision to refuse political asylum in that the Court of Appeal held that the applicant was given insufficient opportunity to give her explanation of the facts taken into account by the Secretary of State in assessing her credibility. In his judgment, with which the other two judges agreed, Lord Justice May stressed that "in these refugee asylum cases*

*the court is entitled to, and should, subject administrative decisions to rigorous examination. The court should ensure that the decision-making process has been wholly fair throughout".*"

These considerations are very interesting because they illustrate the way in which the "reasonableness and perverseness" test is applied by English courts in practice. Besides assessing the reasonableness of the decision, English courts examine whether the Secretary of State has taken into account facts that should not have been taken into account or has excluded facts that should have been taken into account. It is clear that a most anxious scrutiny is applied.

*Bensaid v. United Kingdom* is another case in which the Court assessed whether there was an effective remedy available to the asylum seeker. The questions that arose in *Bensaid* were very similar to those answered in *Vilvarajah*. In *Bensaid*, the English courts applied the "Wednesbury principles."<sup>98</sup>

*Bensaid v. United Kingdom*<sup>99</sup>

*"27. These principles do not permit the courts to make findings of fact on matters within the jurisdiction of the Secretary of State or to substitute their discretion for the minister's. The courts may quash his decision only if he has failed to interpret or apply English law correctly, if he failed to take account of issues which he was required by law to address, or if his decision was so irrational or perverse that no reasonable Secretary of State could have made it (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 King's Bench Reports 223).*

*28. In the recent case of R. v. Home Secretary, ex parte Turgut (28 January 2000) concerning the Secretary of State's refusal of asylum to a young male Turkish Kurd draft evader, Lord Justice Simon Brown, in the Court of Appeal's judgment, stated as follows:*

*"I therefore conclude that the domestic court's obligation on an irrationality challenge in an Article 3 case is to subject the Secretary of State's decision to rigorous examination and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.*

*All that said, however, this is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here – the right not to be exposed to a real risk of Article 3 treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making*

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<sup>98</sup> See also ECHR, 2 May 1997, Reports 1997-III (D. v. United Kingdom).

<sup>99</sup> ECHR, 6 February 2001, Reports of Judgments and Decisions 2001-I (Bensaid v. United Kingdom).

*process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment' – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... – is decidedly a narrow one."*

*"51. The applicant submitted that he had no effective remedy available to him by which he could challenge the decision of the Secretary of State to deport him to Algeria. He argued that judicial review was limited in its scope to an examination of rationality and perverseness and could not enter into the merits. He referred to the recent Smith and Grady v. the United Kingdom judgment (nos. 33985/96 and 33986/96, ECHR 1999-VI), where judicial review was not found to give effective redress for the expulsion of homosexuals from the army. He emphasised that the courts refused to determine the essential disputes of fact between him and the Secretary of State. This inability to determine the substance of his Convention complaint deprived the procedure of effectiveness for the purposes of Article 13 of the Convention.*

*52. The Government submitted that judicial review furnished an effective remedy, and referred to previous findings of the Court to that effect in expulsion cases (see, for example, Vilvarajah and Others v. the United Kingdom, judgment of 30 October 1991, Series A no. 215, and D. v. the United Kingdom, cited above). The domestic case-law demonstrated that the courts considered carefully the evidence before them in such cases. While they accepted that the Court of Appeal in the applicant's case did not resolve the factual disputes in the evidence before it, it nonetheless scrutinised the Secretary of State's decision closely, noting that the Secretary of State had answered with particularity the points made on the applicant's behalf and the exceptional steps which the Secretary of State had stated would be taken to ensure that the applicant was adequately cared for during the journey and on his arrival in Algeria."*

*...  
"55. In Vilvarajah and Others (cited above, p. 39, § 123) and Soering v. the United Kingdom (judgment of 7 July 1989, Series A no. 161, pp. 47-48, §§ 121-24), the Court considered judicial review proceedings to be an effective remedy in relation to the complaints raised under Article 3 in the contexts of deportation and extradition. It was satisfied that English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual 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. This view was followed more recently in D. v. the United Kingdom (cited above, pp. 797-98, §§ 70-71).*

*56. While the applicant argued that, in judicial review applications, the courts will not reach findings of fact for themselves on disputed issues, the Court is satisfied that the domestic courts give careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment. The judgment delivered by the Court of Appeal did so in the applicant's case. The Court is not*

*convinced, therefore, that the fact that this scrutiny takes place against the background of the criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, deprives the procedure of its effectiveness. The substance of the applicant's complaint was examined by the Court of Appeal, and it had the power to afford him the relief he sought. The fact that it did not do so is not a material consideration, since the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see Vilvarajah and Others, cited above, p. 39, § 122).*

...

*58. The Court concludes, therefore, that the applicant had available to him an effective remedy in relation to his complaints under Articles 3 and 8 of the Convention concerning the risk to his mental health of being expelled to Algeria. Accordingly, there has been no breach of Article 13."*

To summarize, the Court considers that the method of judicial review that takes place by English courts qualifies as rigorous scrutiny and that it provides an effective remedy. The Court gives reasons for accepting the "irrationality and perverseness test" of the English courts and makes clear that the "irrationality and perverseness test" is sufficient because domestic courts scrutinize carefully and in detail claims that an expulsion might lead to transfer of an asylum seeker to a country where it has been established that there is a serious risk of inhuman or degrading treatment. It is also important to mention the fact that the Court has illustrated how the "irrationality and perverseness test" applies in practice. In the aforementioned cases, the Court has stated that the domestic courts had fully reviewed the administration's decisions. The domestic courts clearly left the administration a very narrow margin to decide which facts would be taken into account. The Court found it relevant that the domestic courts had the power to quash challenged decisions where it could be established that there was a serious risk of inhuman or degrading treatment if the applicant were returned. Thus, one can say that domestic courts must fully review the facts.

A question that the Court does not answer is whether the judicial review that was applied by the British courts in the above cases must be considered the minimum standard acceptable under article 13. If this is the case, then scrutiny that does not satisfy this minimum standard cannot be considered as providing an effective remedy.

### **4.3 Differences Between the Limited Judicial Review that is Applied by English Courts and the Limited Judicial Review that is Applied by the Dutch Council of State**

As illustrated above, English courts apply limited judicial review in asylum cases. Although the Court has given its opinion on the limited judicial review that is applied by English Courts but has not given its opinion on the limited judicial review that is applied by the Council of State, it is possible to examine the similarities and differences between the limited judicial review that is applied in asylum cases in both countries.

First, it should be emphasized that both English courts and Dutch courts cannot determine stated facts themselves. In this respect, both courts apply limited judicial review. However, what remains unanswered is whether English courts can fully review facts and opinions on credibility. The following sections attempt to answer this question by exploring the differences between the limited judicial review by the English courts and the marginal judicial review applied by the Council of State.

#### ***4.3.1 English Courts can Quash a Challenged Decision for Not Taking into Account Certain Factors***

At first glance, it seems that limited judicial review is very similar to marginal judicial review as applied by the Council of State. Both English courts and the Council of State seem to apply the same criterion of unreasonableness. If one reads the passages more carefully however, one can extract some differences between Dutch marginal judicial review and the limited judicial review applied by English courts. For instance, English courts, according to the “Wednesbury principles,” can quash challenged decisions because a factor that should have been taken into account has not been taken into account or because a factor that should have been left out has been taken into account.

Dutch courts, of course, do not have this possibility. The Council of State has explicitly stated that the assessment whether and which stated facts must be taken into account is the responsibility of the minister or Secretary of State. Dutch courts cannot quash this decision because it is of the opinion that certain facts should already have been taken into account or left out. The Dutch court, for example, cannot distinguish between elements that concern the essence of the asylum seeker’s story and elements that do not.

#### ***4.3.2 The Dutch Court Must Assess the Minister’s Opinion on Credibility As a Whole***

Furthermore, the Dutch court must assess the minister’s opinion on the credibility as a whole and cannot assess each of the elements individually. This is a very important difference between the limited judicial review applied by English courts and the marginal judicial review that is applied by the Council of State. Although the judicial review of the English courts is in a sense limited, it leaves the judge more room to quash a challenged decision. In fact, one of the most important grounds for quashing a challenged decision, namely the review of certain elements which should have been taken into account or left out, has been rejected by the Council of State.<sup>100</sup>

#### ***4.3.3 Reasonableness of the Decision Versus Reasonableness of the Assessment of Credibility***

Another difference between the “Wednesbury principles” and the Council of State’s application of marginal judicial review is in the object of the reasonableness test. English courts can quash a challenged decision to send a fugitive to a country where it is established that there exists a serious risk of inhuman or degrading treatment on the

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<sup>100</sup> ABRvS 28 August 2002, *JV* 2002/355, ABRvS 8 April 2002, *JV* 2002/172, ABRvS 27 January 2003, *JV* 2003/103 and ABRvS 11 August 2003, *JV* 2003/441, ABRvS 28 December 2001, *JV* 2002/73.

ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could have taken.

The Council of State is of the opinion that Dutch courts must scrutinize the minister's assessment of credibility and his selection of stated facts according to the reasonableness standard.

*"The court should have, in assessing the credibility of the asylum seeker's narrative sub 1, limited itself to determining whether the Secretary of State could reasonably have found that the asylum seeker's narrative sub 1 was not credible."*<sup>101</sup>

While English courts apply a standard of reasonableness to the decision as a whole, Dutch courts apply the standard of reasonableness to the minister's opinion on the establishment of facts and the assessment of the credibility of the stated facts and not to the final decision to return an asylum seeker to his country of origin. If this interpretation of the English "Wednesbury Principles" is correct, then English courts, although they cannot determine facts and credibility themselves, can fully review determinations of facts and credibility. The English courts apply the standard of reasonableness to the final decision.

#### ***4.3.4 English Courts Can Draw Their Own Conclusions About Facts***

Another important distinction between limited judicial review applied by English courts and marginal judicial review applied by the Council of State concerns the establishment of facts. Although English courts review challenged decisions in a limited manner, they have more possibilities to review facts. This becomes clear in *Hilal v. United Kingdom*. English courts can assess underlying facts themselves and draw their own conclusions, although they cannot find the facts themselves.

*(subject the Secretary of State's decision to rigorous examination and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion to that arrived at by the Secretary of State).*

This suggests that English courts are not obliged to follow the conclusions the Secretary of State on assessing factual material. Thus, one can conclude that English courts apply full judicial review to qualifications of facts.

Chapter three shed some light on the Council of State's jurisprudence regarding qualifications of facts. As was illustrated, the Council of State's jurisprudence is inconsistent. The Council of State sometimes applies marginal judicial review for qualifications of facts. In some cases, the Council of State's review seems to be more limited than the limited judicial review of English courts for qualifications of facts.

A more important and remarkable difference, however, arises when comparing the considerations given by English courts with the considerations given by the Council of State. Consider the consideration of Lord Justice Simon Brown that English courts fully review factual determinations and can substitute their own opinion for that of the Secretary of State's opinion:

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<sup>101</sup> ABRvS 9 July 2002, *JV* 2002/275.

*“All that said, however, this is not an area in which the Court will pay any especial deference to the Secretary of State’s conclusion on the facts”*

*“Thirdly, whilst I would reject the applicant’s contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the ‘discretionary area of judgment’ – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant’s removal ... – is decidedly a narrow one”*

Therefore, one can conclude that although English courts characterize their method of reviewing administration decisions as limited, the reality is that they review these decisions less marginally than the Council of State does. One might even argue that English courts in fact apply full judicial review to facts.<sup>102</sup>

#### **4.4 Does the Limited Judicial Review That is Applied By the Council of State Provide the Asylum Seeker With an Effective Remedy?**

This section focuses on the question whether the limited judicial review that is applied by the Council of State provides the asylum seeker with an effective remedy. Previous sections have illustrated that the Court has given some standards which have to be met in order for judicial review to provide an effective remedy. These criteria are:

1. Rigorous scrutiny or careful and detailed scrutiny;
2. By an independent body;
3. Effective control of the legality of executive discretion on substantive and procedural grounds and the ability to quash a decision to deport or expel an asylum seeker to a country where it has been established poses a serious risk of inhuman or degrading treatment; and
4. The judicial review has to at least meet the standard that is set by the Court.

The limited judicial review applied by the Council of State does not seem to meet these criteria, and therefore, it does not provide an effective remedy.

##### ***4.4.1 The Differences Between the “Wednesbury Principles” and the Limited Judicial Review That is Applied by the Council of State***

As previously stated, the limited judicial review applied by English courts is less constrained than the limited judicial review applied by the Council of State and can even

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<sup>102</sup> See the annotation of Battjes under ABRvS 11 December 2003, *RV* 2003 nr. 17.

be categorized as full judicial review cloaked as marginal scrutiny.<sup>103</sup> The differences between English courts and Dutch courts on this matter are such that it cannot be concluded that the limited judicial review that is applied by Dutch courts is rigorous scrutiny.

Dutch courts partly apply rigorous scrutiny, as they can give their own opinions on article 3 of the ECHR and in some cases on qualifications of facts. Nevertheless, this does not mean that this cannot be considered rigorous scrutiny because courts cannot apply rigorous scrutiny to the minister's position regarding what happened to the applicant in his country of origin. The Council of State incorrectly refers to the acceptance by the Court of limited judicial review that is applied by English courts. As illustrated above, although the "irrationality and perverseness test" might seem to be a marginal scrutiny, in fact, it is a full scrutiny or in any case a less marginal scrutiny than the scrutiny given by Dutch courts.

#### **4.4.2 No Rigorous Scrutiny**

Second, the limited judicial review that is applied by the Council of State does not provide an effective remedy because there is no rigorous scrutiny of claims under article 3 of the ECHR. According to the Council of State, the judge cannot give his opinion on assessments of credibility. Because Dutch courts are restricted in reviewing these aspects of the asylum seeker's narrative, the administration is actually the only body that is allowed to give an opinion on such aspects. As one can see from the previously-cited cases, the Court is of the opinion that there can only be an effective remedy if rigorous scrutiny by an independent body takes place.

The Council of State has reviewed the qualification of facts in a limited manner in a few cases. As mentioned earlier, however, it did not explain why limited judicial review had to have taken place. As chapter three illustrated, the Council of State applies marginal judicial review in some cases when it comes to the minister's opinion on whether the asylum seeker qualifies for refugee status or for protection on the basis of article 3 of the Convention. In a lot of cases the decision whether the asylum seeker qualifies for refugee status or for protection on the basis of article 3 of the Convention, depends on whether he has drawn the negative attention of the authority/ whether the discrimination was that serious. The answer to these questions actually decides whether the asylum seeker will be provided protection. If the narrative has been found credible, it is a matter of assessing whether the circumstances fall within the definition of "negative attention of the authorities" or "serious discrimination". The assessment of whether the credible statements of the asylum seeker fall within the definition of "negative attention of the authorities" or "serious discrimination" must be seen as part of the qualification of facts. As illustrated before the qualification of facts must be reviewed fully. In this way, one of the most important questions that must be answered to determine whether the asylum seeker faces a real risk of treatment contrary to article 3 of the ECHR is not subject to rigorous, or full, scrutiny.

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<sup>103</sup> See Spijkerboer's Afterword to: J. van Rooij, *"Asylum versus Human Rights" obstacles to later statements or evidence in the light of the European Convention on Human Rights*, Amsterdam: Vrije Universiteit Amsterdam, Faculty of Law, 2004 p. 65.

The administration's opinion on these aspects does not qualify as independent scrutiny. Article 13 of the ECHR requires that rigorous scrutiny must take place by an independent body. Because the administration's assessment is not a remedy by an independent body and because domestic courts cannot rigorously scrutinise the administration's decision, the limited judicial review that takes place by the Dutch courts is not rigorous scrutiny. Therefore, the administration does not fully assess credibility, as it is not an independent body.<sup>104</sup>

#### ***4.4.3 The Scrutiny is Even Less Rigorous If There Is a Circumstance Under Article 31(2) of the Aliens Act 2000***

The previous chapter illustrated that cases in which circumstances under article 31(2) of the Aliens Act 2000 can be attributed to an alien attract more marginal judicial review. This affects the standard of careful preparation and giving of reasons: the standards are met more easily if such circumstances can be attributed to the asylum seeker. In fact, the administration can effectively determine whether there will be a more or less marginal form of judicial review by holding an asylum seeker responsible for such a circumstance. In cases in which a circumstance under article 31(2) of the Aliens Act 2000 obtains, there is an even greater risk of a violation of article 13 of the ECHR because the review in such cases is even less likely to be rigorous scrutiny.

#### ***4.4.4 The Limited Judicial Review that is Applied by the Council of State Does Not Meet the Standard That is Set by the European Court of Human Rights***

The fact that the review that Dutch courts apply is far below the standard that the Court applies in its own jurisprudence is a further argument that undermines the contention that limited judicial review does not deprive the asylum seeker of an effective remedy. In this respect, one can refer to *Mamatkulov and Abdurasulovic v. Turkey*, in which the Court gave the following considerations:

*“107. In the light of the foregoing considerations, it follows from Article 34 that, firstly, applicants are entitled to exercise their right to individual application effectively, within the meaning of Article 34 in fine that is to say, Contracting States must not prevent the Court from carrying out an effective examination of the application – and, secondly, applicants who allege a violation of Article 3 are entitled to an effective examination of the issue whether a proposed extradition or expulsion will entail a violation of Article 3. Indications given by the Court, as in the present case, under Rule 39 of the Rules of Court, permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention.*

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<sup>104</sup> See the note of Battjes under ABRvS 11 December 2003, *RV* 2003 nr. 17.

*Consequently, the terms of an indication given by the Court under Rule 39 must be interpreted against that background.”<sup>105</sup>*

Because the Court is not meant to act as a court of first instance, Contracting Parties to the ECHR must interpret the provisions of the ECHR in a manner that is similar to the Court’s interpretation. The Court’s review is intended to act as a safety net only. Furthermore, the machinery of protection, which is established by the ECHR, brings along a duty for domestic courts to at least apply the same scrutiny that is applied by the Court. If domestic courts do not at least apply the same scrutiny as the Court, then the subsidiary character of proceedings before the Court would lose its meaning because the Court would then be acting as a court of first instance.

The beginning of this chapter illustrated that the Court considers all relevant circumstances and arrives at its own conclusion on the facts. On this, one might refer to *Nasimi v. Sweden*. If the standard that the Court applies must be a minimum standard, then the national remedy must at least meet this standard. The limited judicial review that is applied by the Council of State does not meet this minimum standard.

#### **4.4.5 The Council of State’s Opinion**

The Council of State’s opinion is that the limited judicial review in Dutch asylum law does not deprive the asylum seeker of an effective remedy under article 13 of the ECHR.

The Council of State has given a number of defences of this practice<sup>106</sup>:

*“In the judgments against the United Kingdom of 2 May 1997 in D. (RV 1997, 70), of 7 March 2000 in T.I. (RV 2001,1), of 6 February in Bensaid (RV 2001,2), and of 6 March 2001 in Hilal (RV 2001,1), the question whether there is an effective remedy if the national judge does not form his own opinion on the credibility of the asylum seeker’s application but limits himself to a review of the administration’s assessment has also been discussed.*

*The European Court of Human Rights has considered, in short, that a remedy is effective, if the stated violation of article 3 of the European Convention can be dealt with in front of a judge who can quash the challenged decision on the grounds that the decision, in light of all the circumstances, could not reasonably have been taken. That this review takes place against a background of criteria that are applied at the assessment of the legality or lawfulness of administrative decisions is insufficient to hold this standard of review ineffective.*

*In light of this jurisprudence, there is no ground for the opinion that the judge’s limited review, as explained before under 2.1.2 to 2.1.7, violates article 13 read in conjunction with article 3 of the European Convention on Human Rights.”<sup>xxx</sup>*

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<sup>105</sup> ECHR 6 February 2003, application no. 46827/99 and 46951/99 (Mamatkulov and Abdurasulovic v. Turkey).

<sup>106</sup> ABRvS 11 December 2003, *JV* 2004/52.

The Council of State here refers to several judgments of the Court on the effectiveness of a remedy as provided by English courts. In these judgments, the Court accepts the so called “irrationality and perverseness test” as an effective remedy. The fact that the Court accepts judicial review by the English courts is not a convincing argument, however, because the judicial review applied by English courts fundamentally differs from the marginal judicial review applied by Dutch courts.

#### **4.5 Conclusion**

Thus, one can regrettably conclude that the limited judicial review applied by the Council of State violates article 13 of the ECHR. Because of this, some cases in which asylum seekers are being deported or returned to their countries of origin may involve violations of article 3 of the ECHR.

The core of the assessment on whether there exists a risk of a violation of article 3 of the ECHR is formed by two aspects. The first one is the credibility assessment. The second one is the assessment, based on statements that are considered to be credible, whether the expectations or assumptions of the asylum seeker are plausible. As illustrated in chapter three, the Council of State almost entirely applies marginal judicial review to both of these aspects. The only aspects that are always fully reviewed are factual determinations and the interpretation of international norms. Therefore, the review by Dutch courts is almost entirely a marginal one. In those cases in which the lack of proper documentation is attributable to the asylum seeker, the judicial review applied is even more marginal. Thus, it is very hard for asylum seekers to challenge the minister’s decision on credibility and the lack of proper documentation.

If the credibility assessment and the plausibility of the stated fear or risk are subjected to marginal judicial review, then there is not rigorous scrutiny.

In principle, limited judicial review does not necessarily violate articles 3 and 13 of the ECHR. As has been illustrated, the Court has accepted a limited judicial review that is less marginal than the marginal judicial review applied by the Council of State. This type of “marginal” scrutiny accepted by the Court, however, cannot be compared to the marginal judicial review conducted by the Council of State. For example, the limited judicial review found acceptable by the Court allowed the judge to come to other conclusions about the plausibility of the stated fear or risk.

Furthermore, the protection mechanism of the ECHR involves judicial review by national bodies that has to satisfy certain minimum standards set by the Court. As has been illustrated, however, the Council of State’s marginal judicial review does not meet the standards set by the Court. If the Court accepts the marginal judicial review applied by the Council of State, this would undermine the protective mechanism of the ECHR and lead to a method of review that could not be seen to be providing an effective remedy. In this way, the Court would be acting as a court of first instance and be the first and only body to apply rigorous scrutiny.

After having considered all of these aspects, one can conclude that the limited standard of judicial review applied by Dutch courts does not meet the minimum standard of effectiveness, and as such, the application of marginal judicial review results in expulsions in violation of article 3 of the ECHR. An appeals procedure with marginal judicial review violates article 13 of the ECHR.

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AB	Administratiefrechtelijke Beslissingen
AC	Aanmeldcentrum / Application Centre
Awb	Algemene wet bestuursrecht
ECHR	European Court of Human Rights
ABRvS	Afdeling Bestuursrechtspraak van de Raad van State/ Administrative Jurisdiction Division of the Council of State
IND	Immigratie- en Naturalisatiedienst / Immigration and Naturalization Department
JV	Jurisprudentie Vreemdelingenrecht
NAV	Nieuwsbrief Asiel- en Vluchtelingenrecht
NTB	Nederlands Tijdschrift voor Bestuursrecht
NJCM	Nederlands Juristen Comité voor de Mensenrechten
OC	Onderzoeks- en opvangcentrum / Reception and Investigation Centre
RV	Rechtspraak Vreemdelingenrecht

## ENDNOTES

<sup>i</sup> “2.3.2. De vaststelling dat de vreemdeling reis- of identiteitspapieren, dan wel andere bescheiden heeft overgelegd die niet op hem betrekking hebben, als bedoeld in artikel 31, tweede lid, aanhef en onder e, van de Vw 2000, is van feitelijke aard. De rechter kan zonder terughoudendheid treden in de vraag of die vaststelling van de staatssecretaris, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, juist is.

De beoordeling of een vreemdeling opzettelijk dergelijke documenten heeft overgelegd die niet op hem betrekking hebben en de betekenis die de staatssecretaris daaraan heeft kunnen toekennen, behoort tot de verantwoordelijkheid van de staatssecretaris. De rechter dient dit standpunt terughoudend te toetsen.”

<sup>ii</sup> “2.4.3. Bij de beoordeling door de minister van het asielrelaas gaat het meestal niet om de vraag, of en in hoeverre de verklaringen over de feiten die de asielzoeker aan zijn aanvraag ten grondslag heeft gelegd als vaststaand moeten worden aangenomen. De asielzoeker is immers veelal niet in staat en van hem kan ook redelijkerwijs niet worden gevergd zijn relaas overtuigend met bewijsmateriaal te staven.

2.4.4. Om de asielzoeker, waar dat probleem zich voordoet, tegemoet te komen en toch een adequate beoordeling van de aanvraag in het licht van de toepasselijke wettelijke voorschriften te kunnen verrichten, pleegt de minister blijkens het gestelde in paragraaf C1/1 sub 2 en paragraaf C1/3 sub 2.2. en 3.4 van de Vreemdelingencirculaire 2000 het relaas en de daarin gestelde feiten voor waar aan te nemen, indien de asielzoeker alle hem gestelde vragen zo volledig mogelijk heeft beantwoord en het relaas op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Bovendien geldt daarvoor als vereiste dat zich geen van de in artikel 31, tweede lid, onder a tot en met f, van de Vw 2000 opgesomde omstandigheden die afbreuk doen aan de geloofwaardigheid van de verklaringen van de asielzoeker voordoet.”

<sup>iii</sup> “Voorts was het niet aan de rechtbank om te bepalen, van welke door de vreemdeling gestelde, doch niet onderbouwde, feiten bij de beoordeling van de aanvraag moest worden uitgegaan. Zij had te onderzoeken of geoordeeld moet worden dat de staatssecretaris zich niet in redelijkheid op voormeld standpunt heeft kunnen stellen.”

<sup>iv</sup> “2.4. In de tweede grief betoogt de staatssecretaris - kort weergegeven - dat hij het asielrelaas van de vreemdeling sub 1 in redelijkheid voor ongeloofwaardig heeft kunnen houden.

2.4.1. In overweging 4.3 heeft de rechtbank geoordeeld dat de staatssecretaris het asielrelaas op onjuiste gronden voor ongeloofwaardig heeft gehouden. De rechtbank heeft met dit oordeel miskend dat de vaststelling of en in hoeverre bij de beoordeling van de asielaanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas naar voren

gebrachte feiten behoort tot de verantwoordelijkheid van de staatssecretaris en dat die vaststelling door de rechter slechts terughoudend kan worden getoetst. De rechtbank had zich bij haar oordeel over de geloofwaardigheid van het asielrelaas van de vreemdeling sub 1 dan ook dienen te beperken tot het oordeel of de staatssecretaris zich in redelijkheid op het standpunt heeft kunnen stellen dat het asielrelaas van de vreemdeling sub 1 niet geloofwaardig is.”

<sup>v</sup> “2.2.1. De grief slaagt. In de aan de afwijzing van de aanvraag ten grondslag liggende kennisgeving van het voornemen daartoe is gemotiveerd uiteengezet dat het overleggen van een rijbewijs door de vreemdeling onverlet laat dat het niet overleggen van documenten die zijn reisverhaal ondersteunen en het achterlaten van cruciale reis- en identiteitspapieren als een paspoort en een geboorteakte aan hem is toe te rekenen. Uit de aanhef van artikel 31, tweede lid, van de Vw 2000 volgt dat deze omstandigheid bij het onderzoek naar de aanvraag om een verblijfsvergunning dient te worden betrokken. Voorts is, zoals de Afdeling eerder heeft overwogen (uitspraak van 9 juli 2002, nr. 200202328/1, gepubliceerd in "JV" 2002/275), het primair de verantwoordelijkheid van de minister te bepalen of en in hoeverre bij de beslissing op de aanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas gestelde, doch niet gestaafde feiten. De beslissing welke documenten noodzakelijk zijn voor de beoordeling van de aanvraag en ter onderbouwing daarvan hadden kunnen en moeten worden overgelegd, maakt deel uit van die beoordeling. Er is geen grond voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat de vreemdeling verwijtbaar geen reis- of identiteitspapieren dan wel andere bescheiden heeft overgelegd die noodzakelijk zijn voor de beoordeling van de aanvraag.”

<sup>vi</sup> “7. Gelet hierop is de rechtbank van oordeel dat de door verzoeker gestelde feiten en gebeurtenissen steun vinden in objectieve bronnen die als bewijsmateriaal kunnen dienen. Uit deze informatie kan de conclusie worden getrokken dat als vaststaand kan worden aangenomen dat de door verzoeker gestelde gebeurtenissen hebben plaatsgevonden. De rechtbank overweegt echter dat tevens opvalt dat de informatie niet strookt met de door verzoeker gestelde feiten. Zowel het tijdstip als de plaats van de moord op zijn gestelde grootvader zijn niet in overeenstemming met de door verzoeker naar voren gebrachte informatie van het Ministerie van Buitenlandse Zaken.

8. De rechtbank is van oordeel dat indien gestelde feiten uit een asielrelaas zijn neergelegd in objectieve en onpartijdige bronnen en zodoende op eenvoudige wijze bekeken kan worden of een relaas op waarheid berust, geen grond bestaat voor de toepassing van de onder III.5 terughoudende rechterlijke toets.

Evenals verweerder is de rechter dan in staat om te beoordelen of de door de asielzoeker gestelde feiten evident juist of onjuist zijn. De rechtbank is gelet op het vorenoverwogene van oordeel dat verweerder zich terecht op het standpunt heeft kunnen stellen dat niet geloofwaardig is dat verzoeker in de negatieve belangstelling van welke zijde dan ook verkeert, vanwege de omstandigheid dat hij ‘chief’ zou moeten worden van het koninklijk huis van Damango.”

<sup>vii</sup> “Appellante heeft geen verklaring gegeven, waarom zij in de correcties en aanvullingen op eerdere verklaringen is teruggekomen, op grond waarvan de rechtbank

had moeten oordelen dat de staatssecretaris niet in redelijkheid heeft kunnen nalaten appellante daarin te volgen. De rechtbank heeft onder deze omstandigheden terecht geen aanleiding gezien voor het oordeel dat de staatssecretaris zich niet op het in het besluit neergelegde standpunt heeft mogen stellen.”

viii “2.2. In grief 1 betoogt appellant onder meer dat de rechtbank bij de beoordeling of hij vanwege de door hem gestelde ondervonden discriminatie door de staatssecretaris als vluchteling had moeten worden aangemerkt, ten onrechte voorbij is gegaan aan zijn beroep op paragraaf 65 van het "Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (hierna: Handbook) van de United Nations High Commissioner for Refugees en de vermelde uitspraken van de rechtbank te 's-Gravenhage, nevenzittingsplaats Amsterdam, van 16 maart 1998 en 17 januari 2000 (JV 1998/92 en JV 2000, S99).

2.2.1. Deze grief faalt. De rechtbank heeft terecht geen grond gevonden voor het oordeel dat de staatssecretaris een onjuiste maatstaf heeft aangelegd bij de beoordeling of appellant vanwege de gestelde discriminatie als vluchteling had moeten worden aangemerkt. Het Handbook bevat geen regels die de staatssecretaris binden bij zijn beoordeling of een vreemdeling gegronde reden heeft voor vervolging te vrezen. Dat de rechtbank te 's-Gravenhage, nevenzittingsplaats Amsterdam, naar appellant stelt, in voormelde uitspraken anders heeft overwogen, maakt dit niet anders.”

ix “2.3.1. Zoals de Afdeling eerder heeft overwogen (uitspraak van 9 juli 2002, gepubliceerd in "JV" 2002/275 en NAV 2002/234), behoort de vaststelling of en in hoeverre bij de beoordeling van een asielaanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten tot de verantwoordelijkheid van de minister en kan die vaststelling door de rechter slechts terughoudend worden getoetst.

Indien de minister zich, uitgaande van de gestelde en door hem beoordeelde feiten, op het standpunt stelt dat de vreemdeling niet aannemelijk heeft gemaakt dat hij gegronde reden heeft te vrezen voor vervolging dan wel bij terugkeer een reëel risico loopt op een behandeling in strijd met artikel 3 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden, staat voor de rechter ter beoordeling of de minister terecht tot dat standpunt is gekomen, bij de beantwoording van welke vraag voor terughoudendheid als hierboven aangegeven geen plaats is.

De grief mist feitelijke grondslag als gebaseerd op een onjuiste lezing van de aangevallen uitspraak. Uit de overweging van de rechtbank dat zij geen grond ziet voor het oordeel dat de staatssecretaris zich ten onrechte op het standpunt heeft gesteld dat eiseres niet aannemelijk heeft gemaakt dat zij gegronde vrees voor vervolging heeft, blijkt niet van een marginale toets, als waarvan de grief uitgaat.”

x “2.3 Uit de overwegingen van het besluit van 21 november 2001, noch uit het bij dat besluit ingelaste voornemen daartoe, blijkt dat de staatssecretaris zich op het standpunt heeft gesteld dat het asielrelaas in zijn geheel of op onderdelen ongeloofwaardig is. De rechtbank heeft dan ook terecht overwogen dat de staatssecretaris, uitgaande van de geloofwaardigheid van het relaas, heeft beoordeeld of de vreemdeling daarmee aannemelijk heeft gemaakt dat hij in de negatieve aandacht van de Turkse autoriteiten

staat en dat hij bij terugkeer naar Turkije gegronde vrees voor vervolging heeft en een reëel risico loopt om te worden onderworpen aan een behandeling in strijd met artikel 3 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden ( hierna: EVRM). De rechtbank heeft het oordeel van de staatssecretaris dienaangaande dan ook terecht niet terughoudend getoetst.”

<sup>xi</sup> “De staatssecretaris heeft zich terecht op het standpunt gesteld dat appellanten met hetgeen zij aan hun aanvragen ten grondslag hebben gelegd niet aannemelijk hebben gemaakt dat zij van de zijde van de Turkse autoriteiten gegronde reden hebben vrees voor vervolging te koesteren, dan wel dat zij bij terugzending naar het land van herkomst reëel gevaar lopen slachtoffer te worden van schending van artikel 3 van het EVRM.”

<sup>xii</sup> “Aan appellant kan worden toegegeven dat van hem niet meer kan worden verlangd dan dat hij zijn relaas aannemelijk maakt. De staatssecretaris heeft zich in het bij de rechtbank bestreden besluit evenwel op het standpunt mogen stellen dat de brief, waarvan geen geautoriseerde vertaling is overgelegd, en de foto's geenszins blijk geven van enig verband tussen de door appellant aangevoerde incidenten en zijn weigering om in te gaan op de voorstellen van de Pasdaran. Er is geen grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat aan het bepaalde in artikel 31, eerste lid, van de Vw 2000 niet alsnog is voldaan.”

<sup>xiii</sup> “De interpretatie van de door de vreemdeling afgelegde verklaringen behoort, evenals de beoordeling van de geloofwaardigheid van de door de vreemdeling gestelde feiten, in de eerste plaats tot de verantwoordelijkheid van de staatssecretaris en de wijze waarop die verklaringen door de staatssecretaris zijn opgevat dient door de rechter terughoudend te worden getoetst. De maatstaf daarbij is dan ook niet of de interpretatie van die verklaringen door de staatssecretaris overeenstemt met die door de rechtbank, maar of grond bestaat voor het oordeel dat de staatssecretaris niet in redelijkheid tot die interpretatie van de verklaringen kon komen. De rechtbank heeft bij de beoordeling van het besluit, in zoverre daarin is beslist hoe de verklaringen van de vreemdeling worden gelezen en geïnterpreteerd, ten onrechte vorenbedoeld toetsingskader niet in acht genomen.”

<sup>xiv</sup> “Er bestaat geen grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat de vreemdeling, die tot de Reer Hamar behoort, weliswaar slachtoffer is geworden van banditisme maar hij niet aannemelijk heeft gemaakt dat hij gegronde vrees heeft voor vervolging op in het Vluchtelingenverdrag neergelegde motieven, omdat uit zijn asielrelaas niet is gebleken van vanwege zijn etniciteit of een andere met het Vluchtelingenverdrag verband houdende op hem gerichte negatieve aandacht.”

<sup>xv</sup> “In die uitspraak van 21 mei 2002 is overwogen dat de asielzoeker onvoldoende aannemelijk gemaakt heeft dat de echtgenoot in de bijzondere negatieve belangstelling staat van de Wit-Russische autoriteiten. De minister heeft in het besluit ten aanzien van appellante gemotiveerd uiteengezet dat, naast de omstandigheid dat zij toerekenbaar onvoldoende bescheiden heeft overgelegd die noodzakelijk zijn voor de beoordeling van

de aanvraag, evenmin aannemelijk is gemaakt dat zij in de negatieve belangstelling van die autoriteiten staat.

De rechtbank heeft terecht geen grond gevonden voor het oordeel dat de minister zich niet in redelijkheid op dat standpunt heeft kunnen stellen.”

<sup>xvi</sup> “Voorts heeft de voorzieningenrechter terecht geen grond gevonden voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat appellante niet aannemelijk heeft gemaakt dat de door hem ondervonden discriminatie zodanig ernstig was.”

<sup>xvii</sup> “2.1.1. Deze grieven falen. De rechtbank heeft op goede gronden geoordeeld dat de staatssecretaris het op basis van de in de ambtsberichten verstrekte informatie niet aannemelijk heeft hoeven achten dat appellante bij terugkeer naar of verblijf in (Noord-)Irak een reëel risico loopt het slachtoffer te worden van een met artikel 3 EVRM strijdige behandeling”

<sup>xviii</sup> “Naast de beoordeling van de geloofwaardigheid van de door de vreemdeling gestelde feiten, behoort de beoordeling van het realiteitsgehalte van de door de vreemdeling aan die feiten ontleende vermoedens tot de primaire verantwoordelijkheid van de minister. Ook in zoverre dient de rechter diens oordeel terughoudend te toetsen. De rechtbank heeft dan ook ten onrechte haar eigen oordeel over de gegrondheid van de vermoedens van de vreemdeling in de plaats gesteld van dat van de staatssecretaris”

<sup>xix</sup> “De Afdeling overweegt ambtshalve als volgt. Zoals zij eerder heeft overwogen (onder meer "JV" 2003/103), is de maatstaf bij de te verrichten toetsing niet het eigen oordeel van de rechter over de geloofwaardigheid van het asielrelaas, maar de vraag of grond bestaat voor het oordeel dat de minister, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, bezien in het licht van de verslagen van de gehouden gehoren, de daarop aangebrachte correcties en aanvullingen en het gestelde in de zienswijze, niet in redelijkheid tot zijn oordeel over de geloofwaardigheid van het relaas kon komen. Dit laat onverlet dat de besluitvorming moet voldoen aan de eisen van met name zorgvuldigheid en kenbaarheid van de motivering die het recht daaraan stelt en dat de rechter de besluitvorming daaraan moet toetsen.

Aldus vindt rechterlijke toetsing plaats, zonder dat de rechter een beoordeling aan zich trekt die door de minister moet plaatsvinden.”

<sup>xx</sup> “2.1.3. Gegeven de op de asielzoeker rustende verplichting om volledige medewerking te verlenen aan het onderzoek of hij aan de vereisten voor toelating voldoet en daartoe alle informatie te verschaffen, waarover hij beschikt of redelijkerwijs had kunnen beschikken, noopt geen rechtsregel de staatssecretaris er toe om bij de beoordeling van de geloofwaardigheid van diens verklaringen het door de voorzieningenrechter kennelijk bedoelde onderscheid tussen het reisverhaal en het asielrelaas toe te passen.

2.1.4. Het oordeel van de voorzieningenrechter dat het reisverhaal volstrekt ongeloofwaardig is, is in appèl niet bestreden. Er is geen grond voor het oordeel dat de staatssecretaris zich onder die omstandigheden niet in redelijkheid op het standpunt heeft

kunnen stellen dat de vreemdeling de ten betoge dat hij gegronde vrees voor vervolging koestert gestelde feiten en omstandigheden niet aannemelijk heeft gemaakt.”

<sup>xxi</sup> “Door elk van deze elementen afzonderlijk te beoordelen en zelf te waarderen, buiten het samenhangende toetsingskader, ("JV" 2003/103), heeft de rechtbank het oordeel van de staatssecretaris over de geloofwaardigheid niet getoetst, maar ten onrechte het eigen oordeel daaromtrent daarvoor in de plaats gesteld.”

<sup>xxii</sup> “Gegeven de op de asielzoeker rustende verplichting om volledige medewerking te verlenen aan het onderzoek of hij aan de vereisten voor toelating voldoet en daartoe alle informatie te verschaffen waarover hij beschikt of redelijkerwijs had kunnen beschikken, is er bij de beoordeling van de geloofwaardigheid van diens verklaringen geen grond voor het door de president gemaakte onderscheid tussen punten die wel en andere die niet de kern van de vluchtmotieven zouden betreffen.”

<sup>xxiii</sup> “De vreemdelingen zijn bovendien niet in staat gebleken verifieerbare verklaringen af te leggen omtrent hun gestelde maandenlange reis van Iran, via Turkije, Singapore, en Japan, naar Nederland. De staatssecretaris heeft zich op het standpunt mogen stellen dat zij aldus afbreuk hebben gedaan aan de in beginsel aanwezige bereidheid om hun relaas, voor zover consistent en niet onaannemelijk, voor waar te houden, in zoverre in redelijkheid geen onderbouwing kan worden geleverd.

Dit in aanmerking genomen, bestaat evenmin grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat aan de geconstateerde tegenstrijdige verklaringen van de vreemdelingen de conclusie moet worden verbonden dat het asielrelaas ongelooftwaardig is.”

<sup>xxiv</sup> “2.3.1. In het besluit van 8 november 2003 heeft de minister aan zijn standpunt dat de vreemdeling niet in aanmerking komt voor een verblijfsvergunning, als bedoeld in artikel 3.4, eerste lid, aanhef en onder w, van het Vb 2000, mede ten grondslag gelegd dat de vreemdeling toerekenbaar geen documenten ter ondersteuning van zijn gestelde identiteit en nationaliteit heeft overgelegd. Daartoe wordt overwogen dat de vreemdeling niet aannemelijk heeft gemaakt dat de door hem gestelde diefstal van zijn documenten na aankomst op de luchthaven Schiphol hem niet kan worden toegerekend, aangezien hij tijdens het eerste gehoor heeft verklaard zijn bagage, waaronder zijn documenten, onbeheerd op de luchthaven Schiphol te hebben achtergelaten.

2.3.2. Bij de beoordeling of de vreemdeling toerekenbaar geen documenten heeft overgelegd, als bedoeld in paragraaf C2/8.4 van de Vc 2000, komt de minister een ruime beoordelingsruimte toe. Er is geen grond voor het oordeel dat de minister zich op basis van hetgeen de vreemdeling heeft aangevoerd niet in redelijkheid op het standpunt heeft kunnen stellen dat het ontbreken van documenten aan de vreemdeling is toe te rekenen.”

<sup>xxv</sup> “Uit de formulering van de aanhef van art. 31 lid 2 Vw 2000, alsmede uit de geschiedenis van de totstandkoming van dit artikel volgt dat de hierin genoemde omstandigheden die bij het onderzoek naar de aanvraag om een verblijfsvergunning mede worden betrokken, op zichzelf niet voldoende zijn om tot een afwijzing van die aanvraag te komen. De staatssecretaris heeft in het besluit de aanvraag uitsluitend afgewezen op

grond van de onder d en f genoemde omstandigheden en is derhalve niet op enigerlei wijze gekomen tot een beoordeling van het concrete en gedetailleerde asielrelaas van appellante. Gelet hierop heeft de staatssecretaris de aanvraag van appellante ten onrechte louter op grond van art. 31 lid 2 onder d en f Vw 2000 afgewezen. De rechtbank heeft dit miskend.”

<sup>xxvi</sup> “2.1.9. De staatssecretaris heeft zich in de voornemens om de aanvragen af te wijzen, alsmede in de besluiten van 30 augustus 2001, niet op het standpunt gesteld dat zich een omstandigheid, als bedoeld in artikel 31, tweede lid, aanhef en onder a tot en met f, van de Vw 2000, voordoet die afbreuk doet aan de geloofwaardigheid van de verklaringen van de asielzoeker. Gelet hierop diende de staatssecretaris te beoordelen of het relaas van de vreemdelingen op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Anders dan de minister betoogt, behelzen noch de besluiten noch de daarin ingelaste voornemens om de aanvragen af te wijzen, een op een zodanige beoordeling gebaseerd standpunt van de staatssecretaris, dat het relaas op hoofdlijnen voor ongeloofwaardig moet worden gehouden.

De verspreide overwegingen in de besluiten en de voornemens waarin enkele elementen uit het asielrelaas als bevreemdingwekkend of opmerkelijk zijn aangemerkt, worden niet met elkaar in verband gebracht. Evenmin wordt daaraan enige conclusie verbonden. Ook naar hun inhoud bieden de overwegingen geen grond aan het betoog van de minister dat de staatssecretaris in de besluiten uitdrukkelijk en gemotiveerd heeft uiteengezet dat en waarom het relaas van de vreemdelingen ongeloofwaardig is.

Gelet hierop is de rechtbank er terecht van uitgegaan dat de staatssecretaris het asielrelaas uitsluitend op zwaarwegendheid heeft beoordeeld. Mitsdien faalt de grief.”

<sup>xxvii</sup> “2.1.3. Omdat de staatssecretaris in het besluit van 1 juli 2002 geen omstandigheden, als bedoeld in artikel 31, tweede lid, aanhef en onder a t/m f van de Vw 2000, aan appellant heeft tegengeworpen, geldt volgens het gevoerde beleid als uitgangspunt dat hij het asielrelaas en de daarin gestelde feiten voor waar aanneemt, voorzover is voldaan aan de in de paragrafen C1/1 sub 2, C1/3 sub 2.2 en 3.4 van de Vreemdelingencirculaire 2000 (hierna: de Vc 2000) vermelde vereisten.

Appellant heeft in zijn zienswijze bestreden dat de door hem gestelde verklaringen ongeloofwaardig zijn. In dat verband heeft hij zijn gestelde politieke en artistieke achtergronden, waaronder zijn bekendheid als zanger en vanwege zijn speeches en protestsongs tijdens protestbijeenkomsten, geschetst. Verder is hij ingegaan op de situatie ter plaatse, waarbij hij zijn verhaal heeft toegelicht met informatie uit andere bronnen. Onder verwijzing naar deze persoonlijke achtergronden en de situatie ter plaatse heeft appellant voorts de door de staatssecretaris ongeloofwaardig geachte verklaringen verder toegelicht.

Gelet op het voorgaande en mede gelet op de omstandigheid dat appellant daarbij op de plaatselijke situatie in Nigeria is ingegaan op een wijze die niet op voorhand niet lijkt te stroken met hetgeen over Nigeria bekend is, hetgeen de staatssecretaris in het besluit overigens ook erkent, mocht de staatssecretaris zich in het besluit van 1 juli 2002 niet beperken tot het oordeel dat hij de gestelde verklaringen nog altijd niet geloofwaardig acht. Hij mocht, mede gelet op het door appellant in de zienswijze ingebrachte en op

hetgeen appellant eerder heeft verklaard en gelet op de hierboven vermelde paragrafen van de Vc 2000, onder die omstandigheden de aanvraag niet afwijzen, zonder nader te motiveren, waarom hij het asielrelaas niet voor waar aanneemt.”

<sup>xxviii</sup> “Zoals de Afdeling eerder heeft overwogen, onder meer in de door de rechtbank aangehaalde uitspraak van 9 juli 2002 (in zaak nr. 200202328/1; JV 2002/275 en NAV 2002/234), behoort de beoordeling van de geloofwaardigheid van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten tot de verantwoordelijkheid van de minister en kan die beoordeling slechts terughoudend door de rechter worden getoetst.

2.4.2. In het bestuursrechtelijk bestel, waarvan het vreemdelingenrecht deel uitmaakt, voert het bestuur, in dit geval de minister, de wet uit en is het de taak van de rechter de daartoe door de minister genomen besluiten, indien daartegen beroep is ingesteld, op rechtmatigheid te toetsen aan de hand van de voorgedragen beroepsgronden en ambtshalve aan voorschriften van openbare orde. Daarnaast is de minister voor de uitvoeringspraktijk ten volle verantwoordelijk verschuldigd aan de Staten-Generaal.

2.4.3. Bij de beoordeling door de minister van het asielrelaas gaat het meestal niet om de vraag, of en in hoeverre de verklaringen over de feiten die de asielzoeker aan zijn aanvraag ten grondslag heeft gelegd als vaststaand moeten worden aangenomen. De asielzoeker is immers veelal niet in staat en van hem kan ook redelijkerwijs niet worden gevegd zijn relaas overtuigend met bewijsmateriaal te staven.

2.4.4. Om de asielzoeker, waar dat probleem zich voordoet, tegemoet te komen en toch een adequate beoordeling van de aanvraag in het licht van de toepasselijke wettelijke voorschriften te kunnen verrichten, pleegt de minister blijkens het gestelde in paragraaf C1/1 sub 2 en paragraaf C1/3 sub 2.2. en 3.4 van de Vreemdelingen-circulaire 2000 het relaas en de daarin gestelde feiten voor waar aan te nemen, indien de asielzoeker alle hem gestelde vragen zo volledig mogelijk heeft beantwoord en het relaas op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Bovendien geldt daarvoor als vereiste dat zich geen van de in artikel 31, tweede lid, onder a tot en met f, van de Vw 2000 opgesomde omstandigheden die afbreuk doen aan de geloofwaardigheid van de verklaringen van de asielzoeker voordoet.

2.4.5. Wordt aan dat laatste vereiste niet voldaan, dan mogen ingevolge artikel 31 Vw 2000, mede gelet op de geschiedenis van de totstandkoming van die bepaling (MvT, p. 40/41) en volgens de ter uitvoering daarvan vastgestelde beleidsregels, in het relaas ook geen hiaten, vaagheden, ongerijmde wendingen en tegenstrijdigheden op het niveau van de relevante bijzonderheden voorkomen; van het asielrelaas moet dan een positieve overtuigingskracht uitgaan.”

<sup>xxix</sup> “Bij de toepassing van dit beleid in een concreet geval komt de minister beoordelingsruimte toe. Hij beoordeelt de geloofwaardigheid van het asielrelaas op basis van uitvoerige gehoren en van vergelijking van het relaas met al datgene, wat hij over de situatie in het land van herkomst weet uit ambtsberichten en andere objectieve bronnen en wat hij eerder heeft onderzocht en overwogen naar aanleiding van de gehoren van andere asielzoekers in een vergelijkbare situatie. Dit overzicht stelt hem in staat die beoordeling vergelijkenderwijs en aldus geobjectiveerd te verrichten. De rechter is niet in staat de geloofwaardigheid op vergelijkbare wijze te beoordelen.

Dit betekent niet dat er geen toetsing in rechte plaatsvindt van de beoordeling door de minister. De maatstaf bij de te verrichten toetsing is evenwel niet het eigen oordeel van de rechter over de geloofwaardigheid van het relaas, maar de vraag of grond bestaat voor het oordeel dat de minister, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, bezien in het licht van de verslagen van de gehouden gehoren, de daarop aangebrachte correcties en aanvullingen en het gestelde in de zienswijze, niet in redelijkheid tot zijn oordeel over de geloofwaardigheid van het relaas kon komen. Dit laat onverlet dat de besluitvorming moet voldoen aan de eisen van met name zorgvuldigheid en kenbaarheid van de motivering die het recht daaraan stelt en dat de rechter de besluitvorming daaraan moet toetsen.”

<sup>xxx</sup> “In de uitspraken tegen het Verenigd Koninkrijk van 2 mei 1997 in de zaak D. (RV 1997, 70), van 7 maart 2000 in de zaak T.I (RV 2001, 1), van 6 februari 2001 in de zaak Bensaïd (RV 2001, 2) en van 6 maart 2001 in de zaak Hilal (RV 2001, 1), is eveneens de vraag aan de orde gesteld of sprake is van een effectief rechtsmiddel, indien de nationale rechter zich bij een gestelde schending van artikel 3 van het EVRM geen eigen oordeel vormt over de geloofwaardigheid van hetgeen door de asielzoeker aan de aanvraag ten grondslag is gelegd, maar zich beperkt tot een toetsing van de beoordeling door het bestuursorgaan daarvan.

Het EHRM heeft naar aanleiding daarvan overwogen dat, zakelijk en samengevat weergegeven, een rechtsmiddel effectief is, indien de gestelde schending van artikel 3 van het EVRM bij een rechter aan de orde kan worden gesteld, die het bij hem bestreden besluit kan vernietigen op de grond dat het besluit, alle omstandigheden in aanmerking genomen, in redelijkheid niet kon worden genomen. Dat die toetsing plaatsvindt aan de hand van criteria, die worden toegepast bij de beoordeling van de legaliteit of rechtmatigheid van bestuursrechtelijke besluiten is onvoldoende om deze toetsingsmaatstaf niet effectief te achten.

In het licht van deze jurisprudentie is er geen grond voor het oordeel dat de terughoudende toetsing door de rechter, zoals hiervoor onder 2.1.2. tot en met 2.1.7. uiteengezet, in strijd is met artikel 13, gelezen in samenhang met artikel 3 van het EVRM.”

## AFTERWORD

The paper published here, based on Said Essakkili's masters thesis, concerns the compatibility with the European Convention on Human Rights (ECHR) of Dutch case law on the scope of judicial review in asylum cases. Essakkili's paper is the second part in a broader project. An earlier paper addressed a set of provisions in Dutch law that limit the possibility for asylum seekers to submit statements or evidence after the initial rejection of their applications.<sup>107</sup> Other papers will deal with the accelerated asylum procedure, undocumented asylum seekers, and evidence. The full implications of these elements of Dutch asylum law can only be understood if one appreciates their combined effect. In this afterword, I will sketch the broader picture and point out the tension which exists with the ECHR.

### 1. Five elements of Dutch practice

Since 1 April 2001, the highest Dutch appellate court in immigration cases, the Council of State, has developed a jurisprudence which restricts to the minimum judicial scrutiny of administrative acts in immigration and asylum matters. This jurisprudence combines restrictive positions on (a) the accelerated procedure, (b) undocumented asylum seekers, (c) marginal judicial scrutiny, which is the topic of Essakkili's paper, (d) the possibility of submitting statements or evidence after the initial decision, and (e) evidence. I will briefly introduce these five elements.

#### *The accelerated procedure*

About half of asylum applications are processed in the accelerated procedure, a procedure which takes forty-eight working hours (i.e. hours between 8 AM and 6 PM).<sup>108</sup> In practice, these applications are turned down in about five days after they have been submitted. Asylum applicants get two hours with legal counsel to prepare for the interview and three hours with counsel to discuss the report of the interview and the documented reasons given for the proposed rejection of the application. Translators are consulted by telephone, and these are replaced regularly. I have understood this happens every 45 minutes. Counsel works in shifts, and as a consequence, the asylum seeker is not assisted by the same 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.<sup>109</sup>

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<sup>107</sup> Joukje van Rooij: *Asylum Procedure versus Human Rights*, Vrije Universiteit Amsterdam, April 2004; also published on [www.rechten.vu.nl/documenten](http://www.rechten.vu.nl/documenten).

<sup>108</sup> See for more details about the accelerated procedure para. 1.3 of Essakkili's paper. More extensively, see T.P. Spijkerboer and B.P. Vermeulen: *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p. 216-228.

<sup>109</sup> Afdeling bestuursrechtspraak van de Raad van State 7 Aug. 2001, *Jurisprudentie Vreemdelingenrecht* 2001/259. This is contrary to the case law prior to 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 risk of accelerated procedures is that applicants may have insufficient time to both come forward with their statements and collect evidence. This risk is exacerbated if the use of the accelerated procedure is not limited to manifestly unfounded or abusive cases. This time pressure, combined with the impossibility of building a confidential relationship with counsel, makes it possible that essential elements of the applicant's flight motives or essential evidence will not be conveyed.

### *Undocumented asylum seekers*

Since 1999, Dutch asylum law has contained a provision on undocumented asylum seekers. It initially held that such applications would be considered manifestly unfounded if the applicant had not submitted relevant documents unless the applicant could show that he or she could not be held responsible for this.<sup>110</sup> The strictness of this provision was subsequently mitigated during the legislative process. Under heavy pressure from Parliament,<sup>111</sup> the Government repeatedly and unambiguously stated that the applicant's flight motives would still be examined substantively even when the provision's requirements were met. This led to a practice whereby the incorrect application of the provision could lead to the annulment of a negative decision while the correct application of the provision would not bar access to a meaningful examination of the asylum claim. In other words, the legislation backfired and led to a better procedural position for applicants than before.<sup>112</sup>

In the Aliens Act 2000, a comparable provision appeared,<sup>113</sup> meaning that an applicant's failure to submit relevant documents could be taken into account in assessing an asylum claim. This more careful wording seemed to improve upon the 1999 wording because an applicant's failure to submit relevant documents is obviously relevant. Asylum applicants are required to have documents about their identity, nationality, travel route, and reasons for having fled.<sup>114</sup>

An applicant will not be held responsible for his lack of proper documentation if he or she cannot be blamed for being undocumented. However, the Council of State has held that asylum seekers are responsible for being undocumented if they destroy documents at their smuggler's suggestion or if they have handed such documents over to him.<sup>115</sup> This rule applies even when the asylum seeker is an unaccompanied minor.<sup>116</sup> Therefore, it

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<sup>110</sup> Article 15(c) (f) *Vreemdelingenwet*.

<sup>111</sup> Partly inspired by a rather critical UNHCR position, see *UNHCR's comments on the Dutch Bill on undocumented asylum-seekers*, 5 Oct. 1998.

<sup>112</sup> See Pres. Rb. 's-Gravenhage, 31 March 1999, *Rechtspraak Vreemdelingenrecht* 1999, 13, with my comments giving an overview of the practice and case law.

<sup>113</sup> Article 31(2)(f) *Vreemdelingenwet* 2000.

<sup>114</sup> *Vreemdelingencirculaire* 2000, C1/5.8.2.

<sup>115</sup> Afdeling bestuursrechtspraak van de Raad van State, 28 Dec. 2001, *Jurisprudentie Vreemdelingenrecht* 2002/73; *Rechtspraak Vreemdelingenrecht* 2001, 10; Afdeling bestuursrechtspraak van de Raad van State, 3 July 2002, *Jurisprudentie Vreemdelingenrecht* 2002/296.

<sup>116</sup> 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 Oct. 2003, *Jurisprudentie Vreemdelingenrecht* 2003/539.

can hardly be said that the lack of documentation will not be held against an asylum seeker.<sup>117</sup>

If an asylum seeker is undocumented and can be held responsible for this, then he or she is not entitled to the benefit of the doubt. His or her statements will only be considered credible if there are positive reasons for doing so.<sup>118</sup>

### *Marginal scrutiny*

Marginal judicial scrutiny is the subject of Essakkili's paper and will be dealt with only summarily here. Dutch administrative law distinguishes between full and marginal judicial scrutiny of administrative acts. Under full judicial scrutiny, the court replaces the administration's decision with its own. Interpretations of law are classic examples. Under marginal scrutiny, a court will only annul an administrative act if it is unreasonable. Classic examples of administrative acts subject to marginal scrutiny are those acts based on "policy freedom" (e.g., the law says that the administration *may* give a permit in a certain situation) or "evaluation freedom" (e.g., the law says that the administration may give a permit if *in its opinion* not giving such a permit would be unduly harsh).

According to the Council of State, the Minister of Aliens Affairs' decision that flight motives are not credible can only be subject to marginal judicial scrutiny. At first glance, this seems to be an untenable position. The applicant's statements are true or not, and the administration's decision that such statements are not credible is either correct or not. It is hard to imagine that the administration could have policy freedom or evaluation freedom as to whether something occurred. If the applicant does not have all the documents that the Minister deems necessary, then this affects his or her credibility, and as a result, the judicial scrutiny will be even more marginal. Consequently, the lack of documents seems to have become an independent ground for rejecting an application. In fact, the provision on undocumented asylum applicants seems to apply mainly with a view to giving future applicants an incentive not to destroy their documents and to influence smugglers not to advise or force their clients to destroy their documents.

### *Obstacles to later statements or evidence*<sup>119</sup>

Another element in Dutch asylum law is the formal obstacle to the introduction of further statements or evidence after the initial decision has been reached, even if it has been reached under the accelerated procedure. Because the case is "frozen" when the applicant is interviewed, facts or evidence submitted later will only be taken into account when it was impossible to introduce them earlier, most notably when the fact had not yet

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<sup>117</sup> More extensively, see T.P. Spijkerboer and B.P. Vermeulen: *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p. 152-155.

<sup>118</sup> See extensively para. 3.6.

<sup>119</sup> See extensively Joukje van Rooij: *Asylum Procedure versus Human Rights*, Vrije Universiteit Amsterdam, April 2004, also published on [www.rechten.vu.nl/documenten](http://www.rechten.vu.nl/documenten); and T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p. 297-313.

occurred or when 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 a second time must submit new facts, and (b) that the administration may dismiss the second application if he or she fails to do so out of hand.

According to the Council of State, in case of a second application a court can only examine whether or not an applicant has submitted new facts. If the court concludes that no new facts have been submitted, then the court must reject the appeal.<sup>120</sup> The crucial question, then, is what is considered "new." The Council's definition is extremely restrictive. It qualifies as "new" only those facts that have occurred or that evidence that has come into existence after the first decision was taken or facts or evidence that could not possibly have been introduced before the first decision. If a woman does not immediately disclose that she has been the victim of sexual violence, for example, or if an applicant has arrived without an arrest warrant but submits one at a later stage, this may be taken into account by the administration. Regardless whether the administration takes this into account, the court can only examine whether new facts have been submitted and, in the absence of such facts, must reject the appeal. Thus, this discretionary decision made by the administration is not subject to judicial review at all; whether a fact or document which was submitted late and which does not constitute a new fact in the formal sense should be taken into account and, if so, what effect should be given is not subject to judicial review. This means that the administration is free to reject claims and deport applicants, even when later statements or evidence establish that to do so would violate article 3 of the ECHR.

The Council has introduced two caveats in this inflexible case law. First, if during the interview preceding the first decision the applicant mentions that there are things that she or he cannot express or if the applicant mentions that evidence is underway, it may be unreasonable to take a first decision without waiting for further statements or evidence.<sup>121</sup> At present, the Council has referred to this possibility but it has remained theoretical. Second, the Council has held that under special, individual circumstances it may be necessary to disapply rules that would block the introduction of later statements or evidence.<sup>122</sup> To date, these possibilities are only theoretical and have had little, if any, relevance in practice.

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<sup>120</sup> Afdeling bestuursrechtspraak van de Raad van State, 4 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/219.

<sup>121</sup> Afdeling bestuursrechtspraak van de Raad van State, 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/294

<sup>122</sup> Afdeling bestuursrechtspraak van de Raad van State, 5 March 2002, *Jurisprudentie Vreemdelingenrecht* 2002/125; Afdeling bestuursrechtspraak van de Raad van State, 6 Nov. 2002, *Jurisprudentie Vreemdelingenrecht* 2002/448. The Council may have applied this exception once, in Afdeling bestuursrechtspraak van de Raad van State, 24 April 2003, *Rechtspraak Vreemdelingenrecht* 1974-2003, 58, *Rechtspraak Vreemdelingenrecht* 2003, 49, *Jurisprudentie Vreemdelingenrecht* 2003/280, *Administratiefrechtelijke Beslissingen* 2003, 315, which, however, is so obscurely motivated that it does not give certainty about this.

## Evidence<sup>123</sup>

The statements of the applicant are the most important means of evidence in asylum law. In practice, the administration has discretion whether these statements are credible: the judiciary can only marginally review this point. Also, evidence must be submitted before the first decision on the application has been reached, regardless whether the application is processed under the normal or accelerated procedure. The main concern here is that the weight given by the Council of State to the Dutch Ministry of Foreign Affairs' official country information may be excessive.

As one leading academic remarked, “[i]n the Netherlands, official country reports made by the Dutch Ministry of Foreign Affairs have an almost sacrosanct position, when it comes to the believability, correctness and completeness of the information provided. Reports of ngo’s are rarely, if at all, deemed to provide relevant information that may lead to doubts concerning the correctness or completeness of the official reports.”<sup>124</sup> This semi-sacrosanct status is related to two things. First, in contrast to standard case law, the Council of State in asylum cases does not require the administration to ensure that the expert advice it uses is sound. Country reports may, for example, be based on anonymous sources.<sup>125</sup> Second, official country reports do not have to address the fact that other sources, such as Amnesty International (AI),<sup>126</sup> the British Home Office,<sup>127</sup> and the Office of the United Nations High Commissioner for Refugees (UNHCR),<sup>128</sup> contain additional, divergent, or even contradictory information.

The sufficiency of Dutch official country reports is subject to serious doubt. As an example, one may consider that the Dutch Refugee Council checked the footnotes of the official country report of 24 March 2004 on Somalia and concluded that, inter alia, it misrepresented the sources to which it referred.<sup>129</sup>

Official country reports can only be subjected to judicial scrutiny if the asylum applicant establishes sufficient grounds for questioning whether the reports are correct or

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<sup>123</sup> T.P. Spijkerboer and B.P. Vermeulen: *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p. 261-278.

<sup>124</sup> P. Boeles: Expert Opinion on Country Reports, 14 June 2004, [www.vluchtweb.nl](http://www.vluchtweb.nl).

<sup>125</sup> Afdeling bestuursrechtspraak van de Raad van State, 23 Dec. 2003, *Jurisprudentie Vreemdelingenrecht* 2004/78, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2004/100; Afdeling bestuursrechtspraak van de Raad van State 14 May 2004, *Rechtspraak Vreemdelingenrecht* 2004, 54, *Jurisprudentie Vreemdelingenrecht* 2004/271, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2004/205; comp. T.P. Spijkerboer and B.P. Vermeulen: *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p.267-270.

<sup>126</sup> Afdeling bestuursrechtspraak van de Raad van State 14 Jan. 2002, *Rechtspraak Vreemdelingenrecht* 1974-2003, 6, *Jurisprudentie Vreemdelingenrecht* 2002/76, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2002/59; Afdeling bestuursrechtspraak van de Raad van State, 21 Aug. 2002, *Jurisprudentie Vreemdelingenrecht* 2002/318.

<sup>127</sup> Afdeling bestuursrechtspraak van de Raad van State, 22 Aug. 2003, *Jurisprudentie Vreemdelingenrecht* 2003/526, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2003/313.

<sup>128</sup> Afdeling bestuursrechtspraak van de Raad van State, 16 June 2003, *Jurisprudentie Vreemdelingenrecht* 2003/339.

<sup>129</sup> *VluchtelingenWerk: Put to the test. Sources of the Dutch Foreign Office Country Report on Somalia*, Amsterdam, June 2004.

complete.<sup>130</sup> In practice, this is very difficult because official country reports are not subject to an adversarial procedure. The sources upon which general or individual official country information is based are normally considered at least partly confidential, meaning that they are not accessible to the asylum applicant or his or her lawyer. However, given that an asylum applicant does not normally have access to the sources of official country reports, it is impossible to articulate sufficient grounds for questioning whether the reports are correct or complete. The Council of State has held that courts must accept official country reports at face value if no such grounds have been put forward.<sup>131</sup>

In short, official country reports are often decisive in deciding asylum cases. Unfortunately, since they are not subject to meaningful adversarial proceedings, it is very hard for asylum seekers to question them.

### *Summary*

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

1. The asylum applicant does not fully disclose relevant facts due to trauma, disorientation, or related factors;
2. The asylum applicant does not submit proper documents because it was risky for him or her to bring them or because the applicant did not foresee that a birth certificate might be useful or because the documents were destroyed or handed over to the smuggler; and
3. The administration does not investigate an asylum claim with due care because of time constraints.

It is less likely that such errors will be corrected by the judiciary if the administration's decision on credibility is subject to marginal scrutiny. Thus, both the administrative and judicial phases of the asylum procedure may be flawed. The procedure contains a formal obstacle to the introduction of facts and evidence at later stages, such as 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 possibility of repairing mistakes initially made.

## **2. International criticism of Dutch practice**

Both UNHCR and Human Rights Watch (HRW) have criticised Dutch immigration and asylum law, addressing the issues mentioned here. HRW published a report,

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<sup>130</sup> E.g. Afdelings bestuursrechtspraak van de Raad van State, 14 Jan. 2002, *Rechtspraak Vreemdelingenrecht* 1974-2003, 6, *Jurisprudentie Vreemdelingenrecht* 2002/76, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2002/59.

<sup>131</sup> Afdeling bestuursrechtspraak van de Raad van State, 13 Nov. 2003, *Jurisprudentie Vreemdelingenrecht* 2004/22; comp. Afdeling bestuursrechtspraak van de Raad van State, 5 Sept. 2003, *Jurisprudentie Vreemdelingenrecht* 2003/480.

commentary, and letter to the Immigration Minister.<sup>132</sup> It 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.”<sup>133</sup>

In July 2003, UNHCR voiced its concerns about Dutch asylum practice.<sup>134</sup> It expressed its discomfort with 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 claims by vulnerable and traumatised asylum seekers, including unaccompanied and separated children, have been processed in accelerated procedures in practice. According to UNHCR, such claims should always be channelled through the regular procedure. HRW has urged the Netherlands to limit the use of accelerated procedures in general and, in any case, to exempt those cases that involve serious physical or psychological problems, torture or sexual violence, trauma, unaccompanied children, and those that raise complex legal issues. Further, it has recommended that the Dutch Government explore ways to make asylum seekers’ access to counsel, preferably a single lawyer throughout the process, more flexible to allow adequate time to prepare the claim and the appeal.

On the burden of proof, UNHCR emphasised its shared nature in asylum law and pointed out that asylum seekers may have valid reasons for not having sufficient documentation or for relying on fraudulent documents. For example, applicants may be forced to leave their countries without documents or may be instructed by smugglers to hand them over to them or to destroy them. These should not be grounds for considering an asylum claim manifestly unfounded or abusive.

As to the de facto obligation to immediately submit statements and documents, UNHCR voiced particular concern about cases involving survivors of gender-related violence and torture and other vulnerable cases that are dealt with under the time-limited framework of the accelerated procedure. Particularly in cases where the sole reason that the documents or information could not be submitted in time was because of the strict 48-hour time limit for a first instance decision, UNHCR has said that no cases should be rejected solely on the basis that the relevant information was not raised or that documents were not submitted earlier. HRW has urged the Dutch Government to account for the limited opportunity available to asylum seekers in presenting documentary proof and other relevant information.

On the issue of marginal review, the subject of Essakkili’s paper, UNHCR emphasises that asylum seekers should have at least one appeal with full examination of facts and law. HRW has recommended that the Dutch Government take urgent steps to ensure that

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<sup>132</sup> *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003; *Human Rights Watch Commentary on Dutch Asylum Policy*, 25 Sept. 2003; *Netherlands: Safety of Failed Asylum Seekers at Risk*; *Letter to the Dutch Immigration Minister*, 13 Feb. 2004. All available at [www.hrw.org](http://www.hrw.org).

<sup>133</sup> Human Rights Watch: *Fleeting refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003.

<sup>134</sup> UNHCR: *Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations*, July 2003.

every asylum seeker is provided an adequate opportunity to present his or her claim for asylum and that judicial review should ensure that the merits of the case have been fairly examined. HRW has observed that the extensive use of the accelerated procedure raises serious risks of error, against which 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.

### 3. Compatibility with the European Convention on Human Rights

It is debateable whether current Dutch asylum procedure complies with human rights standards. These issues are summarized below.

#### *Rigorous scrutiny; undocumented asylum applicants*

When evaluating claims holding that expulsion would violate article 3 of the ECHR, ever since *Vilvarajah* 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.<sup>135</sup>

In *Jabari*, the Court made explicit the presumption implicit in this passage. It stated that it is not only the Court's own examination that must necessarily be a rigorous one, but that the notion of an effective remedy under article 13 requires independent and rigorous scrutiny at national level.<sup>136</sup>

*At first sight, this seems contrary to the Court's case law on article 13 of the ECHR in reviewing British immigration cases. In Soering, the Court accepted the British judicial review procedure as an effective remedy under article 13 even though the applicable criteria in that procedure suggest a marginal scrutiny of the administration's acts. However, using a phrase which has been repeated in all relevant later cases, 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).<sup>137</sup>

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<sup>135</sup> ECtHR 30 Oct. 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 Feb. 2001, *Bensaid v. United Kingdom*, Reports 2001-I, par. 34.

<sup>136</sup> ECtHR 7 July 2000, *Jabari v. Turkey*, application 40035/98.

<sup>137</sup> ECtHR 7 July 1989, *Soering v. United Kingdom*, A 161, para. 121. This phrase was repeated in ECtHR 30 October 1991, *Vilvarajah and others v. United Kingdom*, A 215, para. 123; ECtHR 15 November 1996,

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 right at stake.<sup>138</sup> In fact, the Court's position is not that marginal scrutiny of a claim under article 3 is acceptable under article 13 of the 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 violate article 3 of the ECHR. Thus, rigorous scrutiny cloaked in marginal terms is acceptable because of the substance of the national test.

There is no tension between, on the one hand, the Court's existing case law holding that a rigorous scrutiny must be applied on the basis of article 3 and its considerations about article 13 in *Jabari* and, on the other hand, its case law on article 13 in British asylum cases if one accepts that the Court also requires rigorous scrutiny but does not find it problematic that this scrutiny takes place within a framework of what in the domestic legal setting would be considered marginal scrutiny.

*In summary, it is clear from the case law of the European Court of Human Rights that an alien's claim that his or her deportation would violate article 3 of the ECHR must be given rigorous scrutiny by the domestic courts, or the quasi-judicial body constituting the effective remedy, provided, of course, that the applicant has made an arguable claim under article 3 of the ECHR. The Court has not made an exception for credibility in this respect. It is obvious that the marginal scrutiny applied in the Netherlands cannot be considered rigorous scrutiny. As a result of the Council of State's case law on this point, Dutch asylum procedure violated article 13 of the ECHR. This issue is dealt with in greater detail in Chapter 4 of Essakkili's paper.*

#### *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 ECHR. In *Bahaddar*, the Court ruled that applicants in principle must comply with domestic procedural rules because they enable national jurisdictions to discharge their caseload in an orderly manner. However, 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

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*Chahal v. United Kingdom*, Reports 1996-V, para. 148; ECtHR 2 May 1997, *D. v United Kingdom*, Reports 1997-III, para. 70; ECtHR 6 Feb. 2001, *Bensaid v. United Kingdom*, Reports 2001-I, para. 55; ECtHR 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II, para. 77.

<sup>138</sup> This phrase was repeated in *Vilvarajah*, para. 125, and in *D.* para. 71.

to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.<sup>139</sup>

In *Jabari*, the Court ruled on the Turkish rule requiring asylum applicants to submit their claims 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.<sup>140</sup>

Although these decisions do not concern an accelerated procedure, it seems reasonable to conclude that it should not be a priori fatal to an asylum claim if the applicant has not come forward with a complete statement because of trauma or stress or if he or she has not succeeded in collecting all necessary evidence before the end of the accelerated procedure. Under the Council of State's case law on new statements or evidence, however, such delays are usually fatal. In effect, the obstacle rule acts as a concealed time limit for the submission of facts. In the Turkish context of *Jabari*, the application had to be made within five days of entry, but once this had been met, facts could be introduced at a later 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 half of all asylum cases, very short, time limit for submitting facts.

Domestic rules excluding later statements and 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."<sup>141</sup> The argument that the Court should disregard evidence submitted in the procedure before the Court itself when it could have been produced earlier, such as medical statements from AI, has been rejected.<sup>142</sup> Therefore, it is clear that the European Court of Human Rights will take into account later statements and evidence, provided, of course, that they are considered credible, even when a domestic court does not.

It would be inconsistent with the mechanism of the ECHR, however, if the Court were to be a court of first instance. This would be the case if the Court were to accept that domestic courts do not have to take into account statements and evidence which the Court itself does have to take into account. However, the Court's case law requires domestic courts to take into account later statements and evidence. This is clear from *Jabari*, in which the Court held that the automatic and mechanical application of formal procedural

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<sup>139</sup> ECtHR 19 Feb. 1998, *Bahaddar v. The Netherlands*, Reports 1998-I.

<sup>140</sup> ECtHR 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII.

<sup>141</sup> E.g. ECtHR 20 March 1991, *Cruz Varas v. Sweden*, A 201; ECtHR 30 Oct. 1991, *Vilvarajah and others v. United Kingdom*, A 215; ECtHR 15 Nov. 1996, *Chahal v. United Kingdom*, Reports 1996-V; ECtHR 29 April 1997, *H.L.R. v. France*, Reports 1997-III; 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II.

<sup>142</sup> E.g. ECtHR 9 July 2002, *Venkadajalararma v The Netherlands*, application 58510/00.

rules conflicted with article 3 of the ECHR. In the same judgement, the Court held that a procedure in which such procedural rules were applied at the expense of the substantive examination of the claim under article 3 would not provide an effective remedy as required by article 13 of the ECHR. In *Hilal*, the Court decided a case in which a domestic obstacle rule had been applied and basically disregarded the domestic rule, examined the evidence that had been submitted too late by the domestic standards, and concluded that Hilal's expulsion would violate article 3.

### **No adversarial procedure on official country information**

One of the requirements of article 13 of the ECHR is that an alien who has an arguable claim that his or her expulsion would violate article 3 of the ECHR can bring forward the grounds for that claim and dispute the correctness of the administration's decision. This implies that the provision of an effective remedy requires an adversarial procedure. There may be limits to this on national security grounds, but even in such cases, the remedy must be as effective as possible.<sup>143</sup> As outlined above, however, there is no adversarial procedure about official country information. Asylum applicants cannot influence the questions such country information addresses, often are not allowed to consult the sources of official country reports, and have no realistic opportunity to challenge the reports. In a case about the adversarial principle, dealt with under article 6 but equally applicable to the adversarial principle under article 13 of the ECHR, the Court held that "each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision."<sup>144</sup> It is true that this case dealt with a court-appointed expert, but the same principle should apply to expert opinions submitted by the administration which may be decisive in the outcome of the asylum case: the applicant must have a realistic opportunity of challenging it. Such an opportunity is presently lacking in Dutch law.

## **4. Conclusion**

The massive use of the accelerated procedure in Dutch asylum practice, in which the rejection of an asylum claim takes place within forty-eight working hours, enhances the risk that applicants are not in a position to give complete statements about their flight motives and submit available evidence. The de facto impossibility of later submitting statements and evidence implies that asylum claims may be turned down on the basis of the automatic and mechanical application of very short time limits and other formal rules. The rejection of asylum claims on this basis does not exclude the possibility that returning the applicant could violate article 3 of the ECHR. This risk is exacerbated by the fact that not submitting documents, or even submitting only photocopies of documents, before the first decision de facto leads to the rejection of the asylum claim. Thus, decisions taken by the administration may be flawed:

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<sup>143</sup> ECtHR 15 Nov. 1996, *Chahal v. United Kingdom*, Reports 1996-V; comp. ECtHR .20 June 2002, *Al-Nashif v. Bulgaria*, appl. No. 50963/99.

<sup>144</sup> ECtHR 18 March 1997, *Mantovanelli v. France*, Reports 1997-II.

- 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 reasons for having fled de facto leads to the rejection of the asylum claim; and
- Because it is in practice impossible to introduce additional statements or evidence later during the procedure.

These mistakes most often concern the establishment of facts of individual cases, because all three factors have especially adverse effects in this regard. The possibility of these mistakes being corrected by means of judicial review are small because credibility assessment can only be subjected to marginal judicial review and because government evidence is not subjected to a meaningful adversarial procedure.

All of this means that Dutch asylum procedure, by falling short of the standards set by the ECHR, 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 ECHR. However, the Court cannot solve the problem at the heart of many applications that are presently pending, which is the flawed nature of domestic judicial supervision in Dutch asylum cases. Therefore, it is hoped that 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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<sup>i</sup> “2.3.2. De vaststelling dat de vreemdeling reis- of identiteitspapieren, dan wel andere bescheiden heeft overgelegd die niet op hem betrekking hebben, als bedoeld in artikel 31, tweede lid, aanhef en onder e, van de Vw 2000, is van feitelijke aard. De rechter kan zonder terughoudendheid treden in de vraag of die vaststelling van de staatssecretaris, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, juist is. De beoordeling of een vreemdeling opzettelijk dergelijke documenten heeft overgelegd die niet op hem betrekking hebben en de betekenis die de staatssecretaris daaraan heeft kunnen toekennen, behoort tot de verantwoordelijkheid van de staatssecretaris. De rechter dient dit standpunt terughoudend te toetsen.”

<sup>ii</sup> “2.4.3. Bij de beoordeling door de minister van het asielrelaas gaat het meestal niet om de vraag, of en in hoeverre de verklaringen over de feiten die de asielzoeker aan zijn aanvraag ten grondslag heeft gelegd als vaststaand moeten worden aangenomen. De asielzoeker is immers veelal niet in staat en van hem kan ook redelijkerwijs niet worden gevegd zijn relaas overtuigend met bewijsmateriaal te staven.

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2.4.4. Om de asielzoeker, waar dat probleem zich voordoet, tegemoet te komen en toch een adequate beoordeling van de aanvraag in het licht van de toepasselijke wettelijke voorschriften te kunnen verrichten, pleegt de minister blijkens het gestelde in paragraaf C1/1 sub 2 en paragraaf C1/3 sub 2.2. en 3.4 van de Vreemdelingencirculaire 2000 het relaas en de daarin gestelde feiten voor waar aan te nemen, indien de asielzoeker alle hem gestelde vragen zo volledig mogelijk heeft beantwoord en het relaas op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Bovendien geldt daarvoor als vereiste dat zich geen van de in artikel 31, tweede lid, onder a tot en met f, van de Vw 2000 opgesomde omstandigheden die afbreuk doen aan de geloofwaardigheid van de verklaringen van de asielzoeker voordoet.”

iii “Voorts was het niet aan de rechtbank om te bepalen, van welke door de vreemdeling gestelde, doch niet onderbouwde, feiten bij de beoordeling van de aanvraag moest worden uitgegaan. Zij had te onderzoeken of geoordeeld moet worden dat de staatssecretaris zich niet in redelijkheid op voormeld standpunt heeft kunnen stellen.”

iv “2.4. In de tweede grief betoogt de staatssecretaris - kort weergegeven - dat hij het asielrelaas van de vreemdeling sub 1 in redelijkheid voor ongeloofwaardig heeft kunnen houden.

2.4.1. In overweging 4.3 heeft de rechtbank geoordeeld dat de staatssecretaris het asielrelaas op onjuiste gronden voor ongeloofwaardig heeft gehouden. De rechtbank heeft met dit oordeel miskend dat de vaststelling of en in hoeverre bij de beoordeling van de asielaanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten behoort tot de verantwoordelijkheid van de staatssecretaris en dat die vaststelling door de rechter slechts terughoudend kan worden getoetst. De rechtbank had zich bij haar oordeel over de geloofwaardigheid van het asielrelaas van de vreemdeling sub 1 dan ook dienen te beperken tot het oordeel of de staatssecretaris zich in redelijkheid op het standpunt heeft kunnen stellen dat het asielrelaas van de vreemdeling sub 1 niet geloofwaardig is.”

v “2.2.1. De grief slaagt. In de aan de afwijzing van de aanvraag ten grondslag liggende kennisgeving van het voornemen daartoe is gemotiveerd uiteengezet dat het overleggen van een rijbewijs door de vreemdeling onverlet laat dat het niet overleggen van documenten die zijn reisverhaal ondersteunen en het achterlaten van cruciale reis- en identiteitspapieren als een paspoort en een geboorteakte aan hem is toe te rekenen. Uit de aanhef van artikel 31, tweede lid, van de Vw 2000 volgt dat deze omstandigheid bij het onderzoek naar de aanvraag om een verblijfsvergunning dient te worden betrokken. Voorts is, zoals de Afdeling eerder heeft overwogen (uitspraak van 9 juli 2002, nr. 200202328/1, gepubliceerd in "JV" 2002/275), het primair de verantwoordelijkheid van de minister te bepalen of en in hoeverre bij de beslissing op de aanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas gestelde, doch niet gestaafde feiten. De beslissing welke documenten noodzakelijk zijn voor de beoordeling van de aanvraag en ter onderbouwing daarvan hadden kunnen en moeten worden overgelegd, maakt deel uit van die beoordeling. Er is geen grond voor het oordeel dat de staatssecretaris zich niet in

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redelijkheid op het standpunt heeft kunnen stellen dat de vreemdeling verwijtbaar geen reis- of identiteitspapieren dan wel andere bescheiden heeft overgelegd die noodzakelijk zijn voor de beoordeling van de aanvraag.”

<sup>vi</sup> “7. Gelet hierop is de rechtbank van oordeel dat de door verzoeker gestelde feiten en gebeurtenissen steun vinden in objectieve bronnen die als bewijsmateriaal kunnen dienen. Uit deze informatie kan de conclusie worden getrokken dat als vaststaand kan worden aangenomen dat de door verzoeker gestelde gebeurtenissen hebben plaatsgevonden. De rechtbank overweegt echter dat tevens opvalt dat de informatie niet strookt met de door verzoeker gestelde feiten. Zowel het tijdstip als de plaats van de moord op zijn gestelde grootvader zijn niet in overeenstemming met de door verzoeker naar voren gebrachte informatie van het Ministerie van Buitenlandse Zaken.

8. De rechtbank is van oordeel dat indien gestelde feiten uit een asielrelaas zijn neergelegd in objectieve en onpartijdige bronnen en zodoende op eenvoudige wijze bekeken kan worden of een relaas op waarheid berust, geen grond bestaat voor de toepassing van de onder III.5 terughoudende rechterlijke toets.

Evenals verweerder is de rechter dan in staat om te beoordelen of de door de asielzoeker gestelde feiten evident juist of onjuist zijn. De rechtbank is gelet op het vorenoverwogene van oordeel dat verweerder zich terecht op het standpunt heeft kunnen stellen dat niet geloofwaardig is dat verzoeker in de negatieve belangstelling van welke zijde dan ook verkeert, vanwege de omstandigheid dat hij ‘chief’ zou moeten worden van het koninklijk huis van Damango.”

<sup>vii</sup> “Appellante heeft geen verklaring gegeven, waarom zij in de correcties en aanvullingen op eerdere verklaringen is teruggekomen, op grond waarvan de rechtbank had moeten oordelen dat de staatssecretaris niet in redelijkheid heeft kunnen nalaten appellante daarin te volgen. De rechtbank heeft onder deze omstandigheden terecht geen aanleiding gezien voor het oordeel dat de staatssecretaris zich niet op het in het besluit neergelegde standpunt heeft mogen stellen.”

<sup>viii</sup> “2.2. In grief 1 betoogt appellant onder meer dat de rechtbank bij de beoordeling of hij vanwege de door hem gestelde ondervonden discriminatie door de staatssecretaris als vluchteling had moeten worden aangemerkt, ten onrechte voorbij is gegaan aan zijn beroep op paragraaf 65 van het "Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (hierna: Handbook) van de United Nations High Commissioner for Refugees en de vermelde uitspraken van de rechtbank te 's-Gravenhage, nevenzittingsplaats Amsterdam, van 16 maart 1998 en 17 januari 2000 (JV 1998/92 en JV 2000, S99). 2.2.1. Deze grief faalt. De rechtbank heeft terecht geen grond gevonden voor het oordeel dat de staatssecretaris een onjuiste maatstaf heeft aangelegd bij de beoordeling of appellant vanwege de gestelde discriminatie als vluchteling had moeten worden aangemerkt. Het Handbook bevat geen regels die de staatssecretaris binden bij zijn beoordeling of een vreemdeling gegronde reden heeft voor vervolging te vrezes. Dat de rechtbank te 's-Gravenhage, nevenzittingsplaats Amsterdam, naar appellant stelt, in voormelde uitspraken anders heeft overwogen, maakt dit niet anders.”

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<sup>ix</sup> “2.3.1. Zoals de Afdeling eerder heeft overwogen (uitspraak van 9 juli 2002, gepubliceerd in "JV" 2002/275 en NAV 2002/234), behoort de vaststelling of en in hoeverre bij de beoordeling van een asielaanvraag wordt uitgegaan van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten tot de verantwoordelijkheid van de minister en kan die vaststelling door de rechter slechts terughoudend worden getoetst.

Indien de minister zich, uitgaande van de gestelde en door hem beoordeelde feiten, op het standpunt stelt dat de vreemdeling niet aannemelijk heeft gemaakt dat hij gegronde reden heeft te vrezen voor vervolging dan wel bij terugkeer een reëel risico loopt op een behandeling in strijd met artikel 3 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden, staat voor de rechter ter beoordeling of de minister terecht tot dat standpunt is gekomen, bij de beantwoording van welke vraag voor terughoudendheid als hierboven aangegeven geen plaats is.

De grief mist feitelijke grondslag als gebaseerd op een onjuiste lezing van de aangevallen uitspraak. Uit de overweging van de rechtbank dat zij geen grond ziet voor het oordeel dat de staatssecretaris zich ten onrechte op het standpunt heeft gesteld dat eiseres niet aannemelijk heeft gemaakt dat zij gegronde vrees voor vervolging heeft, blijkt niet van een marginale toets, als waarvan de grief uitgaat.”

<sup>x</sup> “2.3 Uit de overwegingen van het besluit van 21 november 2001, noch uit het bij dat besluit ingelaste voornemen daartoe, blijkt dat de staatssecretaris zich op het standpunt heeft gesteld dat het asielrelaas in zijn geheel of op onderdelen ongeloofwaardig is. De rechtbank heeft dan ook terecht overwogen dat de staatssecretaris, uitgaande van de geloofwaardigheid van het relaas, heeft beoordeeld of de vreemdeling daarmee aannemelijk heeft gemaakt dat hij in de negatieve aandacht van de Turkse autoriteiten staat en dat hij bij terugkeer naar Turkije gegronde vrees voor vervolging heeft en een reëel risico loopt om te worden onderworpen aan een behandeling in strijd met artikel 3 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden ( hierna: EVRM). De rechtbank heeft het oordeel van de staatssecretaris dienaangaande dan ook terecht niet terughoudend getoetst.”

<sup>xi</sup> “De staatssecretaris heeft zich terecht op het standpunt gesteld dat appellanten met hetgeen zij aan hun aanvragen ten grondslag hebben gelegd niet aannemelijk hebben gemaakt dat zij van de zijde van de Turkse autoriteiten gegronde reden hebben vrees voor vervolging te koesteren, dan wel dat zij bij terugzending naar het land van herkomst reëel gevaar lopen slachtoffer te worden van schending van artikel 3 van het EVRM.”

<sup>xii</sup> “Aan appellant kan worden toegegeven dat van hem niet meer kan worden verlangd dan dat hij zijn relaas aannemelijk maakt. De staatssecretaris heeft zich in het bij de rechtbank bestreden besluit evenwel op het standpunt mogen stellen dat de brief, waarvan geen geautoriseerde vertaling is overgelegd, en de foto's geenszins blijken geven van enig verband tussen de door appellant aangevoerde incidenten en zijn weigering om in te gaan op de voorstellen van de Pasdaran. Er is geen grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat aan het bepaalde in artikel 31, eerste lid, van de Vw 2000 niet alsnog is voldaan.”

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<sup>xiii</sup> “De interpretatie van de door de vreemdeling afgelegde verklaringen behoort, evenals de beoordeling van de geloofwaardigheid van de door de vreemdeling gestelde feiten, in de eerste plaats tot de verantwoordelijkheid van de staatssecretaris en de wijze waarop die verklaringen door de staatssecretaris zijn opgevat dient door de rechter terughoudend te worden getoetst. De maatstaf daarbij is dan ook niet of de interpretatie van die verklaringen door de staatssecretaris overeenstemt met die door de rechtbank, maar of grond bestaat voor het oordeel dat de staatssecretaris niet in redelijkheid tot die interpretatie van de verklaringen kon komen. De rechtbank heeft bij de beoordeling van het besluit, in zoverre daarin is beslist hoe de verklaringen van de vreemdeling worden gelezen en geïnterpreteerd, ten onrechte vorenbedoeld toetsingskader niet in acht genomen.”

<sup>xiv</sup> “Er bestaat geen grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat de vreemdeling, die tot de Reer Hamar behoort, weliswaar slachtoffer is geworden van banditisme maar hij niet aannemelijk heeft gemaakt dat hij gegronde vrees heeft voor vervolging op in het Vluchtelingenverdrag neergelegde motieven, omdat uit zijn asielrelaas niet is gebleken van vanwege zijn etniciteit of een andere met het Vluchtelingenverdrag verband houdende op hem gerichte negatieve aandacht.”

<sup>xv</sup> “In die uitspraak van 21 mei 2002 is overwogen dat de asielzoeker onvoldoende aannemelijk gemaakt heeft dat de echtgenoot in de bijzondere negatieve belangstelling staat van de Wit-Russische autoriteiten. De minister heeft in het besluit ten aanzien van appellante gemotiveerd uiteengezet dat, naast de omstandigheid dat zij toerekenbaar onvoldoende bescheiden heeft overgelegd die noodzakelijk zijn voor de beoordeling van de aanvraag, evenmin aannemelijk is gemaakt dat zij in de negatieve belangstelling van die autoriteiten staat. De rechtbank heeft terecht geen grond gevonden voor het oordeel dat de minister zich niet in redelijkheid op dat standpunt heeft kunnen stellen.”

<sup>xvi</sup> “Voorts heeft de voorzieningenrechter terecht geen grond gevonden voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat appellant niet aannemelijk heeft gemaakt dat de door hem ondervonden discriminatie zodanig ernstig was.”

<sup>xvii</sup> “2.1.1. Deze grieven falen. De rechtbank heeft op goede gronden geoordeeld dat de staatssecretaris het op basis van de in de ambtsberichten verstrekte informatie niet aannemelijk heeft hoeven achten dat appellante bij terugkeer naar of verblijf in (Noord-)Irak een reëel risico loopt het slachtoffer te worden van een met artikel 3 EVRM strijdige behandeling”

<sup>xviii</sup> “Naast de beoordeling van de geloofwaardigheid van de door de vreemdeling gestelde feiten, behoort de beoordeling van het realiteitsgehalte van de door de vreemdeling aan die feiten ontleende vermoedens tot de primaire verantwoordelijkheid van de minister.

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Ook in zoverre dient de rechter diens oordeel terughoudend te toetsen. De rechtbank heeft dan ook ten onrechte haar eigen oordeel over de gegrondheid van de vermoedens van de vreemdeling in de plaats gesteld van dat van de staatssecretaris”

<sup>xix</sup> “De Afdeling overweegt ambtshalve als volgt. Zoals zij eerder heeft overwogen (onder meer "JV" 2003/103), is de maatstaf bij de te verrichten toetsing niet het eigen oordeel van de rechter over de geloofwaardigheid van het asielrelaas, maar de vraag of grond bestaat voor het oordeel dat de minister, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, gezien in het licht van de verslagen van de gehouden gehoren, de daarop aangebrachte correcties en aanvullingen en het gestelde in de zienswijze, niet in redelijkheid tot zijn oordeel over de geloofwaardigheid van het relaas kon komen. Dit laat onverlet dat de besluitvorming moet voldoen aan de eisen van met name zorgvuldigheid en kenbaarheid van de motivering die het recht daaraan stelt en dat de rechter de besluitvorming daaraan moet toetsen. Aldus vindt rechterlijke toetsing plaats, zonder dat de rechter een beoordeling aan zich trekt die door de minister moet plaatsvinden.”

<sup>xx</sup> “2.1.3. Gegeven de op de asielzoeker rustende verplichting om volledige medewerking te verlenen aan het onderzoek of hij aan de vereisten voor toelating voldoet en daartoe alle informatie te verschaffen, waarover hij beschikt of redelijkerwijs had kunnen beschikken, noopt geen rechtsregel de staatssecretaris er toe om bij de beoordeling van de geloofwaardigheid van diens verklaringen het door de voorzieningenrechter kennelijk bedoelde onderscheid tussen het reisverhaal en het asielrelaas toe te passen. 2.1.4. Het oordeel van de voorzieningenrechter dat het reisverhaal volstrekt ongeloofwaardig is, is in appèl niet bestreden. Er is geen grond voor het oordeel dat de staatssecretaris zich onder die omstandigheden niet in redelijkheid op het standpunt heeft kunnen stellen dat de vreemdeling de ten betoge dat hij gegronde vrees voor vervolging koestert gestelde feiten en omstandigheden niet aannemelijk heeft gemaakt.”

<sup>xxi</sup> “Door elk van deze elementen afzonderlijk te beoordelen en zelf te waarderen, buiten het samenhangende toetsingskader, ("JV" 2003/103), heeft de rechtbank het oordeel van de staatssecretaris over de geloofwaardigheid niet getoetst, maar ten onrechte het eigen oordeel daaromtrent daarvoor in de plaats gesteld.”

<sup>xxii</sup> “Gegeven de op de asielzoeker rustende verplichting om volledige medewerking te verlenen aan het onderzoek of hij aan de vereisten voor toelating voldoet en daartoe alle informatie te verschaffen waarover hij beschikt of redelijkerwijs had kunnen beschikken, is er bij de beoordeling van de geloofwaardigheid van diens verklaringen geen grond voor het door de president gemaakte onderscheid tussen punten die wel en andere die niet de kern van de vluchtmotieven zouden betreffen.”

<sup>xxiii</sup> “De vreemdelingen zijn bovendien niet in staat gebleken verifieerbare verklaringen af te leggen omtrent hun gestelde maandenlange reis van Iran, via Turkije, Singapore, en Japan, naar Nederland. De staatssecretaris heeft zich op het standpunt mogen stellen dat zij aldus afbreuk hebben gedaan aan de in beginsel aanwezige bereidheid om hun relaas,

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voor zover consistent en niet onaannemelijk, voor waar te houden, in zoverre in redelijkheid geen onderbouwing kan worden geleverd.

Dit in aanmerking genomen, bestaat evenmin grond voor het oordeel dat de staatssecretaris zich niet op het standpunt heeft mogen stellen dat aan de geconstateerde tegenstrijdige verklaringen van de vreemdelingen de conclusie moet worden verbonden dat het asielrelaas ongeloofwaardig is.”

<sup>xxiv</sup> “2.3.1. In het besluit van 8 november 2003 heeft de minister aan zijn standpunt dat de vreemdeling niet in aanmerking komt voor een verblijfsvergunning, als bedoeld in artikel 3.4, eerste lid, aanhef en onder w, van het Vb 2000, mede ten grondslag gelegd dat de vreemdeling toerekenbaar geen documenten ter ondersteuning van zijn gestelde identiteit en nationaliteit heeft overgelegd. Daartoe wordt overwogen dat de vreemdeling niet aannemelijk heeft gemaakt dat de door hem gestelde diefstal van zijn documenten na aankomst op de luchthaven Schiphol hem niet kan worden toegerekend, aangezien hij tijdens het eerste gehoor heeft verklaard zijn bagage, waaronder zijn documenten, onbeheerd op de luchthaven Schiphol te hebben achtergelaten.

2.3.2. Bij de beoordeling of de vreemdeling toerekenbaar geen documenten heeft overgelegd, als bedoeld in paragraaf C2/8.4 van de Vc 2000, komt de minister een ruime beoordelingsruimte toe. Er is geen grond voor het oordeel dat de minister zich op basis van hetgeen de vreemdeling heeft aangevoerd niet in redelijkheid op het standpunt heeft kunnen stellen dat het ontbreken van documenten aan de vreemdeling is toe te rekenen.”

<sup>xxv</sup> “Uit de formulering van de aanhef van art. 31 lid 2 Vw 2000, alsmede uit de geschiedenis van de totstandkoming van dit artikel volgt dat de hierin genoemde omstandigheden die bij het onderzoek naar de aanvraag om een verblijfsvergunning mede worden betrokken, op zichzelf niet voldoende zijn om tot een afwijzing van die aanvraag te komen. De staatssecretaris heeft in het besluit de aanvraag uitsluitend afgewezen op grond van de onder d en f genoemde omstandigheden en is derhalve niet op enigerlei wijze gekomen tot een beoordeling van het concrete en gedetailleerde asielrelaas van appellante. Gelet hierop heeft de staatssecretaris de aanvraag van appellante ten onrechte louter op grond van art. 31 lid 2 onder d en f Vw 2000 afgewezen. De rechtbank heeft dit miskend.”

<sup>xxvi</sup> “2.1.9. De staatssecretaris heeft zich in de voornemens om de aanvragen af te wijzen, alsmede in de besluiten van 30 augustus 2001, niet op het standpunt gesteld dat zich een omstandigheid, als bedoeld in artikel 31, tweede lid, aanhef en onder a tot en met f, van de Vw 2000, voordoet die afbreuk doet aan de geloofwaardigheid van de verklaringen van de asielzoeker. Gelet hierop diende de staatssecretaris te beoordelen of het relaas van de vreemdelingen op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Anders dan de minister betoogt, behelzen noch de besluiten noch de daarin ingelaste voornemens om de aanvragen af te wijzen, een op een zodanige beoordeling gebaseerd standpunt van de staatssecretaris, dat het relaas op hoofdlijnen voor ongeloofwaardig moet worden gehouden.

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De verspreide overwegingen in de besluiten en de voornemens waarin enkele elementen uit het asielrelaas als bevreemdingwekkend of opmerkelijk zijn aangemerkt, worden niet met elkaar in verband gebracht. Evenmin wordt daaraan enige conclusie verbonden. Ook naar hun inhoud bieden de overwegingen geen grond aan het betoog van de minister dat de staatssecretaris in de besluiten uitdrukkelijk en gemotiveerd heeft uiteengezet dat en waarom het relaas van de vreemdelingen ongeloofwaardig is. Gelet hierop is de rechtbank er terecht van uitgegaan dat de staatssecretaris het asielrelaas uitsluitend op zwaarwegendheid heeft beoordeeld. Mitsdien faalt de grief.”

<sup>xxvii</sup> “2.1.3. Omdat de staatssecretaris in het besluit van 1 juli 2002 geen omstandigheden, als bedoeld in artikel 31, tweede lid, aanhef en onder a t/m f van de Vw 2000, aan appellant heeft tegengeworpen, geldt volgens het gevoerde beleid als uitgangspunt dat hij het asielrelaas en de daarin gestelde feiten voor waar aanneemt, voorzover is voldaan aan de in de paragrafen C1/1 sub 2, C1/3 sub 2.2 en 3.4 van de Vreemdelingencirculaire 2000 (hierna: de Vc 2000) vermelde vereisten.

Appellant heeft in zijn zienswijze bestreden dat de door hem gestelde verklaringen ongeloofwaardig zijn. In dat verband heeft hij zijn gestelde politieke en artistieke achtergronden, waaronder zijn bekendheid als zanger en vanwege zijn speeches en protestsongs tijdens protestbijeenkomsten, geschetst. Verder is hij ingegaan op de situatie ter plaatse, waarbij hij zijn verhaal heeft toegelicht met informatie uit andere bronnen. Onder verwijzing naar deze persoonlijke achtergronden en de situatie ter plaatse heeft appellant voorts de door de staatssecretaris ongeloofwaardig geachte verklaringen verder toegelicht.

Gelet op het voorgaande en mede gelet op de omstandigheid dat appellant daarbij op de plaatselijke situatie in Nigeria is ingegaan op een wijze die niet op voorhand niet lijkt te stroken met hetgeen over Nigeria bekend is, hetgeen de staatssecretaris in het besluit overigens ook erkent, mocht de staatssecretaris zich in het besluit van 1 juli 2002 niet beperken tot het oordeel dat hij de gestelde verklaringen nog altijd niet geloofwaardig acht. Hij mocht, mede gelet op het door appellant in de zienswijze ingebrachte en op hetgeen appellant eerder heeft verklaard en gelet op de hierboven vermelde paragrafen van de Vc 2000, onder die omstandigheden de aanvraag niet afwijzen, zonder nader te motiveren, waarom hij het asielrelaas niet voor waar aanneemt.”

<sup>xxviii</sup> “Zoals de Afdeling eerder heeft overwogen, onder meer in de door de rechtbank aangehaalde uitspraak van 9 juli 2002 (in zaak nr. 200202328/1; JV 2002/275 en NAV 2002/234), behoort de beoordeling van de geloofwaardigheid van de door de vreemdeling in zijn asielrelaas naar voren gebrachte feiten tot de verantwoordelijkheid van de minister en kan die beoordeling slechts terughoudend door de rechter worden getoetst.

2.4.2. In het bestuursrechtelijk bestel, waarvan het vreemdelingenrecht deel uitmaakt, voert het bestuur, in dit geval de minister, de wet uit en is het de taak van de rechter de daartoe door de minister genomen besluiten, indien daartegen beroep is ingesteld, op rechtmatigheid te toetsen aan de hand van de voorgedragen beroepsgronden en ambtshalve aan voorschriften van openbare orde. Daarnaast is de minister voor de uitvoeringspraktijk ten volle verantwoordelijk verschuldigd aan de Staten-Generaal.

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2.4.3. Bij de beoordeling door de minister van het asielrelaas gaat het meestal niet om de vraag, of en in hoeverre de verklaringen over de feiten die de asielzoeker aan zijn aanvraag ten grondslag heeft gelegd als vaststaand moeten worden aangenomen. De asielzoeker is immers veelal niet in staat en van hem kan ook redelijkerwijs niet worden gevergd zijn relaas overtuigend met bewijsmateriaal te staven.

2.4.4. Om de asielzoeker, waar dat probleem zich voordoet, tegemoet te komen en toch een adequate beoordeling van de aanvraag in het licht van de toepasselijke wettelijke voorschriften te kunnen verrichten, pleegt de minister blijkens het gestelde in paragraaf C1/1 sub 2 en paragraaf C1/3 sub 2.2. en 3.4 van de Vreemdelingencirculaire 2000 het relaas en de daarin gestelde feiten voor waar aan te nemen, indien de asielzoeker alle hem gestelde vragen zo volledig mogelijk heeft beantwoord en het relaas op hoofdlijnen innerlijk consistent en niet-onaannemelijk is en strookt met wat over de algemene situatie in het land van herkomst bekend is. Bovendien geldt daarvoor als vereiste dat zich geen van de in artikel 31, tweede lid, onder a tot en met f, van de Vw 2000 opgesomde omstandigheden die afbreuk doen aan de geloofwaardigheid van de verklaringen van de asielzoeker voordoet.

2.4.5. Wordt aan dat laatste vereiste niet voldaan, dan mogen ingevolge artikel 31 Vw 2000, mede gelet op de geschiedenis van de totstandkoming van die bepaling (MvT, p. 40/41) en volgens de ter uitvoering daarvan vastgestelde beleidsregels, in het relaas ook geen hiaten, vaagheden, ongerijmde wendingen en tegenstrijdigheden op het niveau van de relevante bijzonderheden voorkomen; van het asielrelaas moet dan een positieve overtuigingskracht uitgaan.”

<sup>xxix</sup> “Bij de toepassing van dit beleid in een concreet geval komt de minister beoordelingsruimte toe. Hij beoordeelt de geloofwaardigheid van het asielrelaas op basis van uitvoerige gehoren en van vergelijking van het relaas met al datgene, wat hij over de situatie in het land van herkomst weet uit ambtsberichten en andere objectieve bronnen en wat hij eerder heeft onderzocht en overwogen naar aanleiding van de gehoren van andere asielzoekers in een vergelijkbare situatie. Dit overzicht stelt hem in staat die beoordeling vergelijkenderwijs en aldus geobjectiveerd te verrichten. De rechter is niet in staat de geloofwaardigheid op vergelijkbare wijze te beoordelen.

Dit betekent niet dat er geen toetsing in rechte plaatsvindt van de beoordeling door de minister. De maatstaf bij de te verrichten toetsing is evenwel niet het eigen oordeel van de rechter over de geloofwaardigheid van het relaas, maar de vraag of grond bestaat voor het oordeel dat de minister, gelet op de motivering, neergelegd in het voornemen en het bestreden besluit, bezien in het licht van de verslagen van de gehouden gehoren, de daarop aangebrachte correcties en aanvullingen en het gestelde in de zienswijze, niet in redelijkheid tot zijn oordeel over de geloofwaardigheid van het relaas kon komen. Dit laat onverlet dat de besluitvorming moet voldoen aan de eisen van met name zorgvuldigheid en kenbaarheid van de motivering die het recht daaraan stelt en dat de rechter de besluitvorming daaraan moet toetsen.”

<sup>xxx</sup> “In de uitspraken tegen het Verenigd Koninkrijk van 2 mei 1997 in de zaak D. (RV 1997, 70), van 7 maart 2000 in de zaak T.I (RV 2001, 1), van 6 februari 2001 in de zaak Bensaid (RV 2001, 2) en van 6 maart 2001 in de zaak Hilal (RV 2001, 1), is eveneens de

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vraag aan de orde gesteld of sprake is van een effectief rechtsmiddel, indien de nationale rechter zich bij een gestelde schending van artikel 3 van het EVRM geen eigen oordeel vormt over de geloofwaardigheid van hetgeen door de asielzoeker aan de aanvraag ten grondslag is gelegd, maar zich beperkt tot een toetsing van de beoordeling door het bestuursorgaan daarvan.

Het EHRM heeft naar aanleiding daarvan overwogen dat, zakelijk en samengevat weergegeven, een rechtsmiddel effectief is, indien de gestelde schending van artikel 3 van het EVRM bij een rechter aan de orde kan worden gesteld, die het bij hem bestreden besluit kan vernietigen op de grond dat het besluit, alle omstandigheden in aanmerking genomen, in redelijkheid niet kon worden genomen. Dat die toetsing plaatsvindt aan de hand van criteria, die worden toegepast bij de beoordeling van de legaliteit of rechtmatigheid van bestuursrechtelijke besluiten is onvoldoende om deze toetsingsmaatstaf niet effectief te achten.

In het licht van deze jurisprudentie is er geen grond voor het oordeel dat de terughoudende toetsing door de rechter, zoals hiervoor onder 2.1.2. tot en met 2.1.7. uiteengezet, in strijd is met artikel 13, gelezen in samenhang met artikel 3 van het EVRM.”