



VU Migration Law Series No 4

# **Dutch Accelerated Asylum Procedure in Light of the European Convention on Human Rights**

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Migration Law Series



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## **Preface**

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The text of this paper is current to November 2005. Later developments have only been incorporated in exceptional cases.



## Table of abbreviations

AB	<i>Administratiefrechtelijke Beslissingen</i>
ABRvS	<i>Afdeling Bestuursrechtspraak van de Raad van State</i> (Administrative Jurisdiction Division of the Council of State)
AC	Application Centre
ACVZ	<i>Adviescommissie voor vreemdelingenzaken</i> (Advisory Committee on Alien Matters)
Awb	<i>Algemene wet bestuursrecht</i> (General Administrative Law Act)
ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
IND	<i>Immigratie- en Naturalisatiedienst</i> (Immigration and Naturalisation Department)
JV	<i>Jurisprudentie Vreemdelingenrecht</i>
m.nt.	<i>met noot</i> (with case comment)
NAV	<i>Nieuwsbrief Asiel- en Vluchtelingenrecht</i>
NJCM	<i>Nederlands Juristen Comité voor de Mensenrechten</i> (Dutch Jurists Committee for Human Rights)
RV	<i>Rechtspraak Vreemdelingenrecht</i>
Rva 2005	<i>Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005</i> (Regulation Supplies Asylum Seekers and Other Categories Aliens 2005)
Stb.	<i>Staatsblad</i>
Stcrt.	<i>Staatscourant</i>
TBV	<i>Tussentijds Bericht Vreemdelingencirculaire</i>
UNHCR	United Nations High Commissioner for Refugees
WBV	<i>Wijzigingsbesluit Vreemdelingencirculaire</i>

## Introduction

Mr. Mahmoud Mohammed Said, an Eritrean national, applied for asylum in the Netherlands on 21 May 2001. He stated during his interviews that he had served as a soldier in an anti-tank unit and fought in the war against Ethiopia. During a meeting in August 2000 with his battalion, he criticized his commanders for having insisted that hungry, thirsty and tired soldiers should continue fighting at the front, an insistence that resulted in casualties. On 5 December 2000, Said was summoned to the battalion's headquarters, where he was informed that he had incited soldiers. He was made to hand over his weapons and was detained in an underground cell for almost five months. During this time, he was neither interviewed, charged nor brought before a military tribunal. In April 2001, he managed to escape from detention and fled to the Netherlands. On 23 May 2001, two days after he had applied for asylum, Said's application was rejected because, according to the state secretary, his statements were not sufficiently plausible. Said lodged an appeal with the District Court of Amsterdam and requested an interim measure from the president of that court to stay his expulsion. On 18 June 2001, the president rejected his request for an interim measure and dismissed the appeal, finding that Said's account was neither credible nor plausible<sup>1</sup>. On 16 July 2001, the Administrative Jurisdiction Division of the Council of State rejected the further appeal<sup>2</sup>. On 14 January 2002, Said lodged a complaint with the European Court of Human Rights. This Court held that his expulsion to Eritrea would breach Article 3 of the European Convention on Human Rights<sup>3</sup>.

In the Netherlands, there are two types of asylum procedures: the normal asylum procedure and the accelerated asylum procedure that takes place in application centres (AC-procedure). Under the AC-procedure, asylum applications are dealt with within 48 procedural hours. About 40% of asylum applications in the Netherlands are rejected in the accelerated procedure<sup>4</sup>. The rejection of an application under the AC-procedure has consequences for the available appeal procedures.

This paper addresses the question whether the AC-procedure and available appeal procedures for asylum seekers whose applications have been rejected under the AC-procedure comply with Articles 3 and 13 of the European Convention on Human Rights.

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<sup>1</sup> President of the District Court of Amsterdam 18 June 2001, AWB 01/22880 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>2</sup> ABRvS 16 July 2001, no. 200103141/1 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>3</sup> ECHR 5 July 2005, appl. no. 2345/02.

<sup>4</sup> Annex to *Kamerstukken II* 2004/05, 19637, no. 911, p. 6; Annex to *Kamerstukken II* 2004/05, 19637, no. 958, p. 6; Annex to *Kamerstukken II* 2005/06, 19637, no. 986, pp. 4, 28. The number of applications that are *dealt with* under the AC-procedure is even larger because, since the end of 2004, applications can also be granted under the AC-procedure (see further paragraph 2.2.1). This possibility has been used since May 2005. During the period May – August 2005, 14% of asylum applications were granted under the AC-procedure, most of them as a result of a new non-removal policy for asylum seekers from some parts of Somalia. In effect, during this period, 51% of asylum applications were dealt with under the AC-procedure. Between September and December 2005, 22% of applications were granted under the AC-procedure, as a result of which 53% of applications were dealt with under the AC-procedure (Annex to *Kamerstukken II* 2005/06, 19637, no. 1025, p. 35).

The AC-procedure can also be examined as to whether it complies with similar norms in other international treaties<sup>5</sup>. This paper, however, restricts itself to the European Convention on Human Rights. This convention is the most developed system of legal protection under international human rights law, at least in terms of the frequent use of it made by individuals through the right of appeal mechanism, the powers of the Convention's supervisory bodies and the degree of state compliance with supervisory body decisions<sup>6</sup>. It provides for an individual right of complaint to the European Court of Human Rights. Unlike other bodies established by human rights treaties<sup>7</sup>, the decisions of this court are legally binding on the concerned States<sup>8</sup>. Therefore, it is important to ask whether the AC-procedure complies with this convention.

This paper limits itself to an examination of the current law, policy and jurisprudence of the AC-procedure in light of the European Convention on Human Rights and is not policy oriented.

Chapter one provides an overview of the Dutch asylum procedure. An extensive description of current Dutch law and relevant jurisprudence on the AC-procedure and appeal procedures is presented in chapter two. This chapter also discusses some practical aspects of these procedures. Chapter three examines the question whether the AC-procedure complies with Article 3 of the European Convention on Human Rights. Chapter four discusses the question whether appeal procedures available for asylum seekers whose applications have been rejected under the AC-procedure can be considered in line with the 'effective remedy' requirement of Article 13 of the European Convention on Human Rights.

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<sup>5</sup> For example, Articles 2(3) and 7 of the International Covenant on Civil and Political Rights and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>6</sup> Dixon and McCorquodale 2003, p. 206. Cf. Ovey and White 2002, p. 438.

<sup>7</sup> For example, the Human Rights Committee, established by the International Covenant on Civil and Political Rights. Cf. Dixon and McCorquodale 2003, p. 200.

<sup>8</sup> Article 46 of the European Convention on Human Rights.

## 1. Dutch asylum procedure

### 1.1 Introduction

This chapter provides a short introduction to the Dutch asylum procedure. First, it describes the most important national sources of Dutch asylum law and identifies the member of government responsible for alien affairs. Next, it discusses the grounds on which asylum can be granted. Subsequently, the arrangement of the asylum procedure is described. Lastly, this chapter pays attention to three important features of Dutch asylum law: the rules with regard to undocumented asylum seekers; the obstacles to later statements and evidence; and marginal judicial review.

### 1.2 Sources

The most important national sources of Dutch asylum law are:

- the Aliens Act 2000;
- the Aliens Decree 2000;
- the Aliens Circular 2000; and
- the jurisprudence of District Courts and the Administrative Jurisdiction Division of the Council of State.

The Aliens Act 2000 entered into force on 1 April 2001 and provides the framework for the regulation. The Aliens Decree 2000 is an administrative decree and is more detailed in its provisions than the Aliens Act 2000. The Aliens Circular 2000 contains policy rules.

Since the entering into force of the Aliens Act 2000, the Administrative Jurisdiction Division of the Council of State (hereafter: Council of State) is competent to judge second appeals in alien cases<sup>9</sup>. The Council of State's jurisprudence plays a central role in the development of alien law in the Netherlands<sup>10</sup>.

### 1.3 The responsible member of government

Since 22 July 2002, the member of government responsible for alien affairs has been the Minister of Alien Affairs and Integration. Prior to that time, the Minister of Justice, in fact, the state secretary of justice, was responsible for alien affairs. The actual assessment of asylum application has been devolved to the *Immigratie- en Naturalisatiedienst* (Immigration and Naturalisation Service, hereafter: IND).

In this paper, the term 'minister' refers to the Minister of Alien Affairs and Integration. The term

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<sup>9</sup> Until 1 January 1994, aliens could appeal against a judgment of a District Court with the Judicial Division of the Council of State. Between 1994 and 2001, aliens could not appeal against a judgment of a District Court.

<sup>10</sup> Cf. Spijkerboer 2002.

'minister' is also used to refer to the powers of the Minister of Alien Affairs and Integration, that are actually exercised by the IND.

#### 1.4 The grounds on which asylum can be granted

Article 29, paragraph 1 of the Aliens Act 2000 specifies the grounds on which asylum can be granted. According to this article, an asylum residence permit can be granted when:

- a. the asylum seeker is a refugee in the sense of the 1951 Refugee Convention;
- b. the asylum seeker has shown that there are substantial grounds for believing that he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the country to which he would be expelled;
- c. the minister decides, on humanitarian grounds associated with the asylum seeker's departure from his country of origin, that the asylum seeker cannot reasonably be asked to return to his country of origin; or
- d. the minister believes that returning the asylum seeker to his country of origin would expose him to extreme hardship as regards the general situation there.

Subparagraphs e and f of this article contain provisions for family members of asylum seekers whose applications have been granted on the basis of Article 29, paragraph 1, sub a until d of the Aliens Act 2000.

Subparagraph b is extracted from jurisprudence of the European Court of Human Rights on Article 3 of the European Convention on Human Rights (see paragraph 3.2). Subparagraph c is particularly relevant if the asylum seeker is traumatised. The Aliens Circular 2000 lists a limited number of circumstances which can give rise to the granting of a residence permit pursuant to this provision<sup>11</sup>. Subparagraph d applies in situations of a non-removal policy with regard to the asylum seeker's country of origin<sup>12</sup>. The order of the assessment is fixed: it will first be assessed whether the asylum application can be granted pursuant to sub a, subsequently whether the application can be granted pursuant to sub b, then whether sub c applies, etc<sup>13</sup>.

Asylum seekers whose applications are granted are given identical residence permits and provided with the same rights and facilities irrespective of the ground on which asylum is granted. The residence permit is temporary. If the asylum seeker possesses a temporary residence permit for five years, he can apply for a permanent residence permit<sup>14</sup>.

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<sup>11</sup> Among others, the violent death of close family members or housemates, torture, serious ill-treatment or rape or having witnessed torture, serious ill-treatment or rape of close family members or housemates (Aliens Circular 2000 C1/4.4.2.2).

<sup>12</sup> Aliens Circular 2000 C1/4.5.

<sup>13</sup> Aliens Circular 2000 C1/1.2 and C1/4.1.

<sup>14</sup> Article 34 of the Aliens Act 2000.

## 1.5 The arrangement of the asylum procedure

### 1.5.1 The application

The asylum procedure starts with the asylum seeker's application. The asylum seeker has to file an official request for asylum at one of the two application centres as soon as he arrives in the Netherlands. There is an application centre in Ter Apel and one at Schiphol Airport. Asylum seekers who enter the Netherlands through an external border (sea or air) and whose entry is refused (see paragraph 2.7.1) must file their asylum request at Schiphol Airport. Unaccompanied minors who apply for asylum for the first time in the Netherlands also have to file their asylum applications at Schiphol Airport. All other asylum seekers must file their applications at the application centre in Ter Apel<sup>15</sup>.

### 1.5.2 The first interview

As soon as possible after the application has been filed, the asylum seeker undergoes a first interview<sup>16</sup>. This interview takes place at the application centre. During this interview, the asylum seeker must answer questions about his identity, nationality and travel route<sup>17</sup>. No questions are asked about the reasons for the applicant's departure from his country of origin<sup>18</sup>. A report from the interview is made, and the asylum seeker receives a copy of it as soon as possible<sup>19</sup>.

After the first interview, the minister decides whether the application should be dealt with under the AC-procedure or whether it should be dealt with in the normal procedure. If the latter, the application will be sent to an investigation and reception centre. This decision is called the *procesbeslissing* (process decision, see paragraph 2.3.3).

The AC-procedure is described extensively in chapter two. This paragraph gives a short description of the normal procedure. However, the concepts described here are also relevant to an understanding of the AC-procedure.

### 1.5.3 The detailed interview

The asylum seeker will be subjected to a detailed interview in not less than six days after he has submitted an application<sup>20</sup>. During this interview, he can explain his reasons for leaving his country of origin and for requesting asylum. At this time, the results of the investigations into the applicant's identity, nationality and travel route can be examined as well<sup>21</sup>. A report will be

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<sup>15</sup> Aliens Circular 2000 C3/11.1.

<sup>16</sup> Article 3.110 paragraph 1 of the Aliens Decree 2000.

<sup>17</sup> Aliens Circular 2000 C3/12.2.4.

<sup>18</sup> Article 3.110, paragraph 2 of the Aliens Decree 2000.

<sup>19</sup> Article 3.110, paragraph 3 of the Aliens Decree 2000.

<sup>20</sup> Article 3.111, paragraph 1 of the Aliens Decree 2000.

<sup>21</sup> Aliens Circular 2000 C3/13.4.2.

made from the interview, and the asylum seeker receives a copy of it as soon as possible<sup>22</sup>. The asylum seeker can submit corrections and additional information to this report within two days<sup>23</sup>. However, a term of two weeks is usually given for this purpose<sup>24</sup>.

#### 1.5.4 *The letter of intention*

Article 39, paragraph 1 of the Aliens Act 2000 states that if the minister intends to reject the asylum application, he has to give the asylum seeker a letter of this intention that gives specific reasons. In order to provide the applicant with the possibility of giving a substantive reaction to this, the letter of intention should contain all relevant grounds on which the intended rejection is based.

#### 1.5.5 *The view*

The asylum seeker can submit his written view on the letter of intention within four weeks after the letter has been distributed<sup>25</sup>. Only in special circumstances can more time be given<sup>26</sup>. If the term of four weeks expires and the asylum seeker has not yet submitted his view, then the minister can issue a decision without waiting for the view. The minister can only consider an applicant's view after the expiration of the time limit if a decision has not yet been issued<sup>27</sup>.

#### 1.5.6 *The decision*

According to Article 42, paragraph 1 of the Aliens Act 2000, a decision must be given within six months after an asylum application has been submitted. This time limit can, under special circumstances, be extended for another six months in individual cases<sup>28</sup> or for a year for certain categories of asylum seekers<sup>29</sup>.

The decision should not contain different material grounds for rejecting the application than those that were laid down in the letter of intention<sup>30</sup>. However, if the minister insists on rejecting an application, he should react to the asylum seeker's view in his decision<sup>31</sup>.

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<sup>22</sup> Article 3.111, paragraph 2 of the Aliens Decree 2000.

<sup>23</sup> Article 3.111, paragraph 3 of the Aliens Decree 2000.

<sup>24</sup> Aliens Circular 2000 C3/13.4.3.

<sup>25</sup> Article 3.115, paragraph 2 of the Aliens Decree 2000.

<sup>26</sup> Aliens Circular 2000 C3/15.3.2.

<sup>27</sup> Article 3.115, paragraph 3 of the Aliens Decree 2000.

<sup>28</sup> Article 42, paragraph 4 of the Aliens Act 2000.

<sup>29</sup> Article 43 of the Aliens Act 2000.

<sup>30</sup> Spijkerboer and Vermeulen 2005, p. 214.

<sup>31</sup> Article 42, paragraph 3 of the Aliens Act 2000.

### 1.5.7 Appeal

The asylum seeker can appeal a rejected application with the District Court of The Hague<sup>32</sup>. This court also sits at the other Districts Courts of the Netherlands. According to Article 69, paragraph 1 of the Aliens Act 2000, an appeal must be lodged within four weeks. If the appeal is lodged on time, it has suspensive effect, meaning that the asylum seeker can remain in the Netherlands to wait for the District Court's judgment<sup>33</sup>.

Against an adverse judgment by a District Court, an appeal can be lodged with the Council of State. The period for appeal is also four weeks. This appeal does not have suspensive effect<sup>34</sup>. However, the asylum seeker can request the president of the Council of State to grant an interim measure to allow him to remain in the Netherlands to wait for the Council of State's decision (see further paragraph 2.4.2).

## 1.6 Undocumented asylum seekers

According to Article 31, paragraph 2, sub f of the Aliens Act 2000, an asylum seeker's failure to submit relevant documents can be considered when assessing an application if the asylum seeker can be held responsible for this lack of documentation. The Aliens Circular 2000 states that asylum seekers must submit documents about their identity, nationality, travel route and asylum account<sup>35</sup>. The minister has a rather large degree of discretion in deciding whether the asylum seeker has submitted sufficient documentation<sup>36</sup>. An asylum seeker will be held responsible for a lack of proper documentation if it is his fault that he is undocumented. On this, for instance, the Council of State has ruled that asylum seekers are responsible for being undocumented if they destroy their documents at their smuggler's suggestion or if they have handed these documents over to him<sup>37</sup>. Whether or not the asylum seeker was a minor is not relevant in the Council of State's opinion<sup>38</sup>.

A consequence of an asylum seeker's being held responsible for being undocumented is that he is no longer entitled to the benefit of the doubt. His statements will only be considered credible if there are no gaps, vaguenesses, unlikely turns and contradictions in the asylum account on the level of the relevant details; the account must be positively convincing<sup>39</sup>. Thus, the lack of proper documentation affects the requirement of giving reasons for a decision, as well as, indirectly, the extent of judicial review<sup>40</sup>. Therefore, it is crucial that asylum seekers submit as much relevant documentation as possible.

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<sup>32</sup> Article 71, paragraph 1 of the Aliens Act 2000.

<sup>33</sup> Article 82, paragraphs 1 and 3 of the Aliens Act 2000.

<sup>34</sup> The Aliens Act 2000 does not deviate from article 6:16 of the Awb.

<sup>35</sup> Aliens Circular 2000 C1/5.8.2.

<sup>36</sup> Essakkili 2005, p. 31.

<sup>37</sup> ABRvS 28 December 2001, *JV* 2002/73, *RV* 2001, 10; ABRvS 3 July 2002, *JV* 2002/296.

<sup>38</sup> Among others, ABRvS 25 June 2002, *JV* 2002/292.

<sup>39</sup> ABRvS 27 January 2003, *JV* 2003/130 m.nt. Olivier, *RV* 2003, 5 m.nt. Battjes, *NAV* 2003/100 m.nt. Olivier, *AB* 2003, 286 m.nt. Vermeulen.

<sup>40</sup> Essakkili 2005, p. 35.

## 1.7 Obstacles to later statements and evidence<sup>41</sup>

Article 4:6 of the *Algemene wet bestuursrecht* (General administrative law act, hereafter: Awb) reads as follows:

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

According to the Council of State, the minister can apply Article 4:6, paragraph 2 of the Awb if the subsequent application is based on facts and circumstances that theoretically could, and, therefore, should, have been brought forward during the first procedure. The Council of State restrictively defines new facts and circumstances. For example, an arrest warrant that existed during the course of the first procedure but that was only obtained by the asylum seeker after the decision had been issued<sup>42</sup> or a medical report that was drawn up after the decision but could have been drawn up earlier in the procedure<sup>43</sup> is not regarded as a new fact or circumstance. According to the Council of State, language problems, fear of endangering family members, and shame or psychological problems are not valid reasons to redeem the fact that the applicant did not report certain facts or circumstances on time, while this had been theoretically possible<sup>44</sup>.

The Council of State applies the same restrictive definition of new facts and circumstances in enforcing Article 83 of the Aliens Act 2000 and Article 3.119 of the Aliens Decree 2000. Article 83 of the Aliens Act 2000 states that a court may take into account new facts and circumstances that have occurred since a decision on asylum was made. The Council of State's restrictive interpretation of new facts and circumstances means that facts and circumstances that theoretically could have been reported before the issuance of the initial decision will not be considered if they surface during the appeal stage<sup>45</sup>. When a letter of intention has been issued but subsequent facts or circumstances become known or were already known but were considered differently than they arguably should have been, Article 3.119 of the Aliens Decree 2000 provides that the minister must inform the applicant that he wishes to reject the application in spite of the new evidence and that he must allow the applicant to produce a new view. Effectively, the Council of State's restrictive definition of new facts and circumstances means that an asylum seeker will only be able to raise new facts and circumstances in his view if it would not have been possible for him to have done so earlier in the proceedings<sup>46</sup>.

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<sup>41</sup> See more extensive Van Rooij 2004.

<sup>42</sup> Among others, ABRvS 5 March 2002, *JV* 2002/124.

<sup>43</sup> ABRvS 23 April 2002, no. 200201688/1 (unpublished).

<sup>44</sup> Van Rooij 2004, p. 10.

<sup>45</sup> Van Rooij 2004, p. 15.

<sup>46</sup> Van Rooij 2004, p. 14-15.

The Council of State has also ruled that, in principle, an asylum seeker must submit all relevant documentation at the time of application and that the minister does not have to consider documents that are referred to in the applicant's submitted view but that are not submitted, unless the asylum seeker was in an acute flight situation at the time of his departure from his country of origin<sup>47</sup>.

However, the Council of State has introduced two nuances in the case law on this point. It has stated that if an asylum seeker mentions that there are things that he cannot express or if evidence is in process during the interview that precedes the first decision, that it may be unreasonable to issue a decision without first receiving the outstanding statements or evidence<sup>48</sup>. Moreover, the Council of State has stated that special, individual circumstances may make it necessary to disapply rules that would block the introduction of later statements or evidence<sup>49</sup>. Until now, however, these two nuances in the case law have never been applied in practice and, thus, exist only in theory<sup>50</sup>.

Therefore, an asylum seeker must, in principle, raise all facts and circumstances and submit all documents before the letter of intention is issued, all of this despite considerable difficulties that asylum seekers may have in gathering evidence from their country of origin and despite trauma that often precludes them from frankly speaking about their motives for fleeing<sup>51</sup>.

## 1.8 Marginal judicial review<sup>52</sup>

Dutch administrative law distinguishes between full and marginal judicial review of administrative acts. Marginal judicial review is a limited form of review and means that a court will only annul an administrative decision if it is unreasonable<sup>53</sup>. According to the Council of State, an assessment of the credibility of statements made by an asylum seeker must be reviewed marginally. The minister's opinion as to whether the applicant should be held responsible for the lack of documents that are deemed necessary for the assessment must also be reviewed marginally. In fact, according to the Council of State's jurisprudence, only objectively verifiable facts and the interpretation of international norms should always be reviewed fully. Therefore, review in Dutch courts in asylum cases is almost entirely done marginally<sup>54</sup>. Practice shows that most asylum applications are rejected on the grounds of a lack of credibility. However, because marginal judicial review is applied, it is very hard for asylum seekers to challenge the minister's decision on credibility.

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<sup>47</sup> ABRvS 15 March 2005, *JV* 2005/185.

<sup>48</sup> ABRvS 28 June 2002, *JV* 2002/294.

<sup>49</sup> Among others, ABRvS 5 March 2002, *JV* 2002/125.

<sup>50</sup> T.P. Spijkerboer in his Afterword to Van Rooij 2004, pp. 61-62.

<sup>51</sup> Van Rooij 2004, p. 16.

<sup>52</sup> See more extensive Essakkili 2005.

<sup>53</sup> T.P. Spijkerboer in his Afterword to Essakkili 2005, p. 73.

<sup>54</sup> Essakkili 2005, pp. 35-37, 57.



## 2. Application Centre procedure

### 2.1 Introduction

On 7 June 1994, the minister of justice informed the second chamber of parliament of his intention to establish two application centres and to introduce an accelerated asylum procedure (the AC-procedure). Under the AC-procedure, an asylum application would be dealt with within 24 procedural hours. This procedure was meant as an exception to the normal procedure. Only cases that were manifestly unfounded or inadmissible would be dealt with in the AC-procedure. The minister of justice noted that the AC-procedure was only meant for people who apply for asylum, but in fact have a ‘wafer-thin story’. He also said that most asylum applications would be referred to an investigation and reception centre and that only very weak asylum cases would be dealt with within 24 hours<sup>55</sup>.

The reason given for establishing the application centres and for introducing the AC-procedure was that reception centres in the Netherlands had become overcrowded because of an unexpectedly high number of asylum applications in the second half of 1993. It was said that the application centres would allow for the efficient sorting of applications with little prospect of success and those applications likely to succeed and that the centres would function as floodgates by regulating entry to reception centres<sup>56</sup>. Reception centres would be reserved for asylum seekers with a reasonable claim to asylum; all others, such as ‘asylum tourists’, would be barred from the expensive provision of reception<sup>57</sup>.

During parliamentary discussions, most political parties agreed with the minister’s intention to establish application centres and to introduce an accelerated asylum procedure for manifestly unfounded or inadmissible applications, provided that an agreement would be reached with legal aid<sup>58</sup>. Legal aid organisations, however, who were of the view that the proposal was unacceptable, threatened to boycott the AC-procedure<sup>59</sup>. As a result of these objections, discussions took place that resulted in some changes to the proposed procedures at the application centres<sup>60</sup>. On the basis of these changes, legal aid organisations agreed to participate in the AC-procedure.

On 15 October 1994, two application centres were opened, one in Rijsbergen and one in Zevenaar. On 1 January 1996, another application centre was opened at Schiphol Airport. A

<sup>55</sup> Letter from the Minister of Justice to the Chairman of the Second Chamber of Parliament, 7 June 1994, *NAV* 1994/6, p. 453 e.v.

<sup>56</sup> *Idem*

<sup>57</sup> *Kamerstukken II* 1993-94, 19637, no. 109, p. 7.

<sup>58</sup> *Kamerstukken II* 1993-94, 19637, no. 109. Only *GroenLinks* and *D66* opposed the establishment of application centres.

<sup>59</sup> Letter from the Dutch Refugee Council to the Minister of Justice, 18 May 1994, *NAV* 1994/6, pp. 451-452.

<sup>60</sup> *Kamerstukken II* 1993/94, 19637, no. 112. Among other things, the changes increased the time limit for preparing for the interview from 30 minutes to one hour and increased the time limit for discussing the interview and the letter of intention from one hour to two hours.

fourth application centre was established in 1999 in Ter Apel. Since the opening of these centres, asylum seekers have had to apply for asylum and undergo their first interviews in one of the application centres.

In June 1999, the AC-procedure underwent some important changes. First, the application procedure was extended to 48 procedural hours in order to increase the output of the AC-procedure<sup>61</sup>. Second, the procedure was divided into two parts: the first 24 hours were intended for investigations of identity, nationality and travel route; the second 24 hours were intended to deal with the substance of the application<sup>62</sup>. Third, the AC-procedure was incorporated into the Aliens Circular. On 1 April 2001, the Aliens Act 2000 entered into force. This again modified the AC-procedure. Some parts of the AC-procedure are now incorporated into the Aliens Act 2000 and, especially, the Aliens Decree 2000.

On 1 November 2003, the application centre in Zevenaar closed due to a large decrease in the number of asylum applications. In July 2004, the application centre in Rijsbergen closed as well.

At present, the AC-procedure can no longer be considered an exception to the normal procedure. In 2004, 42% of the asylum applications were rejected through the AC-procedure<sup>63</sup>. From January to April 2005, this number increased to 46%<sup>64</sup>. From May to August 2005, 51% of the asylum applications were being dealt with under the AC-procedure<sup>65</sup>, and the number was 53% from September to December of the same year<sup>66</sup>.

This chapter explores current Dutch law and relevant jurisprudence on the AC-procedure and the appeal procedures available for asylum seekers whose applications have been rejected under the AC-procedure. Some practical aspects of these procedures are also considered. First, this chapter discusses the criteria for dealing with cases under the AC-procedure. Second, it describes the procedure's arrangement. This chapter then pays attention to the possibility of appeal, after which it considers the legal basis of the AC-procedure. Different aspects of legal aid and restrictions on freedom are then explored. This chapter then conveys criticisms of the AC-procedure that have been raised by different organisations. Finally, it ends with a summary.

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<sup>61</sup> *Kamerstukken II* 1998/99, 19637, no. 367, p. 8. Only after frequent consultation with and a strike by legal aid was agreement reached between the State Secretary of Justice and legal aid organisations on the extension to 48 procedural hours (see Lodder 2004, p. 24).

<sup>62</sup> As of 20 December 2002, this distinction no longer exists (Decision of the Minister for Alien Affairs and Integration of 18 December 2002, *Stcrt.* 2002, 201, p. 9).

<sup>63</sup> Annex to *Kamerstukken II* 2004/05, 19637, no. 911, p. 6.

<sup>64</sup> Annex to *Kamerstukken II* 2004/05, 19637, no. 958, p. 6.

<sup>65</sup> Annex to *Kamerstukken II* 2005/06, 19637, no. 986, pp. 4, 28. As of the end of 2004, applications can also be granted under the AC-procedure (see paragraph 2.2.1). In this period, this possibility has been used for the first time, mainly as relates to the new non-removal policy for asylum seekers from some parts of Somalia. Of all asylum applications, 37% were rejected under the AC-procedure during this period, and 14% of applications were granted under the AC-procedure.

<sup>66</sup> Annex to *Kamerstukken II* 2005/06, 19637, no. 1025, p. 35. During this period, 22% of applications were granted under the AC-procedure, and 31% of applications were rejected.

## 2.2 Criteria for dealing with cases under the AC-procedure

This paragraph describes the types of applications that Dutch law deems to be appropriate for processing under the AC-procedure. First, it examines policy. Second, this section explores the Council of State's jurisprudence. Finally, it considers a few examples of applications that have been rejected under the AC-procedure.

### 2.2.1 Policy

According to paragraph C3/12.1.1 of the Aliens Circular 2000, cases can be dealt with under the AC-procedure if it is possible to decide without time-consuming investigations that the application should be rejected pursuant to Articles 30 or 31 of the Aliens Act 2000 or Article 4:6 of the Awb<sup>67</sup>, including manifestly unfounded cases and cases where a claim can be lodged with a third country, or if it can be decided without time-consuming investigations, that, and on which ground of Article 29 of the Aliens Act 2000, the application can be granted. 'Without time-consuming investigations' means that the investigation can be done within 48 procedural hours.

Therefore, the criteria for dealing with cases under the AC-procedure are not criteria that relate to the content of the application. This raises a circular argument, since it effectively means that cases can be dealt with within 48 procedural hours if the investigation into the application can be completed within 48 procedural hours<sup>68</sup>.

During parliamentary discussions on the Aliens Act 2000, the state secretary of justice confirmed that there were no criteria as regards content implied in the law because it would be difficult, if not impossible, to capture all possible scenarios that should conceivably be dealt with under the AC-procedure<sup>69</sup>.

The Aliens Circular 2000 states that the detailed interview of unaccompanied minors under twelve will, in principle, not take place in an application centre<sup>70</sup>. This is the only exception that the Aliens Circular 2000 mentions.

In the memorandum explaining the ministry of justice's 2005 budget, the minister wrote that the number of applications that are settled under the AC-procedure should be maximized ('AC, unless...')<sup>71</sup>.

Only since the end of 2004 has the possibility of granting asylum applications under the AC-procedure existed. Before that time, applications could only be rejected under the AC-procedure.

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<sup>67</sup> See paragraph 1.7.

<sup>68</sup> Spijkerboer and Vermeulen 2005, p. 218.

<sup>69</sup> *Kamerstukken I* 2000/01, 26 732, nr. 5d, p. 6.

<sup>70</sup> Aliens Circular 2000 C5/24.6. The Aliens Circular 2000 has mentioned this exception since 1 April 2005 (WBV 2005/12, *Stert.* 2005, 63, p. 18).

<sup>71</sup> *Kamerstukken II* 29800, chapter VI, no. 2, p. 128.

In a letter dated 18 June 2004 that reacted to critical reports about the AC-procedure from different organisations, the minister wrote that it should also be possible to grant applications in the application centre<sup>72</sup>. A ministerial resolution of 1 December 2004 changed the Aliens Circular 2000 to create the possibility of granting applications in an application centre<sup>73</sup>. In practice, this means that applications can only be granted in an application centre pursuant to Article 29, paragraph 1, sub a, b or c of the Aliens Act 2000<sup>74</sup>. The reason for this is that if after the first interview the expectations are that the application shall be granted, a resting period of six days before the detailed interview is prescribed. Article 3.112, paragraph 1, sub b of the Aliens Decree 2000 states that a six day resting period does not apply if *as a result of the first interview* the minister decides to *reject* the application within 48 procedural hours. A decision to possibly grant an asylum application pursuant to Article 29, paragraph 1, sub d, e or f of the Aliens Act 2000 will often arise after the first interview.

This change in the AC-procedure has occurred without amending the Aliens Act 2000 or the Aliens Decree 2000. Consequently, applications can only be *granted* during the AC-procedure if the minister decides to *reject* the application after the first interview.

In a letter dated 11 March 2005, the IND explained that it is possible to grant an application pursuant to Article 29, paragraph 1, sub d, e or f at an application *centre*, but not during the AC-*procedure*. If such an application is granted at the application centre, the regular procedure applies. This means, for instance, that the detailed interview can only take place six days after the first interview, unless the asylum seeker voluntarily waived this resting period<sup>75</sup>.

No applications have been granted under the AC-procedure until the second half of 2005. In the period from May to August 2005, 14% of asylum applications were granted under the AC-procedure<sup>76</sup>. In the period from September to December 2005, 22% of applications were granted under the AC-procedure<sup>77</sup>. It seems reasonable to assume that most of these applications were granted pursuant to Article 29, paragraph 1, sub d of the Aliens Act 2000 since, among other things, a non-removal policy has applied for asylum seekers from some parts of Somalia as of June 2005<sup>78</sup>. Therefore, these applications have been granted not during the AC-*procedure* but, rather, subsequently at the application *centre*.

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<sup>72</sup> *Kamerstukken II* 2003/04, 19637, nr. 826, p. 7. This letter reacted to reports of the *Adviescommissie voor Vreemdelingenzaken* (ACVZ 2004); the University of Leiden (Lodder 2004); the UNHCR (UNHCR 2003); and the *Nederlands Juristen Comité voor de Mensenrechten* (NJCM 2003).

<sup>73</sup> Decision of the Minister for Alien Affairs and Integration of 1 December 2004, *Stcrt.* 2004, 234, p. 13.

<sup>74</sup> Otherwise: Spijkerboer and Vermeulen 2005, p. 217.

<sup>75</sup> Intern letter of IND's Manager Process Asylum of 11 March 2005 (available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>76</sup> Annex to *Kamerstukken II* 2005-06, 19637, no. 986, p. 28.

<sup>77</sup> Annex to *Kamerstukken II* 2005/06, 19637, no. 1025, p. 35.

<sup>78</sup> E-mail from Arno Pinxter, legal coordinator of Legal Aid at AC Schiphol, dd 21 July 2005, and e-mail from Gerard Oosterholt, legal coordinator of Legal Aid at AC Ter Apel, d.d. 2 August 2005, both on file with author. Cf. Annex to *Kamerstukken II* 2005/06, 19637, no. 986, p. 4.

### 2.2.2 Jurisprudence

The Council of State's jurisprudence clarifies the selection criteria. In a judgment of 7 August 2001<sup>79</sup>, the Council of State asserted:

*When deciding whether an application is suitable for rejection in an application centre, it is only relevant whether the state secretary intends to do that within 48 hours. He only has to abandon this intention if more time is needed to make a decision.<sup>i</sup>*

The Council of State often refers explicitly to the parliamentary history of the Aliens Act 2000. In its judgment of 20 December 2001<sup>80</sup>, for example, it noted:

*According to the parliamentary history of the Aliens Act 2000 and the explanation of the Aliens Decree 2000, the legislator has chosen to prescribe a criterion measured by the length of time for deciding whether an application is suitable for dealing with in an application centre. The idea hereby was that the criterion, that within 48 procedural hours adequately could be decided whether the application could be rejected, guaranteed that only cases which require no time-consuming investigation, would be dealt with in an application centre.<sup>ii</sup>*

Furthermore, the Council of State decided that there are no exceptions to the AC-procedure for certain categories of applications. In a case in which the appellants argued that the AC-procedure was only meant for manifestly unfounded or fraudulent cases<sup>81</sup>, the Council of State asserted:

*When reviewing whether an application could be rejected in an application centre, it is relevant whether the decision concerned has been taken in a careful way within 48 hours. This leads to an assessment of the investigation carried out and to the motivation of the rejection. The law offers no basis for the argument that certain categories applications, as indicated by appellants, are excepted from dealing with in an application centre.<sup>iii</sup>*

With regard to minors, the Council of State maintained:

*The law offers no basis for the argument that certain categories applications, such as minors, are excepted from dealing with in an application centre<sup>82</sup>.<sup>iv</sup>*

<sup>79</sup> ABRvS 7 August 2001, *JV* 2001/259, *NAV* 2001/273.

<sup>80</sup> ABRvS 20 December 2001, *RV* 2001, 20 m.nt. Olivier, *JV* 2002/44 m.nt. Koers, *AB* 2002, 135 m.nt. Sewandono, *NAV* 2002/26 m.nt. Terlouw.

<sup>81</sup> ABRvS 27 August 2001, *RV* 2001, 19 m.nt. Terlouw, *NAV* 2001/317. See also: ABRvS 9 October 2001, *NAV* 2001/341-kort; ABRvS 12 October 2001, *JV* 2001/325, *AB* 2001, 359 m.nt. Sewandono, *NAV* 2002/2 m.nt. Schoorl.

<sup>82</sup> ABRvS 25 June 2002, *JV* 2002/292. This judgment contradicts the agreement between legal aid and the State Secretary of Justice related to the treatment of minors. See Lodder 2003, p. 123.

Applications from minors under the age of twelve can also be dealt with under the AC-procedure. The Council of State declared:

*The Aliens Act 2000, the Aliens Decree 2000 nor the Aliens Circular 2000 prevents that the hearing of minors under twelve years takes place in the AC-procedure*<sup>83</sup>.<sup>v</sup>

The Council of State has also decided that applications from aliens with respect to whom a non-removal policy has been terminated can be rejected under the AC-procedure, even if a judge has not yet expressed himself on the lawfulness of the termination<sup>84</sup>.

In another case, a Somali applicant argued that his case could not be given sufficient careful attention under the AC-procedure, since the European Court of Human Rights had taken an interim measure in a similar case from six Somalis. The Council of State considered however that the European Court of Human Rights had not given reasons for the interim measure<sup>85</sup>. The Council of State considered further:

*Having regard to this and to the nature of the interim measures, it cannot be maintained that due to the bare fact that the interim measures have been taken, the application of the alien cannot be dealt with within the AC-procedure, without being contrary with the necessary care.*<sup>vi</sup>

Finally, the Council of State has also ruled that asylum applications in which possibly Article 1F of the Refugee Convention<sup>86</sup> applies, can be settled under the AC-procedure. The Council of State considered furthermore that asylum seekers cannot resort to *TBV 2001/18*, the provisions of which say that a special 1F unit of the IND will investigate such applications<sup>87</sup>.

### 2.2.3 Practice

Thus, one can conclude from a review of the policy and jurisprudence of the Council of State that many types of cases can be dealt with under the AC-procedure. This paragraph gives a few examples of different cases that have been dealt with under the AC-procedure.

In an application from an asylum seeker from Sierra Leone that was rejected under the AC-procedure, the applicant stated that he had been sold into slavery at five years of age and moved to Nigeria. In the corrections and additional information to the report of the first interview, the applicant's legal counsel indicated that the applicant was illiterate and that he had a very low

<sup>83</sup> ABRvS 9 July 2003, *JV* 2003/389. However, since 1 April 2005, the Aliens Circular 2000 says that the detailed interview of unaccompanied minors under twelve will, in principle, not take place in an application centre (WBV 2005/12, *Stert.* 2005, 63, p. 18).

<sup>84</sup> ABRvS 8 November 2001, *RV* 2001, 11 m.nt. Vermeulen, *JV* 2002/12, *NAV* 2002/1 m.nt. van Mansfeld. See also ABRvS 3 December 2001, *JV* 2002/13.

<sup>85</sup> ABRvS 14 April 2004, *NAV* 2004/127 m.nt. Den Haan.

<sup>86</sup> Article 1F of the Refugee Convention is an exclusion clause designed to exclude from protection persons who have committed very serious crimes outside the asylum state.

<sup>87</sup> ABRvS 15 August 2002, *JV* 2002/344.

level of understanding. In the view, the legal counsel stated that the applicant was possibly mentally disturbed, and at least not fully educated. The minister did not seek the advice of a doctor or psychologist as to the applicant's mental condition and rejected the application under the AC-procedure. The president of the District Court of Amsterdam found the appeal well-founded and ordered the minister to reach a new decision<sup>88</sup>.

Another example involved a mother and son from Armenia. At the time of the application in the Netherlands, the mother was 71 years of age. Her son was schizophrenic and had run out of his medication. In light of the son's condition, the minister asked the medical department for advice and was assured by a doctor there that the son could be subjected to an interview. As it turned out, the applications were rejected under the AC-procedure because the statements of the two applicants contradicted each other on many points. The president of the District Court of Arnhem ruled the appeal well-founded and ordered the minister to take a new decision<sup>89</sup>.

In these two examples, the appeal has been ruled well founded. However, this has only been the case for about 10% of applications that have been dealt with under the AC-procedure<sup>90</sup>.

Consider the application of an asylum seeker from Sri Lanka that was rejected under the AC-procedure. The applicant stated that he had been kidnapped by the Liberation Tigers of Tamil Eelam (hereafter: LTTE) at the age of twelve and that he had been forced to take part in the activities of LTTE from that age. According to him, he had been both trained and ill-treated by the LTTE for eleven years. The applicant further asserted that he had tried to escape several times but that he had only been successful when a tsunami hit Sri Lanka on 26 December 2004. According to the applicant's account, he then fled to an area controlled by the government. Upon arriving in this area, he was allegedly arrested by the secret service of the government on suspicion of spying. According to the applicant, he was then tortured and raped by the police and, under threat of torture, he admitted to having worked for the LTTE. Finally, the applicant said that he then managed to escape and flee to the Netherlands. His legal counsel at the application centre indicated that the applicant was traumatised due to having been both trained and ill-treated by the LTTE for eleven years and that it was, therefore, not suitable for his application to be dealt with under the AC-procedure. Nevertheless, the application was rejected under the AC-procedure because the applicant had not submitted sufficient documentation and because his account was found not to be credible. The president of the District Court of Zutphen and the Council of State ruled the appeal unfounded<sup>91</sup>.

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<sup>88</sup> President of the District Court of Amsterdam, 26 November 2002, AWB 02/84699 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>89</sup> President of the District Court of Arnhem 7 April 2005, NAV 2005/159-kort.

<sup>90</sup> Annex to *Kamerstukken II* 2004/05, 19637, nr. 911, p. 15, and Annex to *Kamerstukken II* 2004/05, 19637, nr. 958, p. 16. In only a small number of cases in which an appeal is found to be well-founded will the minister ultimately grant a residence permit.

<sup>91</sup> President of the District Court of Zutphen 21 April 2005, AWB 05/14668 and 05/14666; ABRvS 18 May 2005, no. 200503742/1 (unpublished).

Another example of asylum applications that were found on appeal not to have been well-founded is the case of A. In that case, the applicant, a Ugandan national, had applied for asylum in the Netherlands in November 2004 at the age of sixteen. He stated that his mother had left the family when he was one year old and that his sister had died in 2000. According to the applicant, his father was kidnapped by unknown men in April 2001 and had not returned since then. A. stated that he had kept himself alive since then by farming and by selling bananas, cassava and sweet potatoes. In May 2001, according to him, he joined the Uganda Young Democrats, a division of the opposition Democratic Party. A. said that he had talked to other young people and told them about abuses committed by the Ugandan government. In February 2004, according to the applicant, he was arrested and detained in a 'safehouse'. He alleged that he had been tortured during this detention and that this had left him scarred. In August 2004, he said that he had had to go to his house with two guards to pick up some documents and that on the way to his house he was told that he was charged with rebellion against the government. According to the applicant, he had managed to escape and fled to the Netherlands. His asylum application was rejected under the AC-procedure because he had not submitted any documents concerning his travel route and because the minister thought that the account was not credible. A. lodged an appeal, and the president of the District Court of Amsterdam ruled the appeal well-founded<sup>92</sup>. However, the Council of State annulled this judgment and ruled the appeal unfounded<sup>93</sup>.

In another case, the applications of a mother, D., and daughter, V., from Sierra Leone were rejected under the AC-procedure. They applied for asylum on 10 February 2005. They stated during their interviews that their village had been attacked by rebels in 1995 and that the husband of D. had been killed. According to their account, they stayed in camps for displaced persons in Freetown from 1995 until 1998 but had to move to a stadium when their camp was attacked by rebels in 1998. They said that they stayed in another camp for displaced persons in Freetown beginning in 2000. In this camp, according to the applicants, D. experienced problems with a female rebel, and in December 2004, D. and V. left Sierra Leone. While discussing the report of the detailed interview with a legal counsel, D. stated that she had been raped by several rebels in 1998 and that she had not been able to reveal this during the interview because of what she described as the interview's bad atmosphere. Legal counsel requested further investigations and a new interview. The minister, however, did not carry out further investigations and rejected the application under the AC-procedure. D. and V. lodged an appeal, stating as one of the grounds for appeal that V. had been terrorised and ill-treated by rebels in the last camp at which they stayed. The president of the District Court of Arnhem, however, ruled the appeal unfounded, since, *inter alia*, it had not been shown that V. had already mentioned these problems during her interview<sup>94</sup>.

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<sup>92</sup> President of the District Court of Amsterdam 24 November 2004, *JV* 2005/S113.

<sup>93</sup> ABRvS 24 February 2005, *JV* 2005/158, *NAV* 2005/110 m.nt. Bruin.

<sup>94</sup> President of the District Court of Arnhem 11 March 2005, AWB 05/7235 and 05/7237 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

These examples demonstrate that practice bears out that many different types of cases are dealt with under the AC-procedure.

### 2.3 Arrangement of the AC-procedure

This paragraph describes the law, jurisprudence and policy related to the arrangement of the AC-procedure. First, it explores the commencement of the AC-procedure. It then considers the definition of procedural hours. Third, it discusses the minister's decision to deal with a case in the AC-procedure, the so-called 'process decision'. Subsequently, this paragraph describes time limits during the AC-procedure. Lastly, it examines the consequences of exceeding time limits during the AC-procedure.

#### 2.3.1 Commencement of the AC-procedure

This paragraph discusses the jurisprudence and policy related to the commencement of the AC-procedure. This is an important matter because more cases can and will be dealt with under the AC-procedure if the minister can begin his investigation before the 48 hour period has started.

A distinction is made in this paragraph between registration at an application centre, the start of an investigation and the submission of an application. Registration at an application centre is only possible if an appointment has been made with the aliens police; spontaneous registration is not possible<sup>95</sup>. After registration, the asylum seeker is able to submit his application<sup>96</sup>.

The 48 hour period begins when the aliens police starts an investigation into the identity, nationality and travel route of the asylum seeker. However, if four hours have passed since the registration, the 48 hour period starts automatically, whether the investigation has started or not. If the asylum seeker's entry into the Netherlands has been refused (at airport Schiphol, see paragraph 2.7.1), this maximum waiting time is six hours, unless the asylum seeker can be held responsible for the passing by of six hours. Exceptional circumstances, such as an unexpectedly large number of asylum seekers on any one day, can mean that more time can pass without starting the 48 hours period, provided that the Royal Military Police (*Koninklijke Marechaussee*) or the minister make a convincing case for this. If this is the case, a reasonableness standard governs when the 48 hour period should begin<sup>97</sup>.

The Council of State has ruled that the 48 hour period should commence in any case upon submission of an application. If an investigation related to an application to be submitted takes place before the application is actually submitted, the 48 hour period should begin when the investigation starts<sup>98</sup>.

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<sup>95</sup> Aliens Circular 2000 C3/12.2.1.

<sup>96</sup> Aliens Circular 2000 C3/12.2.2.

<sup>97</sup> Aliens Circular 2000 C3/12.1.3.

<sup>98</sup> ABRvS 7 August 2002, *JV* 2002/323; ABRvS 28 October 2003, *JV* 2003/559; ABRvS 16 February 2004, *JV* 2004/113, *NAV* 2004/96 m.nt. Schaafsma; ABRvS 16 February 2004, *JV* 2004/145.

Thus, the 48 hour period begins:

- upon submission of an application; or
- when an investigation related to an application to be submitted has started; and,
- in any case when four hours, or six hours if the entry into the Netherlands has been refused, have passed since the actual registration<sup>99</sup>.

Therefore, one must determine exactly when an investigation is related to an application to be submitted

In a number of cases, the Council of State has given its opinion as to whether the 48 hour period has begun. According to the Council of State, an investigation cannot be considered to relate to an application to be submitted when:

- a questionnaire is presented to the asylum seeker with questions about his language and the region from which he fled because this questionnaire aims at the administrative preparation of the investigation in connection with the availability of an interpreter<sup>100</sup>;
- fingerprints are taken from the asylum seeker that are then compared with fingerprints on file because this exercise is meant to decide where the asylum seeker should submit his application and whether, pending registration on appointment in an application centre, he should be received in a *tijdelijke noodvoorziening* (temporary reception centre). Such an investigation can be considered to be one that is conducted with a view to public order and management and cannot, therefore, be thought of as an investigation that relates to application assessment<sup>101</sup>;
- a note is made that the age of an alleged minor is questioned, because this note relates to making transport available so that his age can be determined by X-ray. This is considered to relate to the preparation of an investigation and its management<sup>102</sup>;
- pursuant to Article 55, paragraph 2 of the Aliens Act 2000, the asylum seeker's luggage, clothes and body are searched for the possible presence of travel or identity papers, documents or records. This search safeguards information necessary for the application's assessment and cannot be considered to be an investigation that relates to an application to be submitted<sup>103</sup>;
- pursuant to Article 55, paragraph 2 of the Aliens Act 2000, the simcard from the asylum seeker's mobile phone is read aloud. This safeguards information for the application's assessment and cannot be considered to be an investigation that relates to an application's assessment, despite the fact that the gained information could show that the asylum seeker has stayed in one of the member states to the Dublin Convention<sup>104</sup>;
- pursuant to Article 54, paragraph 1, sub c of the Aliens Act 2000, a dactyloscopic description of the asylum seeker is made, because this is considered purely administrative<sup>105</sup>;

<sup>99</sup> Spijkerboer and Vermeulen 2005, p. 220.

<sup>100</sup> ABRvS 7 August 2002, *JV* 2002/323.

<sup>101</sup> ABRvS 16 February 2004, *JV* 2004/113, *NAV* 2004/96 m.nt. Schaafsma.

<sup>102</sup> ABRvS 16 February 2004, *JV* 2004/113, *NAV* 2004/96 m.nt. Schaafsma.

<sup>103</sup> ABRvS 16 February 2004, *JV* 2004/145. Cf. Aliens Circular 2000 C3/12.2.1.

<sup>104</sup> ABRvS 6 May 2004, *JV* 2004/263.

<sup>105</sup> ABRvS 16 February 2004, *JV* 2004/145. Cf. Aliens Circular 2000 C3/12.2.1.

- the Royal Military Police asks the asylum seeker about his identity and travel route, because these questions are asked pursuant to Article 3 of the Aliens Act 2000, concerning whether entrance into the Netherlands can be refused, and pursuant to Article 5, paragraph 2 of the Aliens Act 2000, concerning whether a claim can be lodged with an airline company<sup>106</sup>;
- the minister translates documents that relate to the application<sup>107</sup>;
- the square 'AC' on a form is ticked. This preliminary decision is based on information provided by the asylum seeker concerning his nationality, descent and age, the results of the search for documents and the policy of the minister. This serves to control the intake of asylum seekers in application centres and to make provisions for the presence of interpreters<sup>108</sup>;
- the minister investigates whether the Netherlands is responsible for dealing with a particular application under the Dublin Convention, because this investigation cannot be considered to be one that relates to application assessment<sup>109</sup>.

On the other hand, the Council of State considers that an investigation does relate to an application to be submitted when:

- fingerprints have been taken from the asylum seeker that are then compared with the Eurodac database as a way of checking whether the asylum seeker has stayed in one of the states that is party to the Dublin Convention and when the asylum seeker is asked whether he has applied for asylum in one of these states parties; these acts are not considered to be of a purely administrative nature or to be related solely to the management of the investigation<sup>110</sup>;
- compulsory substantive questions are asked by telephone when an appointment has been made for an additional asylum application<sup>111</sup>.

Thus, the 48 hour period commences with the start of a substantive investigation. Nevertheless, it is difficult to draw a clear line between the substantive investigation, which triggers the start of the 48 hour period, and purely administrative investigations or acts that are necessary to manage the investigation, which do not. The minister's intention seems to be decisive here. If as a result of the reading aloud of a simcard, information is obtained about an asylum seeker's possible stay in one of the states that is party to the Dublin Convention, the investigation will not be considered to be one that is aimed at application assessment. The 48 hour period commences, however, when an applicant's fingerprints are compared with the Eurodac database and questions are asked *in order to* obtain such information.

### 2.3.2 Procedural hours

The AC-procedure takes a maximum of 48 procedural hours. Given that there are no criteria as relates to the content for dealing with cases under the AC-procedure (see paragraph 2.2), the

<sup>106</sup> ABRvS 15 March 2004, *JV* 2004/198.

<sup>107</sup> ABRvS 26 August 2004, *JV* 2004/406.

<sup>108</sup> ABRvS 6 October 2004, *JV* 2004/459.

<sup>109</sup> ABRvS 9 November 2004, *JV* 2005/24.

<sup>110</sup> ABRvS 28 October 2003, *JV* 2003/559 m.nt. Koers.

<sup>111</sup> ABRvS 15 November 2004, *RV* 2005, 57 m.nt. Winter, *JV* 2005/25.

definition of procedural hours is very important, since only cases that can be carefully dealt with within 48 *procedural* hours can be settled under the AC-procedure. Furthermore, more cases can and will be dealt with under the AC-procedure if the hours that the minister uses to investigate an application are not regarded as procedural hours. This paragraph examines the definition of procedural hours.

Article 1, paragraph 1, sub f Aliens Decree 2000 defines procedural hours as those hours available for investigating asylum applications in application centres, not including the time between 6 p.m. and 8 a.m. and, except for the application centre at Schiphol, weekends and legal holidays<sup>112</sup>. In practice, this means that applications are dealt with in about five days.

In principle, all the hours between the commencement of the AC-procedure and the issuance of the decision are regarded as procedural hours. However, it used to be the practice that the clock was stopped when the asylum seeker and his legal counsel needed more time<sup>113</sup>. In effect, this meant that the asylum seeker was given more time than the time prescribed in the Aliens Decree 2000 or the Aliens Circular 2000, but he was not sent to an investigation and reception centre<sup>114</sup>. The Council of State through its jurisprudence has, however, ended this practice.

According to the Council of State, the fact that no investigation actually takes place, for example, because some parts of the investigation do not connect well<sup>115</sup>, or that extra time is spent on certain parts of the investigation, does not mean that this time was not available for investigation<sup>116</sup>. If legal aid uses more time than the time prescribed in the Aliens Decree 2000 or Aliens Circular 2000, these hours are regarded as procedural hours<sup>117</sup>. Time passed waiting for a female legal counsel is regarded as time available for the investigation and, thus, also as procedural hours<sup>118</sup>.

A reasonableness test applies in assessing whether the minister should be held responsible for a delay and whether the hours of this delay should be considered procedural hours<sup>119</sup>. If the minister cannot reasonably be held responsible for the non-availability of facilities which are necessary for the investigation, such as an interpreter's absence, the hours of this delay should not be considered procedural hours<sup>120</sup>.

<sup>112</sup> The definition of procedural hours has been changed by a ministerial resolution of 11 November 2004 (*Stb.* 2004, 588). Before that date, the definition was 'hours that are available for investigating the asylum application in an application centre, *not including the hours from 10 p.m. to 8 a.m.*' Thus, this included work during the evening and at the weekend at all application centres. The reason for this change was a decrease in the number of asylum seekers.

<sup>113</sup> During the AC-procedure, strict time limits apply for legal aid. See paragraph 2.3.4.

<sup>114</sup> Aliens Circular (old) C3/12.2.4. See Lodder 2004, p. 36.

<sup>115</sup> ABRvS 25 February 2002, *JV* 2002/123.

<sup>116</sup> ABRvS 20 December 2001, *RV* 2001, 20 m.nt. Olivier, *JV* 2002/44 m.nt. Koers, *AB* 2002, 135 m.nt. Sewandono, *NAV* 2002/26.

<sup>117</sup> ABRvS 25 February 2002, *JV* 2002/123.

<sup>118</sup> ABRvS 15 August 2002, 200203711/1 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>119</sup> ABRvS 20 December 2001, *RV* 2001, 20 m.nt. Olivier, *JV* 2002/44 m.nt. Koers, *AB* 2002, 135 m.nt. Sewandono, *NAV* 2002/26; ABRvS 25 February 2002, *JV* 2002/123.

<sup>120</sup> ABRvS 29 June 2001, *JV* 2001/208; ABRvS 25 February 2002, *JV* 2002/123; ABRvS 23 September 2002, *JV* 2002/S427; ABRvS 18 June 2004, *JV* 2004/323.

In a judgment of 29 June 2001<sup>121</sup>, the Council of State noted:

*(...) if the interpreter-problem in the light of the other aspects of the case becomes so serious, that settlement in an application centre is not longer reasonable, the asylum seeker will be send on to an investigation and reception centre.*<sup>vii</sup>

In another case, 11 hours and 30 minutes passed waiting for an interpreter<sup>122</sup>. The Council of State considered:

*Although the investigation has been inoperative during quite a long period (...) the hours during which has been waited for an interpreter can, in this case, not been considered as procedural hours, as meant in article 1.1, sub f Aliens Decree 2000 (...).*<sup>viii</sup>

The Aliens Circular 2000 states that an application should be forwarded to an investigation and reception centre when, despite the efforts of the IND and legal counsel, an interpreter is unavailable on time. In principle, ‘on time’ means that the wait for an interpreter for the benefit of the exchange between an asylum seeker and his legal counsel cannot take more than 22 hours<sup>123</sup>.

### 2.3.3 The ‘process decision’

After the first interview, the minister decides whether the application should be dealt with under the AC-procedure. This decision is called the process decision (*procesbeslissing*).

Since the minister makes this decision after the first interview, he does not yet know the applicant’s motives for seeking asylum (see paragraph 1.5.2).

The IND can in any case continue the procedure in the application centre if the case involves:

- Counter indications regarding the public order;
- deceptive statements as relates to identity, nationality and/or travel route or an unwillingness to cooperate to establish this information;
- another country being responsible for the asylum application and/or for providing protection;
- regulatory or law related counter indications for granting asylum; or
- abuse of the asylum application process.

Cases will be dealt with according to the regular procedure when they involve an asylum seeker:

- who falls under the term of a non-removal policy;
- whose identity, nationality and travel route are undisputed facts;

<sup>121</sup> ABRvS 29 June 2001, *JV* 2001/208.

<sup>122</sup> ABRvS 18 June 2004, *JV* 2004/323.

<sup>123</sup> Aliens Circular 2000 C3/12.1.4.

- for whom no other country is responsible; and
- for whom there are no other counter indications<sup>124</sup>.

Legal aid is informed of the process decision. If the decision means that the minister will investigate whether the application should be dealt with in an application centre, then legal aid has the opportunity to convey the applicant's motives for seeking asylum and its opinion as to whether the application should be dealt with under the AC-procedure. Based on this, the minister decides whether the application should be sent to an investigation and reception centre or whether it should be settled in the application centre<sup>125</sup>.

If an asylum application is possibly suitable for being dealt with under the AC-procedure, then the detailed interview is held in the application centre. After this interview, it is still possible to examine the application in further detail in an investigation and reception centre<sup>126</sup>.

Obviously, the process decision is important for the asylum seeker. If the minister decides that the application should be dealt with under the AC-procedure, strict time limits apply for the asylum seeker and his counsel (see paragraph 2.3.4); the period for lodging an appeal is only one week, and the appeal does not have suspensive effect (see paragraph 2.4).

Despite all of this, the asylum seeker cannot lodge an objection to or an appeal against the process decision. The Council of State has ruled that the process decision cannot be considered a decision in the sense of Article 1:3, paragraph 1, of the Awb or an act in the sense of Article 72, paragraph 3, of the Aliens Act 2000. It has stated:

*The so-called process decision is nothing more than an internal decision to not abandon the intention to reject the application within 48 procedural hours. This decision calls for the applicant no independent legal consequence into being.*

*That the rule, set down in article 3.111, paragraph 1, Aliens Decree 2000, (...) does not apply if the state secretary considers to reject the application within 48 procedural hours, does not change this. Such an intention has indeed as consequence that the resting period (of six days before the asylum seeker will be subjected to the detailed interview, LS) does not apply, but it is not aimed at that consequence. That consequence follows direct from article 3.111, paragraph 1, Aliens Decree 2000<sup>127</sup>.ix*

<sup>124</sup> Aliens Circular 2000 C3/12.2.6

<sup>125</sup> Aliens Circular 2000 C3/12.2.6

<sup>126</sup> Aliens Circular 2000 C3/12.2.7.

<sup>127</sup> ABRvS 4 October 2001, *RV* 2001, 21 m.nt. Terlouw, *JV* 2001/321 and ABRvS 4 October 2001, *NAV* 2001/335 m.nt. Groenewegen. T.P. Spijkerboer and B.P. Vermeulen are of the opinion that the Council of State's arguments are insufficient and unconvincing (Spijkerboer and Vermeulen 2005, p. 223).

### 2.3.4 Time limits

During the AC-procedure, strict time limits apply for the asylum seeker and his legal counsel. For the minister, however, only one time limit applies, namely that of issuing his decision on the application within 48 procedural hours.

Most time limits for the asylum seeker are laid down in the Aliens Decree 2000. First, Article 3.112, paragraph 1, sub b of the Aliens Decree 2000 states that the time limits mentioned in Article 3.111 of the Aliens Decree 2000 do not apply if the minister decides to deal with the application within 48 procedural hours. This means that there is no compulsory six day resting period before the asylum seeker will be subjected to the detailed interview and that, furthermore, the minimum time limit of two days for providing further information does not apply to the AC-procedure. Second, Article 3.117, paragraph 2 of the Aliens Decree states that the alien has to provide his view as relates to the minister's letter of intention within three procedural hours instead of the usual four weeks<sup>128</sup>.

Some time limits on the AC-procedure are not laid down by law, strictly speaking, but by the Aliens Circular 2000. According to paragraph C3/12.2.7 of the Aliens Circular 2000, the asylum seeker has up to two procedural hours to, with the help of legal counsel:

- discuss the first interview report;
- examine the other results of the investigation into the applicant's identity, nationality and travel route;
- if necessary, submit a written reaction to the first interview report and the other results of the investigation; and
- prepare for the detailed interview<sup>129</sup>.

If legal aid believes that the application is not suitable for processing under the AC-procedure, then it also has to convey to the IND within these two procedural hours the applicant's motives for seeking asylum<sup>130</sup>.

Because the two day minimum time limit for providing corrections and additional information does not apply under the AC-procedure<sup>131</sup>, the Aliens Circular 2000 establishes that the asylum seeker and his legal counsel have three procedural hours after the detailed interview for:

- discussing the report of the detailed interview;
- discussing the letter of intention;
- if necessary, producing corrections and additional information to the report of the detailed interview; and
- producing a view with regard to the letter of intention<sup>132</sup>.

<sup>128</sup> Article 3.118, paragraph 2, of the Aliens Decree 2000.

<sup>129</sup> To do all of this, in fact much more has to be done during these two hours (see paragraph 2.6.1).

<sup>130</sup> See Aliens Circular 2000 C3/12.2.6.

<sup>131</sup> Article 3.112, paragraph 1, sub b in conjunction with Article 3.111, paragraph 3, of the Aliens Decree 2000.

<sup>132</sup> Aliens Circular 2000 C3/12.1.4. See also paragraph 2.6.1.

Thus, as far as legal aid is concerned, a time limit of two procedural hours applies after the first interview and a time limit of three procedural hours applies after the detailed interview. Effectively, this means that only five out of 48 procedural hours are at the disposal of legal aid during the AC-procedure.

*Point of time of issuing the report of the detailed interview*

Article 3.111 paragraph 2 of the Aliens Decree 2000 reads:

*(... ) A copy of the report of the detailed interview will be brought to the notice of the alien as soon as possible.*

In an application centre, the report of the detailed interview and the letter of intention are issued simultaneously. Thus, the letter of intention bases itself on an uncorrected report of the detailed interview.

About this, the Council of State noted:

*The AC-procedure is characterized by very short time limits, also for producing the letter of intention. Within the framework of that shortened procedure, a course of action, in which a report of the detailed interview and the letter of intention are issued simultaneously and therefore for the discussion of the report no separate time is reserved, stays within the bounds of a reasonable explanation of the words ‘as soon as possible’<sup>133.x</sup>*

However, it should be stated that the Council of State did not accept this course of action under the normal procedure, since it could not be precluded that ‘this had influenced the materiel content of the decision’<sup>134</sup>.

*The commencement of time limits*

The Council of State has decided that Article 3.117 of the Aliens Decree means that the time limit of three procedural hours for giving a view begins at the time at which the letter of intention is given to the Asylum Seekers’ Legal Aid Foundation (*Stichting Rechtsbijstand Asiel*)<sup>135</sup>. This is despite the fact that often not all available time is actually used for discussing and producing a view. This start of the three hour time limit also applies if new legal counsel appears because of a change in work schedule (see paragraph 2.6.1)<sup>136</sup> or if the reports of the detailed interview and the views of family members are not given out at the same time, meaning that legal aid cannot simultaneously put forward the related cases of family members<sup>137</sup>.

<sup>133</sup> ABRvS 21 January 2002, *JV* 2002/98.

<sup>134</sup> ABRvS 22 June 2004, *JV* 2004/325.

<sup>135</sup> ABRvS 3 May 2002, *JV* 2002/220 m.nt. Olivier.

<sup>136</sup> ABRvS 31 October 2003, *JV* 2004/13.

<sup>137</sup> President of the ABRvS 9 March 2004, *JV* 2004/181.

Under special circumstances, it is possible to enter into consultations on when the letter of intention is issued. It is, however, legal aid's responsibility to make it, on time and motivated, known to the minister that such consultation is desirable. A simple announcement from a legal counsel that there was a capacity problem with the legal aid, as a reaction to a reminder of the minister, cannot be considered to be a timely request for consultation<sup>138</sup>. There are no examples in the Council of State's jurisprudence as to consultation about the point in time at which the letter of intention is issued. Therefore, what exactly the Council of State means by 'special circumstances' is unclear.

### 2.3.5 Exceeding time limits

#### *Exceeding time limits by legal aid*

Only one article in the Aliens Decree 2000 discusses exceeding time limits. Article 3.117, paragraph 5 reads:

*Our minister takes into account a view which is received when the time limit has already expired, if the decision has not yet been notified. (...)*

The minister, however, does not need to wait until the end of the 48 hour period to make his decision. Should the applicant submit his view after the minister has made his decision but before the expiry of the 48 hour period, the minister does not need to consider it<sup>139</sup>.

According to the Aliens Circular 2000, if the asylum seeker and his legal counsel do not meet a time limit, the minister will remind counsel and inquire as to why the time limit was not met. The reason given will be recorded in the applicant's file<sup>140</sup>.

If the time limit of two hours for preparing the detailed interview is not met, a further three hours can be given to legal aid, after which the IND can begin the detailed interview<sup>141</sup>. The minister, however, is not obliged to grant extra time.

If the time limit of three hours for discussing the report of the detailed interview and for submitting the applicant's view is not met, then the minister can wait until the 46th hour at the latest before starting to prepare for a decision, after which he must issue a decision.

Research carried out by the University of Leiden shows that in practice the minister is not very willing to grant a respite if it seems that a time limit will not be met. This especially concerns the three hour time limit for discussing the report of the detailed interview and the letter of inten-

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<sup>138</sup> ABRvS 16 July 2002, *JV* 2002/303.

<sup>139</sup> ABRvS 19 June 2002, *JV* 2002/S287.

<sup>140</sup> Aliens Circular 2000 C3/12.1.4; C3/12.2.7 and C3/12.2.9.

<sup>141</sup> Aliens Circular 2000 C3/12.1.4; C3/12.2.7 and C3/12.2.9.

tion and for producing the applicant's view<sup>142</sup>. If this time limit is not met, then the minister will usually issue his decision without waiting for the applicant's view.

The Council of State has asserted regarding exceeding time limits:

*It is the responsibility of the legal counsellor to let it be known timely and motivated to the state secretary, who is after all responsible for the course of the procedure, that more time is needed for bringing out the view, than is provided for in the rules. If the legal counsellor however does not indicate that more time is needed, than the state secretary can in principle issue the decision within the period of 48 procedural hours, even when at the end of the three hours time limit no view is brought out. The responsibility of the state secretary for a careful procedure requires nevertheless that he considers carefully his intention to reject the application within 48 procedural hours, given that the view has not been submitted<sup>143</sup>.<sup>xi</sup>*

In another case, legal counsel had indicated that more time was needed for discussion and to produce the applicant's view. The Council of State considered that the state secretary should, therefore, reconsider his expressed intention to reject the application in the AC-procedure<sup>144</sup>. It considered further:

*Does he nevertheless hold on to the intention, than it is his responsibility to, as far as notifying the decision within the time limit of 48 procedural hours allows it, set a term for the legal counsellor to finish off his work and, as far as necessary, to put the by then achieved results in writing, or to apply article 3.117, paragraph five Aliens Decree 2000.<sup>xii</sup>*

Taken together, this means that if legal aid cannot finish its work within the set time limits, the minister can issue his decision after the three hour time limit without waiting for the applicant's view. Practice shows that no view is submitted in about 50% of cases dealt with under the AC-procedure.

This, however, seems to conflict with other judgments of the Council of State. For example, the Council of State noted:

*The possibility for the alien to produce a view should (...) considered to be an essential part of the procedure which precedes the realisation of the decision on the application<sup>145</sup>.<sup>xiii</sup>*

<sup>142</sup> Lodder 2004, pp. 66-68.

<sup>143</sup> ABRvS 3 May 2002, *JV* 2002/220 m.nt. Olivier. See also ABRvS 31 May 2002, 200201812/1, *NAV* 2002/203-kort, in which the Council of State dismissed this consideration of the District Court of Zwolle: 'if the decision has been taken in the AC-procedure without any form of legal aid to the asylum seeker, it cannot be argued that the decision has been established carefully. The court holds the legal aid in the 48-hours procedure so fundamental and essential, that it is unreasonable and contrary to the necessary care to put the absence of this legal aid, due to capacity problems with Legal Aid, fully on the account and at the risk of the asylum seeker' (District Court of Zwolle 22 March 2002, *JV* 2002/186, *NAV* 2002/153-kort).

<sup>144</sup> ABRvS 25 February 2002, *JV* 2002/123.

<sup>145</sup> ABRvS 10 October 2002, *JV* 2002/436. Likewise in ABRvS 26 February 2003, *JV* 2003/139.

*Exceeding time limits by the minister*

The 48 hour period ends with the issuance of a decision<sup>146</sup>. If the minister exceeds the 48 hour period, the application is sent to an investigation and reception centre<sup>147</sup>. However, some comments can be given on this assertion.

First, it can be difficult for the asylum seeker to show that the 48 hour period has been exceeded. Dutch courts cannot deal *ex officio* with this question<sup>148</sup>. Thus, the applicant must raise this issue on his own initiative. With regard to the burden of proof, the Council of State is of the view that it is the minister's responsibility to clearly and uniformly record the timeframe for the different acts performed during the 48 hour period<sup>149</sup>. The minister's record will be presumed to be accurate unless there is a concrete reason for doubting it. The applicant bears the burden of proof, and it should be noted that a reason for doubt will not be considered concrete if:

- the asylum seeker submits a statement from the administrative head of Legal Aid to the effect that IND officials in charge told him that the investigation started earlier than the time recorded by the minister<sup>150</sup>;
- manual changes have been made to the data<sup>151</sup>; or
- the asylum seeker submits testimony from two Legal Aid employees to the effect that the time put forward by the aliens police is incorrect, since the asylum seeker was at that time just about to leave his counsel's consultation room and go to the place where he would be notified of the minister's decision<sup>152</sup>.

Therefore, it is difficult for the asylum seeker to successfully dispute the times recorded by the minister.

Second, even if a court rules on appeal that the 48 hour period was exceeded, the application will not always be sent to an investigation and reception centre. Pursuant to Article 8:72, paragraph 3 of the Awb, a court may, if it finds that the appeal is well-founded, determine that all or part of the legal consequences of the annulled order, or the annulled part thereof, should be allowed to stand. The Council of State has ruled that this provision can only be applied when after annulment of an decision, only one decision, with the same content as the annulled decision, is rightly possible<sup>153</sup>. In other words; if further proceedings in an investigation and reception centre cannot lead to the conclusion that the application shall be granted, the legal consequences of the annulled decision can be allowed to stand. If on appeal it is found that the applicant's contention that the 48 hour period was exceeded is indeed well-founded, then the power of article 8:72,

<sup>146</sup> ABRvS 19 July 2002, *JV* 2002/308.

<sup>147</sup> Aliens Circular 2000 C3/12.1.4.

<sup>148</sup> ABRvS 4 June 2002, *JV* 2002/269.

<sup>149</sup> The 'ACLIS-outline serves to this end, see ABRvS 19 July 2002, *JV* 2002/308. 'ACLIS' is a file in which the asylum applications in an application centres are registered.

<sup>150</sup> ABRvS 17 June 2002, *JV* 2002/273.

<sup>151</sup> ABRvS 26 August 2002, no. 200203728/1 (unpublished).

<sup>152</sup> ABRvS 25 September 2002, *JV* 2002/410.

<sup>153</sup> ABRvS 18 December 2001, *JV* 2002/119.

paragraph 3, Awb can be applied<sup>154</sup>. This means that the 48-hours period can sometimes be exceeded 'unpunished'.

Whether the Council of State is correct in concluding that Article 8:72, paragraph 3, of the Awb can be applied if the 48 hour period is exceeded, however, is debateable. It could be argued, for example, that more time for preparing both the detailed interview and the applicant's view could result in reaching a different decision. Moreover, since the only criterion for the AC-procedure is whether an application can be carefully dealt with within 48 procedural hours, exceeding this period should in effect mean that the asylum seeker gets the procedure which he is entitled to<sup>155</sup>.

Third, the minister is sometimes able to restart the AC-procedure, which means that the 48 hour period starts again as well. This would be possible, for instance, if the asylum seeker changes during the procedure his statements as to his age, identity, nationality, or travel route or as relates to his account of asylum, as a result of which it could be said that the application's substance has changed. This could be the case if the asylum seeker changes his account, such that a new review and interview become necessary, or if he changes his travel route, such that it would be possible to file a so called 'Dublin claim'<sup>156</sup>. The Council of State considered that the AC-procedure can only be restarted if the changes are so significant that it can be said that the application amounts to a new application<sup>157</sup>.

Fourth, an asylum seeker whose application cannot be decided upon within 48 procedural hours will sometimes not be sent to an investigation and reception centre but, rather, will have to stay in a border prison. This will be possible if there needs to be further investigation into the applicant's account as to asylum, his identity, his nationality or his travel route and if it is expected that this can be done within six weeks<sup>158</sup>. This possibility was introduced on 20 April 2004<sup>159</sup> with the purpose of restricting the number of applicants who are sent from application centres to investigation and reception centres. According to the minister's explanation, asylum seekers whose applications seem favourable will not be placed in a border prison.

Finally, the Aliens Circular 2000 states that if the application is forwarded to an investigation and reception centre purely for non-substantive reasons, that the asylum seeker is not entitled to another detailed interview<sup>160</sup>. Exceeding the 48 hour period is considered to be a non-substantive reason<sup>161</sup>.

However, according to Article 3.111, paragraph 1 of the Aliens Decree 2000, the asylum seeker should get a resting period of six days before the detailed interview. Exceptions to this rule apply when the minister intends to reject the application within 48 procedural hours or when the asy-

<sup>154</sup> ABRvS 10 April 2002, *JV* 2002/173; ABRvS 12 April 2002, *JV* 2002/175 m.nt. Olivier.

<sup>155</sup> B.K. Olivier in his case comment to ABRvS 12 April 2002, *JV* 2002/175.

<sup>156</sup> Aliens Circular 2000 C3/12.1.5.

<sup>157</sup> ABRvS 1 May 2002, *JV* 2002/204, *AB* 2002/251 m.nt. Sewandono.

<sup>158</sup> Aliens Circular 2000 C3/12.3.3.1.

<sup>159</sup> Decision of the Minister for Aliens Affairs and Integration of 20 April 2004 (WBV 2004/32), *Stert.* 2004, 79, p. 13.

<sup>160</sup> Aliens Circular 2000 C3/12.2.8.

<sup>161</sup> ABRvS 1 September 2004, *JV* 2004/427 m.nt. Hoftijzer.

lum seeker is deprived by law of his liberty<sup>162</sup>. Thus, if the 48 hour period is exceeded and if the asylum seeker is not deprived of his liberty, then Article 3.111, paragraph 1, of the Aliens Decree 2000 is breached<sup>163</sup>. This means that if an applicant is not deprived of his liberty and is sent to an investigation and reception centre, he should get a new detailed interview because he did not have the six day resting period to which he was entitled. Paragraph C3/13.4.1 of the Aliens Circular 2000 conflicts therefore with the 'higher' Aliens Decree 2000, if the asylum seeker is not deprived of his liberty<sup>164</sup>.

The Aliens Circular 2000 states that when an asylum seeker is not given a second detailed interview in the investigation and reception centre that the report of the detailed interview should again be given out to the asylum seeker and legal aid and that a time limit of six weeks, instead of two, applies for the submission of corrections and additional information to the report of the detailed interview<sup>165</sup>. In a judgment of 13 March 2003, the Council of State ruled an appeal well founded because the report of the detailed interview had not been given out again and because a reaction time of six weeks had not been granted<sup>166</sup>.

For these five reasons, asylum seekers will not always get the procedure to which they are entitled when the 48 hour period is exceeded.

## 2.4 Appeal

Asylum seekers can appeal before the District Court of The Hague, which also sits at the other Districts Courts in the Netherlands, if their application is rejected. A further appeal from a District Court judgment can be lodged with the Council of State. This paragraph examines the different aspects of the appeals procedure for applications that have been rejected under the AC-procedure. First, this paragraph looks at the period for appeal. Second, it discusses suspensive effect and interim measures. Lastly, this paragraph pays attention to reception benefits.

### 2.4.1 *Period for appeal*

According to Article 69, paragraph 2 of the Aliens Act 2000, if an asylum application is rejected within a specified number of hours as defined by administrative decree, then an appeal must be lodged within one week. The Council of State has decided that the number of hours as meant in article 69, paragraph 2 of the Aliens Act 2000, is laid down in Article 3.117 of the Aliens

<sup>162</sup> Article 3.112, paragraph 1, sub a and b of the Aliens Decree 2000.

<sup>163</sup> ABRvS 20 December 2001, *JV* 2002/114.

<sup>164</sup> See the case comment of Koers at ABRvS 24 November 2003, *JV* 2004/40.

<sup>165</sup> Aliens Circular 2000 C3/13.4.1.

<sup>166</sup> ABRvS 13 March 2003, *JV* 2003/181. In ABRvS 1 September 2004, *JV* 2004/427 m.nt. Hofstijzer, this provision was also not complied with. The Council of State, however, did not give ex officio a consideration to this, probably because the District Court had overlooked it and because the lawyer had not actually made an appeal on this provision.

Decree<sup>167</sup>. This means that if an asylum application is rejected under the AC-procedure that the time limit for lodging an appeal is one week, instead of the usual four weeks.

It should be noted that Article 69, paragraph 2 of the Aliens Act 2000 applies to both appeals lodged before a District Court and further appeals before the Council of State.

The Council of State has ruled that if an application has been rejected under the AC-procedure in circumstances in which the 48 hour period has been exceeded that the time limit for lodging an appeal is still reduced to one week<sup>168</sup>. The Council of State's position is that determining whether an application has been rejected within 48 procedural hours requires a substantive assessment. This, however, seems to violate Article 69, paragraph 2 of the Aliens Act 2000 because the express wording of that law suggests that the time limit for lodging an appeal is only reduced to one week if the application has been rejected *within* a number of hours<sup>169</sup>.

#### 2.4.2 *Suspensive effect and interim measures*

##### *Suspensive effect*

According to Article 82, paragraph 1 of the Aliens Act 2000, a decision concerning a residence permit should be suspended until the period allowing for appeal with a District Court has ended or, if an appeal has actually been lodged, until the District Court decides on the appeal. This does not apply, however, if the decision relates to an application that has been rejected within a number of hours defined by administrative decree<sup>170</sup>. The Council of State has decided that this number of hours is laid down in Article 3.117 of the Aliens Decree<sup>171</sup>. This means that decisions which have been taken under the AC-procedure are immediately effective and that asylum seekers whose applications have been rejected under the AC-procedure do not stay lawfully in the Netherlands as from the time of a negative decision<sup>172</sup>. Article 61, paragraph 1 of the Aliens Act 2000 says that an alien who does not stay lawfully in the Netherlands must leave the Netherlands voluntarily within the time limit meant in Article 62 of the Aliens Act 2000. According to Article 62, paragraph 3, sub c of the Aliens Act 2000, an asylum seeker whose application has been rejected within a number of hours defined by administrative decree must leave the Netherlands immediately rather than within the usual four week period<sup>173</sup>. If the rejected applicant does not leave the Netherlands voluntarily, then the minister can expel him<sup>174</sup>.

This means that even though an asylum seeker has lodged an appeal against the rejection of his

<sup>167</sup> ABRvS 29 June 2001, *JV* 2001/208, *NAV* 2001/229. See further paragraph 2.5.

<sup>168</sup> ABRvS 5 March 2002, *JV* 2002/143, *AB* 2002, 197 m.nt. Sewandono.

<sup>169</sup> Cf. Spijkerboer and Vermeulen 2005, p. 217.

<sup>170</sup> Article 82, paragraph 2, sub a of the Aliens Act 2000.

<sup>171</sup> ABRvS 29 June 2001, *JV* 2001/208, *NAV* 2001/229. See further paragraph 2.5.

<sup>172</sup> Article 45, paragraph 1 sub a of the Aliens Act 2000.

<sup>173</sup> See paragraph 2.5 for the legal basis of this provision.

<sup>174</sup> Article 63, paragraph 1 and 2 of the Aliens Act 2000.

asylum application under the AC-procedure, he does not stay lawfully in the Netherlands anymore as from the time of a negative decision and he has to leave the Netherlands immediately.

Article 82, paragraph 1 of the Aliens Act 2000 does not apply to an appeal lodged with the Council of State. In that case, the general rule of Article 6:16 of the Awb applies, meaning that there is no suspensive effect.

### *Interim measures*

To prevent his expulsion from the Netherlands during the assessment of his appeal, Article 8:81 of the Awb allows an asylum seeker to request the president of the court with jurisdiction in the proceedings on the appeal, to grant an interim measure. Generally, the asylum seeker is allowed to remain in the Netherlands for this decision, provided that the request has been submitted on time<sup>175</sup>, meaning within 24 hours after the rejection of his asylum application<sup>176</sup>. The asylum seeker is not allowed to remain in the Netherlands, however, if reasons of public order or national security apply or if there is a risk that he would not be allowed to return to his country of origin or transit through a third country because of, for example, an expired passport or visa<sup>177</sup>.

The foregoing does not apply with regard to requests for interim measures with the president of the Council of State. According to the Aliens Circular 2000, an asylum seeker whose application has been rejected under the AC-procedure is not allowed to remain in the Netherlands to await the decision of the president of *the Council of State* on his request for an interim measure<sup>178</sup>. This means that even though an asylum seeker has lodged an appeal with the Council of State against a judgment of a District Court that he can be expelled from the Netherlands before the appeal has been assessed.

The president can only grant an interim measure if an appeal has been lodged<sup>179</sup>. Because requests for interim measures must be lodged within 24 hours, the one week period of appeal as laid down in Article 69, paragraph 2 of the Aliens Act 2000 (see above) exists more in theory than in practice.

The hearing on a request for an interim measure under the AC-procedure takes place within ten days<sup>180</sup>. The decision follows within five working days after the hearing<sup>181</sup>. Parties can submit additional documents up to one day before the hearing. The minister does not have to lodge a defence before the hearing takes place<sup>182</sup>.

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<sup>175</sup> Aliens Circular 2000 C4/17.3.2.

<sup>176</sup> Aliens Circular 2000 C3/12.2.10.2.

<sup>177</sup> Aliens Circular 2000 C4/17.3.2.

<sup>178</sup> Aliens Circular 2000 C4/18.2.

<sup>179</sup> Article 8:81, paragraph 1, of the Awb.

<sup>180</sup> Bruin 2003, p. 149; Spijkerboer and Vermeulen 2005, p. 225.

<sup>181</sup> Article 4.3.7 *Procesregeling Vreemdelingenkamers*

<sup>182</sup> Article 8:58 of the Awb, which says that parties may submit additional documents up to ten days before the hearing, and Article 8:42 of the Awb, which states that the administrative authority must lodge a defence within four weeks of the date on which the notice of appeal has been sent to the authority, do not apply in procedures on an interim measure.

According to Article 8:81 of the Awb, the president of the District Court can grant an interim measure if immediate speed is required because of the interests involved.

District courts presume that immediate speed is required if lodging an appeal does not have suspensive effect<sup>183</sup>. According to the president of the Council of State, however, an asylum seeker does not have a sufficiently urgent interest when he has not yet been given notice of the date of his expulsion. To take an example, the Council of State stated:

*The only circumstance that a judgment of a court is subjected to implementation, does not provide that immediate speed is required in the sense of article 8:81 Awb. With this judgment is involved the circumstance that applicant did not state that he has been given notice of the date of his expulsion and therefore it is not clear on which term the expulsion will take place*<sup>184.xiv</sup>

In another case, the Council of State asserted:

*Although it has been indicated to applicant that he will be expelled in a very short term, the president sees under these circumstances no reason to allow the request*<sup>185.xv</sup>

The Council of State has ruled, however, that the minister does not have to inform the asylum seeker of the date of his expulsion because the power to expel is legally inherent in a negative decision<sup>186</sup>.

When deciding whether a request should be granted, the presidents of the courts actually apply the criteria for assessing on the merits<sup>187</sup>. Essentially, this means that the president of the court will determine whether the decision to reject the application under the AC-procedure was taken carefully within 48 procedural hours<sup>188</sup>.

According to Article 8:86, paragraph 1 of the Awb, the president of the court can give an immediate judgment on the merits:

*If the request is made when an appeal has been lodged with the District Court, and the president considers after the hearing (...) that further inquiry cannot reasonably be expected to contribute to an assessment of the case, he may give immediate judgment on the merits.*

With regard to applications that have been rejected under the AC-procedure, presidents of the

<sup>183</sup> Spijkerboer and Vermeulen 2005, p. 254.

<sup>184</sup> President of the ABRvS 9 November 2001, *JV* 2002/14 m.nt. Boeles.

<sup>185</sup> President of the ABRvS 23 August 2002, *JV* 2002/351.

<sup>186</sup> ABRvS 29 mei 2001, *JV* 2001/166, *RV* 2001, 65, *AB* 2001. 266.

<sup>187</sup> Spijkerboer and Vermeulen 2005, p. 228.

<sup>188</sup> See, for example, President of the District Court of Haarlem 23 August 2001, AWB 01/39541 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)); ABRvS 27 August 2001, *RV* 2001, 19 m.nt. Terlouw, *NAV* 2001/317-kort; President of the District Court of Groningen 21 February 2003, *JV* 2003/234; President of the District Court of Haarlem 22 November 2004, AWB 04/48023 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

court often use this power<sup>189</sup>. Consequently, the procedure relating to interim measures is, in fact, a highly accelerated assessment on the merits.

Thus, to prevent his expulsion during the assessment of the appeal, an asylum seeker must request the president of the court to grant an interim measure. To remain in the Netherlands until the president has made his decision, the applicant must lodge an appeal and request for an interim measure within 24 hours after the rejection of his application. If an asylum seeker lodges an appeal with the Council of State and requests an interim measure to prevent his expulsion during the assessment of the appeal, he is not allowed to await the decision of the president of the Council of State. When deciding on the request, presidents of the courts apply in fact the criteria for assessment on the merits. Usually, they issue an immediate judgment on the merits. If not, however, presidents of the District Court will usually rule that the asylum seeker should not be expelled before the judgment on appeal has been handed down. However, the president of the Council of State only grants interim measures, if the asylum seeker has been given notice of the date of his expulsion.

### 2.4.3 Reception conditions

Asylum seekers whose applications have been rejected under the AC-procedure and who lodge an appeal do not have a right to reception benefits, such as housing, food and clothing or financial support<sup>190</sup>. An exception to this is made for unaccompanied minors<sup>191</sup> and for asylum seekers whose request for an interim measure to await the judgment on the appeal has been granted<sup>192</sup>.

Thus, asylum seekers are left to fend for themselves during the period between the rejection of their application in the application centre and the passing of the judgment on the request for an interim measure. This period, which is usually two weeks, can be much longer if the appeal is not considered to be well-founded and if the asylum seeker has lodged an appeal with the Council of State. Asylum seekers sometimes find shelter with their compatriots, but they are often left homeless and on the streets<sup>193</sup>.

Asylum seekers whose applications have been rejected at application centre Schiphol, are often detained in a border prison (see paragraph 2.7.1).

## 2.5 Legal basis

Most of the time limits that apply under the AC-procedure are not laid down in the Aliens Act 2000 but, rather, in the Aliens Decree 2000. According to Article 37 sub a and b of the Aliens Act 2000, by or pursuant to an administrative decree, rules will be laid down as relates to the way in which

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<sup>189</sup> Bruin 2003, p. 155.

<sup>190</sup> This follows from Article 1, sub d of *Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005* (Regulation supplies asylum seekers and other categories aliens 2005, hereafter: Rva 2005).

<sup>191</sup> Article 3, paragraph 3, sub b of the Rva 2005.

<sup>192</sup> Article 3, paragraph 3, sub a of the Rva 2005.

<sup>193</sup> NJCM 2003, p. 23.

applications are submitted and dealt with and about the way that the investigation is arranged. Article 39, paragraph 3, of the Aliens Act 2000 states that, by administrative decree, rules will be laid down regarding the time limits for the alien to submit a view. These articles form the basis for the regulation of the AC-procedure under the Aliens Decree 2000. Some important time limits, however, are not laid down in the Aliens Decree 2000 but, rather, in the Aliens Circular 2000 (see paragraph 2.3.4). Thus, it can be said that these time limits have no basis in law.

Three articles of the Aliens Act 2000 refer to an accelerated procedure. The first of these is Article 62, paragraph 3, sub c, which says that an alien whose application has been rejected within a number of hours as specified by administrative decree must leave the Netherlands immediately, rather than the usual four week period. The second article of the Aliens Act 2000 that refers to an accelerated procedure is Article 69, paragraph 2. This article states that if an asylum application is rejected within a number of hours as defined by administrative decree that the appeal against this decision must be lodged within one week, instead of the usual four weeks. The third article of the Aliens Act 2000 that refers to an accelerated procedure is Article 82, paragraph 2, sub a, which says that an appeal from an asylum application that has been rejected within a number of hours as specified by administrative decree does not have suspensive effect.

The number of hours referred to in these three articles is not defined by the Aliens Decree 2000. Three articles in the Aliens Decree 2000 mention a number of hours. Article 3.112, paragraph 1, sub b of the Aliens Decree 2000 says that the time limits laid down in Article 3.111 of the Aliens Decree (a minimum resting period of six days before the detailed interview and a minimum time limit of two days for submitting corrections and additional information to the report of the detailed interview) do not apply if the minister considers to reject the asylum application within 48 procedural hours. Article 3.117, paragraph 1 of the Aliens Decree states that if the minister intends to reject an application within 48 procedural hours, a letter of intention should be provided to the alien and the alien must submit his view with regard to the letter within three procedural hours, rather than the normal time limit of four weeks. Article 3.118, paragraph 2 of the Aliens Decree speaks of rejection within 48 procedural hours if a third country is responsible for the treatment of the asylum application.

These articles, however, do not refer to Article 62, paragraph 3, sub c; Article 69, paragraph 2; or Article 82, paragraph 2, sub a of the Aliens Act 2000. The number of hours mentioned in these articles has not been defined in an administrative decree. Therefore, in fact, there is no legal basis for withholding a term for departure, shortening the period for appeal, or withholding suspensive effect on appeal in cases that have been rejected within 48 hours. Nevertheless, the Council of State has said, without elaborating, that the number of hours meant by Article 69, paragraph 2 and Article 82, paragraph 2, sub a of the Aliens Act 2000 are laid down in Article 3.117 of the Aliens Decree<sup>194</sup>. However, this has not been decided with regard to Article 62, paragraph 3, sub c of the Aliens Act 2000 until now.

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<sup>194</sup> ABRvS 29 June 2001, *JV* 2001/208, *NAV* 2001/229.

Although most aspects of the AC-procedure have a sufficient legal basis, this is not the case with regard to time limits laid down in the Aliens Circular 2000 and for withholding a term for departure, shortening the period for appeal, and withholding suspensive effect on appeal<sup>195</sup>.

## 2.6 Legal aid

Paragraph 2.3.4 mentions the time limits applicable to legal aid. This paragraph, discusses other aspects of legal aid during the AC-procedure. First, it looks at the duties of Legal Aid and the Dutch Council for Refugees. Second, it explores the possibility of legal counsel for building a trusting relationship with the asylum seeker. Third, this section examines some aspects of legal aid with regard to the appeals procedure. Last, it considers the quality of legal aid at application centres.

### 2.6.1 Duties

In an application centre, two organisations, Legal Aid (*Stichting Rechtsbijstand Asiel*) and the Dutch Council for Refugees (*Vluchtelingenwerk Nederland*), protect the interests of asylum seekers. These organisations have different tasks during the AC-procedure. The Dutch Council for Refugees has a more supportive role, in that it informs asylum seekers about procedural matters in an application centre and supports Legal Aid's activities<sup>196</sup>. Most staff members of the Dutch Council for Refugees are volunteers.

#### *Providing information about the procedure before the first interview*

When an asylum seeker submits an application for asylum, he gets a brochure from the IND with summarized information about the procedure in an application centre. (When the author visited the application centre at Schiphol in May 2005 and asked for this brochure, however, she was given a brochure about the procedure in an investigation and reception centre. In fact, most of the brochures available at the application centre dealt with the procedure at investigation and reception centres. The wrong brochures were distributed to asylum seekers for some time. Furthermore, this brochure was incomplete<sup>197</sup>.)

After the intake by the aliens police, an asylum seeker receives written information from the Dutch Council for Refugees about the procedure in an application centre and about the detailed interview<sup>198</sup>.

<sup>195</sup> See: Vermeulen 2003, pp. 177-179.

<sup>196</sup> See [http://www.vluchtelingenwerk.nl/80-In\\_eeen\\_AC.html](http://www.vluchtelingenwerk.nl/80-In_eeen_AC.html).

<sup>197</sup> In May 2005, asylum seekers still received the July 2004 version. Thus, the brochure did not mention the possibility of granting applications under the AC-procedure. Moreover, it did not contain information about time limits. Finally, it should be noted that not all the information in the brochure is correct. It mentions, for example, on page 7 that the AC-procedure at the application centre at Schiphol starts immediately after the asylum seeker's arrival at the application centre (see paragraph 2.3.1). At pages 8 and 10, the brochure says that during the first interview and during the detailed interview, a legal counsellor may be present to *speak on behalf of the asylum seeker* (see paragraph 2.6.1).

<sup>198</sup> This brochure contains old information and no information about time limits as well.

*Preparing and attending the first interview*

During the AC-procedure, no time is reserved for the asylum seeker to prepare his first interview with a legal counsellor. Nevertheless, the Dutch Council for Refugees usually has an opportunity to give information about the first interview before the asylum seeker is subjected to it. The minister, however, does not consider whether the applicant has been given information by the Dutch Council for Refugees prior to this interview. As a result, not all asylum seekers are prepared for the first interview<sup>199</sup>.

Article 3.113 of the Aliens Decree 2000 states that the asylum seeker can be assisted during both the first interview and the detailed interview. It also says that the asylum seeker should be informed of this opportunity. At application centres, however, Legal Aid does not attend interviews<sup>200</sup>. This is because the *Raad voor Rechtsbijstand* (Council of Legal Aid) determines the level of subsidy that Legal Aid and the Dutch Council for Refugees receive and the activities for which this money is earmarked. The *Raad voor Rechtsbijstand* has determined that the Dutch Refugee Council should attend interviews. Thus, staff members of the Dutch Council for Refugees attend some of the interviews, where they take notes and observe the interview to ensure that it is carried out in accordance with the established rules. The Dutch Council for Refugees attends about 10% of first interviews. They select themselves which first interviews they will attend<sup>201</sup>.

Thus, an asylum seeker meets his legal counsel for the first time after the first interview.

*Discussing the first interview afterwards and preparing for and attending the detailed interview*

After the first interview, the application is reported to Legal Aid, and the file, along with a copy of the report of the first interview and, possibly, other results of the investigation into the identity, nationality and travel route of the applicant, are given to Legal Aid. From this time, legal counsel can spend two procedural hours with the asylum seeker. These two hours are meant to rectify possible mistakes and misunderstandings in the report of the first interview and to prepare the asylum seeker for his detailed interview. Thus, during these two hours, legal counsel must:

- read the report of the first interview and the rest of the file;
- introduce himself to the asylum seeker and explain his role and independence from the executive;
- introduce the interpreter and explain his role and independence from the executive;
- determine whether the interpreter and the asylum seeker understand each other;
- explain what he will discuss with the asylum seeker;

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<sup>199</sup> E-mail from Eli Akbas, work counsellor with the Dutch Council for Refugees, at the application centre at Schiphol, dated 27 July 2005, on file with author.

<sup>200</sup> E-mail from Arno Pinxter, legal coordinator of Legal Aid, at the application centre at Schiphol, dated 27 July 2005, on file with author.

<sup>201</sup> E-mail from Eli Akbas, work counsellor with the Dutch Council for Refugees, at the application centre at Schiphol, dated 26 July 2005, on file with author.

- discuss the report of the first interview with the asylum seeker and verify that the information is correct;
- discuss the eventual other results of the investigation into the identity, nationality and travel route of the applicant and check that this information is correct;
- if necessary, produce corrections and additional information to the report of the first interview;
- stress the importance of documents that can support the applicant's identity, nationality and travel route, as well as his account of asylum;
- explain the criteria that are relevant for the application decision;
- learn the applicant's motives for seeking asylum;
- attempt to gather more documents that can support the applicant's identity, nationality and travel route, as well as his account of asylum;
- if necessary, let it be known to the minister that in his opinion, the case is unsuitable for the AC-procedure; and
- explain the purpose and importance of the detailed interview and advise the asylum seeker on how to conduct himself during the interview<sup>202</sup>.

Clearly, much must be done within two hours. Often, the discussion between the applicant and legal counsel takes place with the assistance of an interpreter by telephone. This means that it takes much more time to explain and discuss matters. Moreover, the *Tolk en Vertaalcentrum Nederland* (Dutch Interpretation and Translation Centre) does not permit interpreters to telephonically interpret any single call for more than one hour. Consequently, legal counsel must redial for an interpreter if an interpretation of more than one hour is necessary<sup>203</sup>.

Legal counsellors work at the application centre one day every few weeks. Thus, there are constantly different legal counsellors present. Because of this, an asylum seeker will meet at least three different legal counsellors at an application centre.

It sometimes is the case that the two hour period commences at the end of the working day, meaning that the two hour period will be divided into two parts, one hour during day one and one hour during day two. Because of this, two different legal counsellors have to do the work as described above, as a result of which much valuable time will be wasted.

As discussed previously, legal counsellors do not attend interviews. The Dutch Council for Refugees attends about 25% of the detailed interviews. Legal counsel can indicate to the Dutch Council for Refugees that they think that it is important that they be able to attend a particular detailed interview. In such cases, the Dutch Council for Refugees will grant the request. However, if legal counsel does not make such an indication, then the Dutch Council for Refugees will decide by itself whether or not to attend a particular interview. Importance will be given to the fact that an asylum seeker is a minor or appears to be confused or emotional<sup>204</sup>.

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<sup>202</sup> Catz and Koers 2003, p. 94; Hoftijzer, 2003, pp. 66-67.

<sup>203</sup> Vellenga 2003, p. 58.

<sup>204</sup> E-mail from Eli Akbas, work counsellor of the Dutch Council for Refugees, at the application centre at Schiphol, dated 26 July 2005, on file with author.

*Discussing the detailed interview afterwards and producing a view*

After the detailed interview, the report of the detailed interview and the letter of intention will be given to Legal Aid. From that moment, legal counsel has three procedural hours to:

- read the report of the detailed interview and the rest of the file;
- read the letter of intention;
- introduce himself to the asylum seeker;
- introduce the interpreter;
- check whether the interpreter and the asylum seeker understand each other;
- explain what he will discuss with the asylum seeker;
- discuss the report of the detailed interview with the asylum seeker and verify that the information is correct;
- attempt to gather more information, evidence and documents that can support the application;
- if necessary, produce corrections and additional information to the report of the detailed interview;
- discuss the letter of intention with the asylum seeker;
- produce a view with regard to the letter of intention;
- explain to the asylum seeker what will happen next and whether or not he will lodge an appeal on his behalf.

The detailed interview often takes place the day after the first interview. This means that the asylum seeker will meet a different legal counsellor than before. Therefore, this legal counsellor has to read the report of the first interview as well in these three hours<sup>205</sup>.

The discussion with the asylum seeker again takes place with the assistance of an interpreter by telephone, and as before, it is possible that the three hour period will be divided into two parts, meaning that two different legal counsellors will have to complete the work described above.

If the legal counsellor does not have enough time to produce a view, it is his responsibility to let it be known in time and motivated to the minister that more time is needed for bringing out the view, than is provided for in the rules (see paragraph 2.3.5). This can cause a dilemma for the legal counsellor, as, formulating a good and fully motivated opinion that more time is needed, takes about as much time as actually producing a view. Moreover, the legal counsellor should discuss this dilemma with the applicant, and there is little time for this<sup>206</sup>.

*Discussing the decision*

After the decision has been issued to the asylum seeker, legal counsel will discuss the decision with the asylum seeker. Generally, this is done by a different legal counsellor, who is seeing the case for the first time. This takes place after the 48 hour period.

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<sup>205</sup> Vellenga 2003, p. 52.

<sup>206</sup> F. Koers, in his case comment to the Court of Appeals of Den Haag 31 October 2002, *JV* 2002/467.

### *Second opinion*

Legal counsel is also tasked with giving a second opinion. If a legal counsellor decides against lodging an appeal, for example, because he considers the application to be weak and with little prospect for success, the asylum seeker can discuss his case with one other legal counsellor.

### *Conclusion*

During the AC-procedure, the asylum seeker meets a legal counsellor:

- after the first interview to discuss the first interview and to prepare for the detailed interview;
- after the detailed interview to discuss the detailed interview and the letter of intention and to produce a view;
- after the issuance of the decision to discuss the decision; and
- if desired, after the discussion of the decision for a second opinion.

Usually, all of this occurs with a new legal counsellor. It is even sometimes the case that discussions on the first or detailed interviews are carried out by two different legal counsellors. Because the legal counsellor must do a lot of work in a short period of time, the meetings are often rushed. In between these meetings and the interviews, the asylum seeker will meet staff members of the Dutch Council for Refugees, who will provide information to the applicant about the procedures and who will sometimes attend the interviews.

#### *2.6.2 Building a trusting relationship with the asylum seeker?*

Several aspects of the AC-procedure make it difficult for legal counsel to build a trusting relationship with the asylum seeker during the AC-procedure.

One reason for this is the scheduling modalities related to legal counsellors at application centres. As noted above, the asylum seeker will meet a new legal counsellor during each meeting, which makes it difficult for him to build a trusting relationship with legal counsel<sup>207</sup>.

Another reason for a lack of trust is that it can be difficult for the asylum seeker to distinguish between IND officials and legal counsel. Legal counsellors ask the same types of questions as IND officials, also do not wear uniforms, have offices in the same building as IND officials, and have offices that physically look similar to the offices of IND officials<sup>208</sup>. Furthermore, legal counsellors have to collect asylum seekers from the applicant waiting room themselves. For this, they have a special pass to open the doors at the application centre, that has the logo of the IND on it and a sticker that says 'lawyer'. After their meeting, legal counsel has to lock up the asylum seeker himself<sup>209</sup>. This also makes it difficult for asylum seekers to distinguish between IND officials and legal counsellors and, as a result, to trust their legal counsellors.

A third reason for a lack of trust is the fact that many asylum seekers are not used to the fact

<sup>207</sup> Vellenga 2003, p. 58; Catz and Koers 2003, p. 95.

<sup>208</sup> Doornbos 2003, pp. 171, 185.

<sup>209</sup> Hofijzer 2003, p. 64.

that legal counsellors who are paid by the government can also be independent<sup>210</sup>. Because of the time restrictions for legal aid in the AC-procedure, there is insufficient time for legal counsel to explain his independence and for the asylum seeker to appreciate this. It is doubtful that asylum seekers even know and understand the position of legal counsellors under the Dutch asylum procedure system<sup>211</sup>, as a result of which they possibly do not trust their legal counsellors.

### 2.6.3 *Appeal*

If an asylum seeker wants to lodge an appeal against the rejection of his application, this will often be done by the legal counsellor who has discussed the report of the detailed interview with the asylum seeker and produced a view. If the legal counsellor who discusses the report of the detailed interview thinks that the case does not have good prospects for success, then the legal counsellor who discusses the decision with the asylum seeker can lodge an appeal. The asylum seeker can, however, ask for a second opinion from a different legal counsellor. If, however, the legal counsellor who gives the second opinion also thinks that the case does not have good prospects for success, then the asylum seeker cannot lodge an appeal against the rejection of his asylum application. Because an asylum seeker cannot freely choose his legal counsellor, the applicant is entirely in the hands of the legal counsellors present at the application centre.

Because the hearing of cases that have been dealt with under the AC-procedure often takes place within ten days, legal counsel does not have much time to carry out further investigations into the case, collect more evidence or develop persuasive arguments for the applicant.

Furthermore, because asylum seekers whose applications have been rejected in the AC-procedure, have no right to reception benefits (see paragraph 2.4.3), it is difficult for legal counsellors to keep in touch with their clients.

### 2.6.4 *Quality*

For a number of reasons, the quality of legal aid at application centres is not always of a high standard.

The most important reason for this is the time pressure that legal aid experiences<sup>212</sup>. Because of this, important tasks, such as the thorough discussion of interviews, the production of corrections and additional information and the submission of views, is sometimes omitted<sup>213</sup>. After the end of the AC-procedure, legal counsellors must still work under a high degree pressure because there is little time for them to submit arguments to the court.

Another reason is that legal aid is very fragmented at application centres. Because of the way that the provision of legal aid is structured, most asylum seekers see three or four different legal

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<sup>210</sup> Doornbos 2003, p. 186.

<sup>211</sup> Doornbos 2003, p. 191.

<sup>212</sup> Laemers and De Groot-van Leeuwen 2003, p. 240; Human Rights Watch 2003, p. 10; ACVZ 2004, p. 18.

<sup>213</sup> NJCM 2003, p. 18.

counsellors during the application procedure. The quality of legal aid suffers because of this, because handing cases over to new legal counsellors can lead to misunderstandings, inadvertent confusion and oversight<sup>214</sup>.

A third reason that the quality of legal aid at application centres is not always of a high standard relates to the fact that the asylum seeker cannot choose his own legal counsellor. Thus, there are no 'market forces' to encourage an increasing quality of legal aid<sup>215</sup>. This means, furthermore, that the asylum seeker is entirely at the hands of the legal counsellor on duty<sup>216</sup>. When legal counsel decides not to make corrections and additional information to the report of an interview or not to produce a view, the asylum seeker must accept this; he cannot ask for a second opinion<sup>217</sup>.

Lastly, legal counsellors who do not perform well will not often face any serious consequences. It is difficult for an asylum seeker to file a complaint against his legal counsellor or legal counsellors if he is unfamiliar with the existing regulations for filing complaints, lacks the time to do so or suffers from a language barrier, and because the asylum seeker is dependent on his legal counsellor or legal counsellors<sup>218</sup>. Moreover, an asylum seeker who loses his case will usually disappear, as he will be expelled from the Netherlands, will go underground, or will leave for another country<sup>219</sup>.

Nienke Doornbos, a researcher from Radboud University Nijmegen, has examined the communication that takes place in the Dutch asylum procedure as part of a study sponsored by the IND, the Dutch Refugee Council, the *Raad voor Rechtsbijstand* and the *Stichting Vluchtelingenorganisaties Nederland* (Corporation Refugee Organisations Holland). She attended interviews with asylum seekers and listened to the conversations between asylum seekers and legal counsellors in investigation and reception centres and in application centres. Her research shows that some traditional tasks of lawyers, such as consultation with the asylum seeker on whether or not to continue the case, are often omitted<sup>220</sup>. She discovered, furthermore, that legal counsellors in application centres usually do not stress the difficulty of the situation in which the asylum seeker finds himself, namely that the asylum seeker will get a decision within 48 hours and will possibly be expelled from the Netherlands. Therefore, asylum seekers are often unaware of the consequences of the AC-procedure<sup>221</sup>. Doornbos' research describes the atmosphere with legal aid at application centres as rushed. Most legal counsellors do not take the time to set the asylum seeker at ease<sup>222</sup>. Furthermore, many legal counsellors do not check whether the interpreter and the asylum seeker understand each other<sup>223</sup>.

As the most important cause for the behaviour of legal counsel, Doornbos mentions the difficult circumstances in which legal counsellors work, such as a high level of pressure and time con-

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<sup>214</sup> Catz and Koers 2003, p. 95.

<sup>215</sup> Catz and Koers 2003, pp. 91-92.

<sup>216</sup> Cf. the District Court of Zwolle 22 March 2002, *JV* 2002/186, *NAV* 2002/153-kort.

<sup>217</sup> Hofijzer 2003, p. 69.

<sup>218</sup> Laemers and De Groot-van Leeuwen 2003, p. 248.

<sup>219</sup> Catz and Koers 2003, p. 92.

<sup>220</sup> Doornbos 2003, p. 189.

<sup>221</sup> Doornbos 2003, p. 189.

<sup>222</sup> Doornbos 2003, p. 184.

<sup>223</sup> Doornbos 2003, p. 185.

straints, and the segmented nature of legal aid in application centres<sup>224</sup>. Another cause that her research raises is the lack of effort by and poor motivation of some legal counsellors<sup>225</sup>.

Legal counsellors face a dilemma. Either they provide legal aid in a way that means that their services will not be of a high standard or they must stop providing legal aid in application centres and, as a result, leave asylum seekers with little resources to make a strong application for asylum<sup>226</sup>.

## 2.7 Restrictions on freedom

With regard to restrictions on freedom, there are differences between the application centres Schiphol and Ter Apel.

### 2.7.1 Schiphol

Pursuant to Article 3 of the Aliens Act 2000, entry into the Netherlands can be refused if, among other things, the alien does not have a valid passport or a required visa or if he does not have sufficient means at his disposal to pay for his stay in the Netherlands and later journey to a place outside the Netherlands where his entry will be guaranteed. Effectively, entry for many asylum seekers who apply for asylum at Schiphol will be refused because almost all of them will fall under at least one of the grounds for refusal of entry under Article 3 of the Aliens Act 2000.

Article 5, paragraph 1 of the Aliens Act states that an alien whose entry into the Netherlands has been refused must leave the Netherlands immediately. According to paragraph 3, this obligation does not apply, however, if the alien applies for asylum.

Article 6, paragraph 1, of the Aliens Act 2000 says that Dutch authorities can force an alien whose entry into the Netherlands has been refused to stay at a designated location. Paragraph 2 allows for the securing of this designated location against unauthorized departure. If an alien whose entry has been refused applies for asylum at Schiphol, then he will have to stay there at the application centre pursuant to Article 6, paragraph 1 of the Aliens Act 2000<sup>227</sup>. Pursuant to Article 6, paragraph 2 of the Aliens Act 2000, the application centre at Schiphol has been secured against unauthorized departure. This means that most asylum seekers are effectively deprived of their freedom during the AC-procedure at the application centre at Schiphol.

After rejection of the asylum application, the deprivation of freedom of the asylum seeker will most often be continued. In such cases, the asylum seeker will be transferred to the border prison (*grenshospitium*) in Amsterdam. If accommodation in the border prison is not available, however, he will be turned on the street<sup>228</sup>.

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<sup>224</sup> Doornbos 2003, p. 192.

<sup>225</sup> Doornbos 2003, p. 191. Cf. Vellenga 2003, p. 52.

<sup>226</sup> Laemers and De Groot-van Leeuwen 2003, p. 249. Cf. Hoftijzer 2003, pp. 70-71.

<sup>227</sup> Aliens Circular 2000 C3/12.3.2.

<sup>228</sup> Reneman 2003, p. 162.

The asylum seeker can appeal against the measure of Article 6 of the Aliens Act 2000. If he does not, however, the minister must notify the District Court within 28 days that he has imposed a measure pursuant to Article 6 of the Aliens Act 2000<sup>229</sup>. The hearing with the District Court will then take place in no more than 14 days<sup>230</sup> and the judgment will be passed within seven days<sup>231</sup>. Thus, the deprivation of freedom will be examined by a court within 49 days.

On appeal, a court will find an application to be well-founded if the measure conflicts with the Aliens Act 2000 or if the measure imposed cannot be reasonably justified after taking into account all the interests concerned<sup>232</sup>. If the court finds that the appeal is not well-founded, then the asylum seeker can lodge an appeal to contest the continued deprivation of his freedom<sup>233</sup>. Appeal before the Council of State is limited to the first appeal to measures pursuant to of Article 6 of the Aliens Act 2000<sup>234</sup>.

The law does not restrict the amount of time that an asylum seeker can be deprived of his freedom. The Aliens Circular 2000 notes, however, that strict scrutiny will be applied when an asylum seeker has been deprived of his freedom for more than six months<sup>235</sup>.

### 2.7.2 *Ter Apel*

According to Article 55, paragraph 1 of the Aliens Act 2000, an asylum seeker must remain at a designated location in accordance with the instructions given by an authorized authority, while his application is being assessed. Pursuant to this article, asylum seekers at the application centre in Ter Apel<sup>236</sup> have to be present at the application centre from 7.30 a.m. to 6 p.m. They can also stay at the application centre overnight. If he has been told that his presence at the application centre is no longer necessary for purposes of his application's assessment, then the asylum seeker can leave before 6 p.m. Whether his presence is necessary is exclusively within the IND's discretion, but the IND will take into account the time schedule of legal aid. The period between 7.30 a.m. and 8 a.m. is not used to assess applications but, rather, for routine administrative matters and to search the clothes, body and luggage of the asylum seeker<sup>237</sup>.

If an asylum seeker leaves the application centre before the end of the AC-procedure without permission or does not return on time, then he is presumed to be no longer interested in continuing his application. Non-compliance in this respect will be taken into account pursuant to Article 31, paragraph 2, sub b of the Aliens Act 2000. Furthermore, this is punishable under Article 108 of the Aliens Act 2000.

<sup>229</sup> Article 94, paragraph 1 of the Aliens Act 2000.

<sup>230</sup> Article 94, paragraph 2 of the Aliens Act 2000.

<sup>231</sup> Article 94, paragraph 3 of the Aliens Act 2000.

<sup>232</sup> Article 94, paragraph 4 of the Aliens Act 2000.

<sup>233</sup> Article 96, paragraph 1 of the Aliens Act 2000.

<sup>234</sup> Article 95, paragraph 1 of the Aliens Act 2000.

<sup>235</sup> Aliens Circular 2000 A5/2.2.6.

<sup>236</sup> This paragraph also applies to the few asylum seekers in the application centre at Schiphol whose entrance has not been refused.

<sup>237</sup> Aliens Circular 2000 C3/12.2.5.1.

When an asylum seeker does not return on time to the application centre, two things can happen. If the detailed interview has already taken place and if the asylum seeker returns at the application centre after the letter of intention has been issued but before the end of the three hour time period for producing his view, then the asylum seeker can produce his view. No provision exists to allow extra time for the asylum seeker to discuss the report of the detailed interview or to produce his view.

If the detailed interview has not yet taken place, then the procedure in the application centre continues if the asylum seeker returns to the application centre before the decision is been issued. The time during which the asylum seeker was, without authorization, not present at the application centre is not considered to be procedural time, nor is the time between when the asylum seeker returns to the application centre and when the work on his application actually resumes. Therefore, the applicant's stay at the application centre can be longer than usual.

If the asylum seeker does not return to the application centre before the end of the three hour period allowed for producing a view, then a decision will be issued<sup>238</sup>.

Therefore, at the application centre in Ter Apel, the asylum seeker's freedom is restricted between the hours of 07.30 a.m. to 6 p.m., except in those case where the applicant gets permission to leave before 6 p.m.

At both the application centres, asylum seekers must stay in a designated room during the whole day and can only go outside in a closed inner courtyard<sup>239</sup>.

## 2.8 Criticism of the AC-procedure

Several organisations have written critical reports about the Dutch AC-procedure. This paragraph summarizes the criticisms of four important organisations<sup>240</sup>.

### 2.8.1 Human Rights Watch

Human Rights Watch argues that the AC-procedure often deprives asylum seekers of their fundamental right to a full and fair consideration of their claims<sup>241</sup>. It believes that the criteria for dealing with cases under the AC-procedure are inappropriately vague and that they allow for an

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<sup>238</sup> Aliens Circular 2000 C3/12.2.5.2.

<sup>239</sup> *Kamerstukken II* 2002/03, 19637, no. 708, p. 3.

<sup>240</sup> See further, among others, the Concluding Observations of the Committee on the Rights of the Child concerning the Netherlands of 30 January 2004 (CRC/C/15/Add.227), in which the Committee expresses its concern about the determination and rejection of a significant and increasing proportion of refugee applications through the 48 hour accelerated procedure and recommends that the Netherlands ensure that the determination of refugee status for minors adheres to international standards and, consequently, that it reconsider the 48 hour accelerated procedure (paras. 53-54); the explanatory memorandum to the report of the Council of Europe on Accelerated asylum procedures in Council of Europe member states of 2 August 2005, in which the rapporteur expresses his concern about the wide use of accelerated procedures in Council of Europe member states; and the proposal of the Dutch Council for Refugees for a new asylum procedure of 18 June 2004 (available at [www.vluchtweb.nl](http://www.vluchtweb.nl)).

<sup>241</sup> Human Rights Watch 2003, p. 6.

enormous amount of discretion on the part of IND officials<sup>242</sup>. Human Rights Watch has urged the Dutch government to ‘ensure that cases involving serious physical or psychological problems at the time of the applicant’s asylum interview, cases involving possible survivors of torture or sexual violence, and other persons exhibiting symptoms of trauma be exempted from accelerated consideration and admitted to the full asylum procedure’<sup>243</sup>. In addition, it argues that the Dutch government should ensure that applications from unaccompanied minors are dealt with under the normal asylum procedure<sup>244</sup>. Human Rights Watch states that applicants have little opportunity to document their need for protection<sup>245</sup>. Furthermore, it states that ‘the rigid framework of deadlines fails to allow meaningful access to legal counsel and raises serious risks of refolement’<sup>246</sup>. Human Rights Watch is also critical of the fact that asylum seekers who wait for their judgement on appeal from a decision in the AC-procedure have no right to reception benefits<sup>247</sup>.

### 2.8.2. UNHCR

The main criticism of UNHCR as regards the Dutch AC-procedure is that the accelerated procedure is not restricted to manifestly unfounded cases and cases that are clearly abusive. Claims by traumatised applicants and other vulnerable cases, including unaccompanied and separated minors, should, according to UNHCR, always be dealt with under the regular asylum procedure. It has expressed its concern that the 48 hour framework under the AC-procedure does not allow for the establishment of the necessary amount of confidence and trust<sup>248</sup>. Furthermore, UNHCR is of the opinion that suspensive effect should, in principle, be granted in asylum cases and that material support should not be terminated until the deadline for requesting review has passed or until a decision on suspensive effect has been taken<sup>249</sup>.

### 2.8.3 *Nederlands Juristen Comité voor de Mensenrechten*

The *Nederlands Juristen Comité voor de Mensenrechten* (Dutch Jurists Committee for Human Rights, hereafter: NJCM) wrote a commentary on the use of the AC-procedure in November 2003. According to the NJCM, the criteria for dealing with cases under the AC-procedure are too vague and are formulated too broadly. Additionally, according to the committee, the AC-procedure does not sufficiently provide for the recognition of trauma, torture and sexual abuse, particularly given that psychological assistance is unavailable. In the NJCM’s opinion, the AC-procedure is inappropriate when dealing with serious and complex asylum applications. In such cases, legal aid does not have sufficient time to do their work properly; thus, there is no ‘equa-

<sup>242</sup> Human Rights Watch 2003, p. 6.

<sup>243</sup> Human Rights Watch 2003, p. 8.

<sup>244</sup> Human Rights Watch 2003, p. 18.

<sup>245</sup> Human Rights Watch 2003, p. 12.

<sup>246</sup> Human Rights Watch 2003, p. 10.

<sup>247</sup> Human Rights Watch 2003, pp. 28-30.

<sup>248</sup> UNHCR 2003, pp. 2-3.

<sup>249</sup> UNHCR 2003, p. 4.

lity of arms'. Furthermore, according to the NJCM, the AC-procedure inadequately deals with possible communication problems during interviews. As a result, the reports of the interviews can contain mistakes, meaning that applications can be, and are, wrongfully rejected<sup>250</sup>. The NJCM believes that the provision of appeal does not sufficiently compensate for the shortcomings of the AC-procedure, particularly given that the time limit for adducing arguments for appeal is very short as a result of which legal aid is under high pressure. Furthermore, the NCJM recognizes that it is difficult for legal counsellors to stay in contact with their client because asylum seekers do not have a right to material support<sup>251</sup>.

#### 2.8.4 *Adviescommissie voor Vreemdelingenzaken*

The Advisory Committee on Alien Matters (*Adviescommissie voor Vreemdelingenzaken*)<sup>252</sup> has advised the minister about the AC-procedure. It has concluded that there are a number of serious problems. First, there is not enough time for asylum seekers to rest and to prepare themselves for the application process. For many asylum seekers, some time is needed before they realize that they can trust the government. Second, there is insufficient time for staff members of the Dutch Council for Refugees to speak with asylum seekers. Third, legal aid does not have enough time to prepare for the detailed interview and to produce the view. According to the Advisory Committee, the time limits for legal aid are too strict<sup>253</sup>. Lastly, the 48 hour period is sometimes also too short for the IND, meaning that determining the applicant's identity can not always be done thoroughly enough<sup>254</sup>. The Advisory Committee has made a number of recommendations to change the AC-procedure to allow for more time for asylum seekers and legal aid<sup>255</sup>, and according to it, it should be possible to grant applications as well once the recommendations have been implemented<sup>256</sup>.

#### 2.8.5 *The minister's reaction*

In a letter dated 20 May 2003, the minister reacted to the report of Human Rights Watch<sup>257</sup>. The minister argued that the criteria for dealing with cases under the AC-procedure are not too vague because the Aliens Circular 2000 mentions in sufficiently clear terms that applications are to be dealt with under the AC-procedure when it is possible to decide on an application without time-consuming investigations<sup>258</sup>. In reaction to the claim made by Human Rights Watch that cases involving applicants with serious physical and psychological problems, cases with applicants who may have survived torture or sexual violence, and cases involving applicants who exhibit

<sup>250</sup> NJCM 2003, p. 38.

<sup>251</sup> NJCM 2003, p. 27.

<sup>252</sup> The ACVZ was established by the Aliens Act 2000. Its task is to advise the minister about alien laws and policy (Article 2 of the Aliens Act 2000).

<sup>253</sup> ACVZ 2004, p. 18.

<sup>254</sup> ACVZ 2004, p. 19.

<sup>255</sup> ACVZ 2004, p. 21.

<sup>256</sup> ACVZ 2004, p. 23.

<sup>257</sup> *Kamerstukken II* 2002/03, 19 637, no. 738.

<sup>258</sup> *Kamerstukken II* 2002/03, 19 637, no. 738, pp. 2-3.

other symptoms of trauma should be exempted from the AC-procedure, the minister noted that when it is unclear whether an applicant should be subjected to an interview that the advice from the medical department is solicited. If this department decides that the asylum seeker should not be subjected to an interview, then the application will not be dealt with under the AC-procedure. Furthermore, the minister stated that applications from victims of torture and sexual abuse will not often be rejected during the AC-procedure<sup>259</sup>.

In a letter dated 18 June 2004, the minister reacted to the reports from UNHCR, NJCM and the Advisory Committee<sup>260</sup>. In that letter, the minister noted that he did not agree with the conclusion that the AC-procedure involves serious risks that applications are processed carelessly. He considers the AC-procedure as a full asylum procedure with enough safeguards, as a result of which a well-considered decision in individual cases can be taken. The minister was not of the opinion that communication with asylum seekers during the AC-procedure requires more time, rest and space than is the case at present. Furthermore, in his opinion, the minister stated that there are no problems with the way in which the cases of asylum seekers are heard or the amount of time available under the AC-procedure<sup>261</sup>. The minister did not agree with, nor did he adopt, the recommendations put forward by the NJCM to give asylum seekers whose applications have been rejected in the AC-procedure the right to material reception, since this, according to the minister, would undermine the AC-model's function as filtering for reception centres. Related to this, he also opposed the automatic granting of suspensive effect<sup>262</sup>.

However, the minister promised to investigate how an improved AC-procedure could be created within the existing framework<sup>263</sup> and made assurances that asylum applications from unaccompanied minors under twelve years of age would no longer be dealt with under the AC-procedure<sup>264</sup>.

To implement the promise to improve the AC-procedure within the existing framework, the minister decided that applications could be granted as well during the AC-procedure (see paragraph 2.2.1)<sup>265</sup>. The minister is not of the opinion that the AC-procedure should first be brought into line with the other recommendations of the Advisory Committee before this possibility could be introduced<sup>266</sup>. No other changes of the AC-procedure have been introduced until now.

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<sup>259</sup> *Kamerstukken II* 2002/03, 19 637, no. 738, p. 4.

<sup>260</sup> *Kamerstukken II* 2003/04, 19 637, no. 826.

<sup>261</sup> *Kamerstukken II* 2003/04, 19 637, no. 826, p. 4.

<sup>262</sup> *Kamerstukken II* 2003/04, 19 637, no. 826, p. 14.

<sup>263</sup> *Kamerstukken II* 2003/04, 19 637, no. 826, p. 6.

<sup>264</sup> *Kamerstukken II* 2003/04, 19 637, no. 826, p. 13. The Aliens Circular, as of 1 April 2005, incorporates this (WBV 2005/12, *Stcrt.* 2005, 63, p. 18).

<sup>265</sup> Decision of the Minister for Immigration and Integration of 1 December 2004, *Stcrt.* 2004, 234, p. 13.

<sup>266</sup> *Kamerstukken II* 2003/04, 19 637, no. 826, p. 12.

## 2.9 Summary

About 40% of asylum applications in the Netherlands are rejected under the AC-procedure<sup>267</sup>. Cases are suitable for dealing with under the AC-procedure if it is possible to carefully deal with the application within 48 procedural hours. The Council of State has decided that there are no exceptions from the AC-procedure for certain categories of cases. As a result, many types of cases can be dealt with under the AC-procedure, including cases from minors and from asylum seekers who are traumatised or mentally disturbed. The minister has indicated that the percentage of applications that are dealt with under the AC-procedure should be maximized ('AC, unless...').

The AC-procedure begins at the moment at which the application is submitted or, alternatively, at the moment at which the first investigation related to the application to be submitted takes place, but in any case, the AC-procedure begins when four, or, if entry into the Netherlands has been refused, six hours have passed since the actual registration on appointment. The Council of State's jurisprudence shows that 'investigation aimed at the application to be submitted' involves a substantive investigation and not purely an administrative investigation or acts that are necessary to manage the investigation.

The AC-procedure takes a maximum of 48 procedural hours. Article 1, paragraph 1, sub f of the Aliens Decree 2000 defines procedural hours as those hours that are available for investigating an asylum application in an application centre, excluding the hours between 6 p.m. and 8 a.m. and, except for the application centre at Schiphol, weekends and legal holidays. Hours are not considered to be procedural hours when they could not reasonably be considered to have been used for investigation into an application, as the result of facts and/or circumstances adduced and made reasonable by the minister, such as the incidental absence of an interpreter.

After the first interview, the minister decides whether the application is suitable for processing under the AC-procedure (the process decision). The asylum seeker cannot lodge an objection or appeal against this decision.

During the AC-procedure, the asylum seeker has two procedural hours with legal counsel to:

- discuss the report of the first interview;
- discuss other results of the investigation into his identity, nationality and travel route;
- submit corrections and additional information to the report and other results of the investigation; and
- prepare for the detailed interview.

After this, the detailed interview takes place. The report of the detailed interview and the letter of intention are issued at the same time. After the detailed interview, the asylum seeker has three procedural hours with legal counsel to:

- discuss the report of the detailed interview
- discuss the letter of intention;
- submit corrections and additional information to the report of the detailed interview; and
- submit a view with regard to the letter of intention.

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<sup>267</sup> The number of applications that are *dealt with* under the AC-procedure is even larger because, since the end of 2004, applications can be granted under the AC-procedure (see, further, supra note 4).

The minister has a high degree of discretion in deciding whether to grant an extension to these time limits. Furthermore, he can make a decision without considering the applicant's view if the time limit of three procedural hours has been exceeded.

If it is not possible to make a decision within 48 procedural hours, then the application will, in principle, be sent to an investigation and reception centre. However, the asylum seeker does not always receive the procedure to which he is entitled if the 48 hour time period has been exceeded.

The asylum seeker can appeal the rejection of his asylum application before a District Court, and he can lodge an appeal against the judgment of the District Court before the Council of State. The period for appeal is one week, rather than the usual four weeks. To prevent his expulsion from the Netherlands during the appeal process, the asylum seeker must ask the president of the court to grant an interim measure, and he must do so within 24 hours of his application's rejection. When deciding whether to grant the applicant's request, the presidents of the courts apply, in fact, criteria for deciding the case on the merits and usually give immediate judgment on the merits. If this is not the case, then the president of the District Court will usually decide that the asylum seeker cannot be expelled before the judgment on his appeal. If the asylum seeker lodges an appeal before the Council of State and requests an interim measure to prevent his expulsion during the assessment of the appeal, then he is not allowed to await the decision of the president of the Council of State. The president of the Council of State will only grant an interim measure if the asylum seeker is given notice of the date of his expulsion.

Asylum seekers whose applications have been rejected under the AC-procedure have, in principle, no right to reception benefits. Only unaccompanied minors and asylum seekers whose request for an interim measure to prevent their expulsion during the assessment on appeal has been granted have a right to reception benefits.

The Aliens Decree 2000 covers most aspects of the AC-procedure, meaning that there is a sufficient legal basis for these aspects. Such cannot be said, however, for time limits laid down in the Aliens Circular 2000 and for withholding a term for departure, shortening the period for appeal and withholding suspensive effect on appeal.

Legal aid works under difficult circumstances in application centres. First, strict time limits apply. Legal counsellors have to do a large amount of work in little time. Only five out of 48 procedural hours are at the disposal of legal aid during the AC-procedure. After an application has been rejected, legal aid only has about ten days to prepare arguments for appeal. Second, different aspects of the AC-procedure make it difficult for legal counsel to build a trusting relationship with the asylum seeker ; in large part, this is due to the unfortunate way in which the schedule for legal counsellors is structured. Moreover, asylum seekers completely depend on legal counsellors present in the application centre and cannot freely choose counsel. Consequently, the quality of legal aid available to asylum seekers is not always of a high standard.

At the application centre at Schiphol, most asylum seekers are deprived of their freedom. At the application centre in Ter Apel, the freedom of asylum seekers is restricted between 7.30 a.m. and 6 p.m., except when they are given permission to leave the application centre before 6 p.m. If an asylum seeker does not comply with the instructions to remain at the application centre, then this is taken into account in the asylum application. Furthermore, this non-compliance can be punished.

A number of organizations have criticized the AC-procedure. Their main criticisms are that the

AC-criteria are too vague, that the AC-procedure offers inadequate resources to recognize trauma, torture and sexual abuse and that there is insufficient time for legal aid. The minister disagrees with these criticisms but has promised to investigate how an improved AC-procedure could be created within the existing framework.

### 3. Article 3 of the European Convention on Human Rights

#### 3.1 Introduction

Does the AC-procedure comply with Article 3 of the European Convention on Human Rights (hereafter: the Convention)? The last part of this chapter takes a position on this question. First, this chapter raises some general points related to Article 3 of the Convention in expulsion cases. It then discusses the ‘principle of effectiveness’ applied by the European Court of Human Rights (hereafter: the Court). Thirdly, this chapter considers relevant case law from the Court.

#### 3.2 General aspects

Article 3 of the Convention states:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

The prohibition of torture and inhuman or degrading treatment or punishment is absolute. Article 3 is the only article of the Convention that does not contain qualifications, exceptions, or restrictions. Furthermore, states parties to the Convention cannot derogate from its provisions under Article 15, which deals with states of emergency during times of war and public emergency.

According to the Court’s case law, a state party violates Article 3 of the Convention if it expels an alien to a country where he faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. In *Soering v. the United Kingdom*, which was decided in the context of extradition, the Court stated:

*In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country<sup>268</sup>.*

In *Cruz Varas and others v. Sweden*, the Court held that this principle also applies in expulsion cases. According to it:

*Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion<sup>269</sup>.*

<sup>268</sup> ECHR 7 July 1989, Series A no. 161, § 91.

<sup>269</sup> ECHR 20 March 1991, Series A no. 201, § 70.

The Court confirmed this judgment in many other cases by stating that:

*The Court recalls that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, an expulsion decision may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the State, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled*<sup>270</sup>.

Ill-treatment must attain ‘a minimum level of severity’ if it is to fall within the scope of Article 3 of the Convention. Whether ill-treatment will meet this minimum level in any particular case will depend on the circumstances of the case, including the length of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim<sup>271</sup>.

Article 3 of the Convention also applies when the feared treatment or punishment does not come from public authorities. In *H.L.R. v. France*<sup>272</sup>, the Court ruled that Article 3 can also apply where the danger emanates from persons or groups of persons who are not public officials, provided that the authorities of the receiving state cannot provide adequate protection. In *Ahmed v. Austria*<sup>273</sup>, the court did not find it relevant whether or not there was a lack of State authority in the receiving state, with regard to the appropriateness of Article 3.

The Court stressed the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 in *Chahal v. the United Kingdom*. In that case, the United Kingdom wanted to deport Chahal to India, arguing that he had been involved in terrorist activities and that he posed a risk to British national security. The Court stated:

*Article 3 enshrines one of the most fundamental values of democratic society (...). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.*

(...)

*In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration*<sup>274</sup>.

<sup>270</sup> Inter alia ECHR 30 October 1991, Series A no. 215 (*Vilvarajah and others v. the United Kingdom*), § 102-103; ECHR 28 November 1996, Reports 1996-V (*Nsona v. the Netherlands*), § 92; ECHR 23 February 1999, appl. no. 45925/99 (*Pranjko v. Sweden*); ECHR 5 March 2002, appl. no. 62045/00 (*Hemat Kar v. Sweden*).

<sup>271</sup> Inter alia ECHR 18 January 1978, Series A no. 25 (*Ireland v. the United Kingdom*), § 162; ECHR 6 March 2001, Reports 2001-II (*Hilal v. the United Kingdom*), § 60.

<sup>272</sup> ECHR 29 April 1997, Reports 1997-III.

<sup>273</sup> ECHR 17 December 1996, Reports 1996-VI.

<sup>274</sup> ECHR 15 November 1996, Reports 1996-V, § 79-80.

Thus, the protection against expulsion cannot be limited by the behaviour of the person involved. Furthermore, Article 3 of the Convention affords protection regardless of the reason for the feared ill treatment or punishment. This is well illustrated by the above-mentioned case of *Soering v. the United Kingdom*<sup>275</sup>. That case involved a German national who had killed the parents of his girlfriend in the United States. According to the Court, his extradition to the United States would violate Article 3 of the Convention because it would risk exposing him to the ‘death-row phenomenon’ in the United States.

### 3.3 The principle of effectiveness

The principle of effectiveness is a principle of treaty interpretation the value of which all schools of treaty interpretation recognise<sup>276</sup>. This principle means that ‘particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text’<sup>277</sup>.

The principle of effectiveness plays a central role in the Court’s interpretation and application of the provisions of the Convention<sup>278</sup>.

In *Artico v. Italy*, the Court held:

*The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (...)*<sup>279</sup>.

In that case, the Court ruled that legal assistance must not only be given to an accused but that it must also be effective. The Court found that there was a violation of Article 6, paragraph 3, sub c of the Convention (the right of everyone charged with a criminal charge to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require) because the court-appointed lawyer was unable to act, and despite this, the authorities did not replace him or force him to fulfil his obligations to the accused<sup>280</sup>.

<sup>275</sup> ECHR 7 July 1989, Series A no. 161.

<sup>276</sup> Merrills 1993, p. 98. Cf. International Court of Justice 3 February 1994 (Territorial dispute (Libyan Arab Jamahiriya v. Chad)), § 51; International Court of Justice 27 June 2001 (LaGrand (Germany v. United States of America)), § 91.

<sup>277</sup> G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge: Grotius 1986, pp. 42-49, cited in Merrills 1993, p. 77.

<sup>278</sup> Merrills 1993, p. 113. Cf. Reid 1998, p. 34.

<sup>279</sup> ECHR 13 May 1980, Series A no. 27, § 33.

<sup>280</sup> Cf. ECHR 9 April 1984, Series A no. 76 (*Goddi v. Italy*), in which the Court also ruled that there had been a breach of Article 6, paragraph 3, sub c of the Convention, since notice of the hearing had been sent to a lawyer who was no longer acting for the applicant and because the officially appointed lawyer was unfamiliar with the case and did not have the time and facilities that he would have needed to study the case file, prepare his pleadings and, if appropriate, consult his client. Therefore, the legal assistance was not considered to have been effective.

In *Golder v. the United Kingdom*<sup>281</sup>, the Court considered:

*(...) hindering the effective exercise of a right may amount to a breach of that right (...)*

It held that ‘access to court’ is inherent in Article 6 of the Convention, because that article’s guarantees would be meaningless without it.

Article 6, paragraph 3, sub c of the Convention (see above) only applies in criminal matters. However, in *Airey v. Ireland*, the Court stated:

*However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case*<sup>282</sup>.

In *Soering v. the United Kingdom*<sup>283</sup>, the Court noted:

87. *In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (...). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (...).*

*(...)*

90. *It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (see paragraph 87 above).*

In *Mamatkulov and Askarov v. Turkey*, the Grand Chamber of the Court stated:

*The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications.*

*(...)*

*The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law*

<sup>281</sup> ECHR 21 February 1975, Series A no. 18, § 26.

<sup>282</sup> ECHR 9 October 1979, Series A no. 32, § 26.

<sup>283</sup> ECHR 7 July 1989, Series A no. 161.

*of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose (...), and also in accordance with the principle of effectiveness*<sup>284</sup>.

The Court held that a state party's failure to comply with interim measures should be regarded as preventing the effective examination of an applicant's complaint and as hindering the effective exercise of his or her right to apply and, accordingly, as a violation of Article 34 of the Convention<sup>285</sup>.

These judgments reveal the Court's position that state parties must not only comply with the explicit wording of a provision of the Convention but that they also must refrain from, and prevent any action or situation that would, although not expressly prohibited, nevertheless precludes the effective enjoyment of the rights in question<sup>286</sup>.

### **3.4 Relevant case law from the Court**

#### *3.4.1 Bahaddar v. the Netherlands*<sup>287</sup>

Mr. Bahaddar, a Bangladeshi national, applied for asylum in the Netherlands on 13 July 1990. On 31 March 1993, he lodged an appeal against the rejection of his asylum application with the Council of State, noting that he would submit the grounds for appeal as soon as possible. The Council of State informed Bahaddar's counsel on 28 June 1993 that she would have to submit her grounds for appeal by 29 July 1993 since she had not thus far done so. The lawyer did not submit the grounds for appeal until 20 October 1993, and when she did so, no explanation was given for the delay.

On 7 March 1994, the president of the Council of State declared that Bahaddar's appeal was inadmissible because it had failed to submit the grounds for appeal in a timely manner. The Council of State rejected Bahaddar's objection to this judgment on 29 September 1994 on the grounds that he had been given ample opportunity to submit the grounds for appeal, that he had been informed of the consequences for failing to do so and that he should have submitted a request for an extension of the time limit before it expired. Bahaddar applied to the European Commission of Human Rights and also made a second application for a residence permit. He subsequently lodged a third application for asylum. The State Secretary of Justice rejected both applications. Bahaddar's appeal against this decision was declared inadmissible for having failed to submit grounds for appeal within the time limits set for that purpose. The government argued before the Court that the complaint should be declared inadmissible because Bahaddar had not exhausted the available domestic remedies.

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<sup>284</sup> ECHR 4 February 2005, appl. no. 46827/99 and 46951/99, § 101 and 123.

<sup>285</sup> § 128.

<sup>286</sup> Orakhelashvili 2005, p. 227. See, for other examples of judgments illustrating this approach, Merrills 1993, pp. 98-113 and Ovey and White 2002, p. 36.

<sup>287</sup> ECHR 19 February 1998, Reports 1998-I.

The Court held:

*It follows that, even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner. Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim<sup>288</sup>.*

The Court found that special circumstances did not apply in this case. In determining this, it considered as relevant the following:

- the applicant's lawyer was given an opportunity to cure the failure of stating any grounds of appeal and the time limit for that purpose expired nearly four months after the appeal was lodged;
- it would have been possible for the applicant's lawyer to have requested an extension of this time limit. The applicant's lawyer made no such request. She submitted grounds for appeal nearly three months after the time limit had expired and did so without explaining the delay;
- the applicant was able to lodge new applications before Dutch authorities, even after the expiry of the time limit. In fact, he availed himself of this opportunity twice. The applicant's appeal against the rejection of these applications was declared inadmissible for failure to timely submit grounds for appeal;
- at no stage during the domestic proceedings was the applicant refused an interim measure against his expulsion; and
- even now, it would be possible for the applicant to lodge a new application, and if necessary to apply for an interim measure<sup>289</sup>.

In these circumstances, the Court ruled that the applicant failed to exhaust the available domestic remedies.

One can conclude from this judgment that the formal requirements and time-limits laid down in domestic law should normally be complied with. However, asylum seekers must also have a realistic opportunity to prove that their expulsion would violate Article 3 of the Convention. Therefore, time limits should not be so short, or applied so inflexibly, as to deny asylum seekers this opportunity. The principle of effectiveness requires that the provisions of the Convention are interpreted and applied in such a way as to give effect to safeguards in a practical and effective

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<sup>288</sup> § 45.

<sup>289</sup> § 46-48.

way. Therefore, formal requirements and time limits may not hinder an effective appeal to article 3 of the Convention.

### 3.4.2 *Jabari v. Turkey*<sup>290</sup>

In 1995, ms. Jabari, an Iranian national, fell in love with a man, X, and they decided to marry. However, X's family opposed the marriage. In June 1997, X married another woman. Jabari continued to see and have sexual relations with X. In October 1997, policemen stopped Jabari and X on the street and they both were arrested and detained. Jabari underwent a virginity examination while in custody, and after a few days, she was released from detention with her family's help. Subsequently, she fled to Turkey and applied for asylum. The police rejected her application because it had not been submitted in a timely manner. Jabari was informed that section 4 of the Asylum Regulation 1994 required her to have lodged her application within five days of her arrival in Turkey. Subsequently, Jabari lodged a complaint with the Court.

In her complaint, Jabari stated that she had committed adultery in Iran and that she had had to leave before criminal proceedings could be brought against her. She said that she probably would have been prosecuted and sentenced to a form of inhuman punishment. Jabari argued that she was granted refugee status under the Refugee Convention by the UNHCR on the ground that she had a well-founded fear of persecution because of her membership in a particular social group, namely women who have transgressed social mores according to UNHCR guidelines dealing with gender-based persecution.

The Court held:

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

*The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (...). In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention*<sup>291</sup>.

It could not be said, according to the Court, that the situation in Iran had evolved such that adul-

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<sup>290</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

<sup>291</sup> § 39-40.

terous behaviour was no longer considered a reprehensible affront to Islamic law. It took judicial notice of recent surveys of the current situation in Iran and noted that punishment of adultery by stoning still remained on the statute book and that it could be resorted to by the authorities. Therefore, according to the Court, there was a real risk of Jabari being subjected to treatment contrary to Article 3 if she were to be returned to Iran. Thus, deporting her to Iran would, if executed, violate Article 3.

The conclusion can be that, since Article 3 embodies one of the most fundamental values of a democratic society and because it absolutely prohibits torture or inhuman or degrading treatment or punishment, its effective application can also have procedural consequences. A rigorous scrutiny must necessarily be conducted when an applicant complains that his expulsion would violate Article 3. Therefore, short time limits should not be applied automatically and mechanically.

### 3.5 Violation of Article 3 of the European Convention on Human Rights?

This paragraph explores whether the AC-procedure complies with Article 3 of the Convention.

#### 3.5.1 Time limits

The AC-procedure is an accelerated asylum determination procedure with very short time-limits for the asylum seeker. The Council of State has held that all cases that can be carefully dealt with within 48 procedural hours, are suitable for dealing with in the AC-procedure. The AC-procedure is thus not reserved for manifestly unfounded, inadmissible or clearly abusive applications. About 40% of all asylum applications in the Netherlands are rejected under the AC-procedure.

The UNHCR states in its Handbook on Procedures and Criteria for Determining Refugee Status<sup>292</sup>:

*It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own*<sup>293</sup>.

(...)

*A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case*<sup>294</sup>.

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<sup>292</sup> UNHCR 1992.

<sup>293</sup> P. 31, § 190.

<sup>294</sup> P. 32, § 198.

Asylum seekers therefore need time to establish trust and confidence in the authorities and to settle in before conveying their reasons for having fled. The entire AC-procedure, however, takes only 48 procedural hours.

During the AC-procedure, the asylum seeker has two procedural hours with legal counsel to:

- discuss the report of the first interview;
- discuss other results of the investigation into his identity, nationality and travel route;
- submit corrections and additional information on the report and on the other results of the investigation; and
- prepare the detailed interview.

After the detailed interview, the asylum seeker has three procedural hours with legal counsel to:

- discuss the report of the detailed interview
- discuss the letter of intention;
- submit corrections and additional information on the report of the detailed interview; and
- submit a view on the letter of intention.

In her study (see paragraph 2.6.4), Doornbos found that it is uncertain that all relevant asylum aspects will be raised during the detailed interview. This has to do with the routine character of the interview and the strict rules that structure the interview. The interview sometimes takes place in an adversarial and intimidating atmosphere. Some asylum seekers do not tell their full story because they are not able to see the consequences of certain statements and the purpose of certain questions being asked<sup>295</sup>. Furthermore, the reports of the interview do not always neutrally reproduce the interview. They give little insight into the way in which statements are made, and incorrect translations and interpretations in the report sometimes result in information being lost<sup>296</sup>.

Because of this and because asylum seekers should actually submit all relevant facts and circumstances before the letter of intention has been sent (see paragraph 1.7), it is very important that asylum seekers have enough time, together with legal aid, to prepare for the interviews, correct the reports of the interviews, submit additional information and evidence and submit their view with regard to the letter of intention. During the AC-procedure, however, legal aid only has five procedural hours to do this. Furthermore, it is very difficult to get an extension of the time limits for legal aid, and the grant of an extension is discretionary.

Because of these constraints, it will not always be possible for asylum seekers to come forward with full statements or to collect enough evidence to prove that their expulsion would violate Article 3 of the Convention. This will especially be the case if applicants are traumatised, mentally disturbed or minors because it will often take much longer for asylum seekers in such cases to establish trust and confidence in the authorities before they can explain the reasons for their

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<sup>295</sup> Doornbos 2003, pp. 152-153.

<sup>296</sup> Doornbos 2003, pp. 233-234.

flight or the cause of their trauma<sup>297</sup>. Furthermore, it will often be necessary to obtain evidence from the country from which the asylum seeker claims to have fled, and this will hardly be possible within 48 procedural hours. It should also be stressed that an asylum seeker will often have difficulty establishing a trusting relationship with legal counsel because, among other things, the applicant will meet counsel for only a short period of time and because a different legal counsellor will be assigned each time. Moreover, because of short time limits, the quality of legal aid at application centres is not always of a high standard.

Additionally, it is very difficult for an asylum seeker to show within the short timeframe of the AC-procedure that his case is not suited to the AC-procedure. The decision whether or not to deal with a case under the AC-procedure is taken after the first interview and, hence, without knowing the asylum seeker's motives and before the applicant has met a legal counsellor. If a legal counsellor believes that an application should not be dealt with under the AC-procedure, then he has to show this in two or three procedural hours, depending on the stage of the procedure in which he meets the asylum seeker. Before a legal counsellor can submit a good and fully motivated opinion that a case should be sent to an investigation and reception centre, however, he has to thoroughly assess the file and discuss the case with the asylum seeker through an interpreter. This requires a great deal of time, and the time limit of two or three hours usually expires already during this discussion with the asylum seeker<sup>298</sup>. The time limit for legal aid will therefore often be too short to be able to show that a case is not suitable for dealing with in the AC-procedure. Furthermore, in these two or three hours, the legal counsellor has to discuss the reports of the interview with the asylum seeker and verify that the information is correct, he has to submit corrections and additional information if necessary and he has to prepare the detailed interview or submit a view with regard to the letter of intention. If a legal counsellor tries to convince the minister that a particular application should be sent to an investigation and reception centre, then he will not have enough time to carry out his other tasks. If the minister insists on dealing with the case within 48 procedural hours, then the reality is that the asylum seeker will have had no chance to correct the reports of the interviews, to submit additional information or to submit his view. The decision will then be taken on the basis of an incomplete file. Understandably, many legal counsellors do not want to run this risk. Thus, the short timeframe of the AC-procedure makes it extremely difficult to show that a case is not suitable for the AC-procedure.

After an application is rejected under the AC-procedure, short time limits apply for lodging an appeal. Asylum seekers must lodge an appeal and request an interim measure within 24 hours of the rejection of their application to prevent their immediate expulsion from the Netherlands. Generally, the hearing on this takes place within ten days. Legal counsellors, therefore, have only several days to formulate arguments for appeal and to collect additional evidence. The president usually gives an immediate judgment on the merits, as a result of which it will not be possible to submit further evidence as to the judgment on the merits.

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<sup>297</sup> UNHCR 2003, p. 3.

<sup>298</sup> See the case comment of F. Koers to the Court of Appeals of Den Haag 31 October 2002, *JV* 2002/467.

The short time limits under the AC-procedure make it possible that essential elements of the asylum account or necessary evidence will not be put forward. Because of time constraints for appeal and other limitations in the appeal procedure<sup>299</sup>, it will not always be possible to rectify these shortcomings on appeal.

In *Bahaddar v. the Netherlands*<sup>300</sup>, the Court said that formal requirements and time limits laid down by domestic law should normally be complied with, even in cases of expulsion to a country where the applicant alleges a risk of ill-treatment contrary to Article 3. The Court, however, added:

*It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim*<sup>301</sup>.

In *Bahaddar v. the Netherlands*, the Court did not find any special circumstances that would have excepted Bahaddar from the obligation to comply with the time limit laid down by domestic law. The Court noted that Bahaddar had an opportunity to cure the failure within a month, that it would have been possible for him to have requested an extension of the time limit, that the applicant was able to lodge new applications and that at no stage he was refused an interim measure against his expulsion. These circumstances, however, differ from the circumstances under the AC-procedure.

Under the AC-procedure, if the three hour time limit for discussing the report of the detailed interview and the letter of intention and for submitting the view are not met, then the legal counsellor has to let in be known on time and motivated to the minister that more time is needed for bringing out the view<sup>302</sup>. However, formulating a good and fully motivated opinion that more time is needed, takes almost as much time as producing a view, and there will often not be enough time to produce such an opinion. If legal counsel fails to show that more time is needed, then the minister can, in principle, make a decision, even when no view has been presented at the end of the three hour time period<sup>303</sup>. Furthermore, the minister can issue a decision even when the legal counsellor indicates that more time is needed. In such a case, the minister has to give a time limit for the legal counsellor to finish his work, *as far as notifying the decision within the time limit of 48 procedural hours allows it*<sup>304</sup>. However, the minister does not need to wait until the end of the 48 hour period before he makes the decision. If the applicant's view is sub-

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<sup>299</sup> The obstacles to later statements and evidence and marginal judicial review, see paragraph 1.7 and 1.8.

<sup>300</sup> ECHR 19 February 1998, Reports 1998-I.

<sup>301</sup> § 45.

<sup>302</sup> ABRvS 3 May 2002, *JV* 2002/220 m.nt. Olivier.

<sup>303</sup> ABRvS 3 May 2002, *JV* 2002/220 m.nt. Olivier.

<sup>304</sup> ABRvS 25 February 2002, *JV* 2002/123.

mitted before the end of the 48 hour period but after the notification of the decision, then the minister does not need to take the view into account<sup>305</sup>. Research carried out by the University of Leiden shows that the minister is usually not willing to grant a respite for this three hour time limit<sup>306</sup>.

Unlike in *Bahaddar v. the Netherlands*, a legal counsellor does not automatically get the right to cure an omission under the AC-procedure; he has to formulate a good and fully motivated request for an extra term. However, there is often not enough time to produce such an opinion within the framework of the AC-procedure. Even if legal counsel makes such a request, the minister can still issue a decision without waiting for a view. In such a case, the minister only has to grant extra time for legal counsel as far as the 48 procedural hour time limit allows for it. Thus, the possibility of requesting an extension of the time limit under the AC-procedure is merely theoretical.

An asylum seeker whose application has been rejected under the AC-procedure can lodge a new application. However, Article 3.1, paragraph 1 of the Aliens Decree 2000 states that, even when an asylum seeker has lodged an application, he can still be expelled if, according to the minister's provisional opinion, no new facts or circumstances have been submitted. Because of this and due to obstacles to later statements and evidence (see paragraph 1.7), lodging a new application should also be considered as a mere theoretical possibility.

Bahaddar had at no stage of the proceedings been refused an interim measure against his expulsion. The present practice is that the president of the Council of State only grants an interim measure if the applicant has been notified of the date of his expulsion<sup>307</sup>, even though the minister does not have to explicitly inform the asylum seeker of this date, this date simply being a legal consequence of a rejected application<sup>308</sup>. For an asylum seeker whose application has been rejected, it is, therefore, likely that the president of the Council of State will refuse him an interim measure. Furthermore, since the hearing with regard to the interim measure will usually take place within ten days of an application having been rejected, asylum seekers do not have enough time to prepare for the hearing, thus increasing the chance that their request for an interim measure will be rejected. The likelihood of rejection is also increased due to the very nature of the criteria used by the president of the court to decide whether or not to grant an interim measure (see paragraphs 2.4.2 and 4.5.2).

Finally, in the case of Bahaddar, the time limit for submitting grounds for appeal was nearly four months. Under the AC-procedure, the time limit for submitting a view and grounds for appeal are, respectively, three procedural hours and ten days. Thus, the time limits under the AC-procedure are much shorter than the time constraints were in *Bahaddar v. the Netherlands*.

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<sup>305</sup> ABRvS 19 June 2002, *JV* 2002/S287.

<sup>306</sup> Lodder 2004, pp. 66-68.

<sup>307</sup> President of the ABRvS 9 November 2001, *JV* 2002/14 m.nt. Boeles; President of the ABRvS 23 August 2002, *JV* 2002/351.

<sup>308</sup> ABRvS 29 mei 2001, *JV* 2001/166, *RV* 2001, 65, *AB* 2001. 266.

In *Jabari v. Turkey*<sup>309</sup>, the Court stated:

*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>310</sup>.

The AC-procedure does not give a formal time limit for submitting an asylum application, but once it has been submitted, there are short time limits for submitting a statement and for submitting and collecting evidence. As indicated above, these time limits are applied automatically and mechanically as well, since it is very difficult to be granted with an extra term, if a time limit threatens to exceed.

### 3.5.2 *The scope of the investigation*

In *Jabari v. Turkey*, the Court noted:

*(...) having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (...)*<sup>311</sup>.

In her concurring opinion in *Said v. the Netherlands*<sup>312</sup>, Judge Thomassen stated that the conclusion that an asylum seeker's account is not credible, should be based on a thorough investigation into the facts and be accompanied by adequate reasoning. Such an obligation, in her opinion, flows directly from Articles 2 and 3 of the Convention. She concluded that no serious investigation had been carried out in Said's case.<sup>313</sup> This lack of rigorous scrutiny contributed to the conclusion that there had been a violation of Article 3<sup>314</sup>.

All investigations must be completed within 48 procedural hours under the AC-procedure. Since there are no criteria as regards content for dealing with cases under the AC-procedure, also complicated cases can be dealt with under the AC-procedure<sup>315</sup>.

If an application cannot be carefully dealt with within 48 procedural hours, then it should in principle be sent to an investigation and reception centre. The minister, however, has said that

<sup>309</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

<sup>310</sup> § 39-40.

<sup>311</sup> § 39.

<sup>312</sup> ECHR 5 July 2005, appl. no. 2345/02.

<sup>313</sup> Said's asylum application had been rejected under the AC-procedure.

<sup>314</sup> The Court did not consider this matter, no direct complaint on this having been lodged. Cf. Spijkerboer in his comment to the judgment in *JV* 2005/304.

<sup>315</sup> For examples, see paragraph 2.2.3.

he wants to maximize the number of applications that are settled under the AC-procedure ('AC, unless...')<sup>316</sup>. Therefore, the minister will often try to finish an investigation within 48 procedural hours<sup>317</sup>, as a result of which the investigation will not always be thorough enough. In *N. v. Finland*, the Court found that it was relevant that there was no indication that the initial asylum interview had been in any way rushed or otherwise conducted superficially<sup>318</sup>. The term of 48 procedural hours under the AC-procedure, however, increases the chance that the first or the detailed interview will be conducted in a rushed or superficial manner.

Additionally, even if it is not possible to complete an investigation within 48 procedural hours, an asylum seeker will not always get the procedure, and thus the investigation, to which he is actually entitled (see paragraph 2.3.5).

In summary, the tight framework under the AC-procedure does not guarantee a thorough investigation into the facts accompanied by adequate reasoning. Because of short time limits and other limitations in the appeal procedures<sup>319</sup>, these shortcomings are not rectified on appeal.

### 3.5.3 Conclusion

According to the principle of effectiveness as applied by the Court, Article 3 of the Convention should be interpreted and applied in a way that makes its safeguard practical and effective<sup>320</sup>. Hindering the effective exercise of Article 3 may amount to a breach of that article<sup>321</sup>. This means that asylum seekers must have an effective possibility to show that their expulsion would violate Article 3 of the Convention. *Bahaddar v. the Netherlands* and *Jabari v. Turkey* illustrate this approach. These cases show that the right to an effective appeal under Article 3 of the Convention has consequences for the structure of asylum procedures<sup>322</sup>. Accordingly, Article 3 places positive obligations on the contracting states in expulsion cases<sup>323</sup>.

<sup>316</sup> *Kamerstukken II* 2004-05, 29800, chapter VI, no. 2, p. 128.

<sup>317</sup> Cf. Vellenga 2003, p. 53.

<sup>318</sup> ECHR 26 July 2005, appl. no. 38885/02, § 157.

<sup>319</sup> The obstacles to later statements and evidence and marginal judicial review, see paragraphs 1.7-1.8.

<sup>320</sup> ECHR 13 May 1980, Series A no. 27 (*Artico v. Italy*), § 33; ECHR 7 July 1989, Series A no. 161 (*Soering v. the United Kingdom*), § 87.

<sup>321</sup> Cf. ECHR 21 February 1975, Series A no. 18 (*Golder v. the United Kingdom*), § 26.

<sup>322</sup> Cf. Court of Appeals of Den Haag 31 October 2002, *RV* 2002, 22 m.nt. Vermeulen, *JV* 2002/467 m.nt. Koers, *NAV* 2002/291 m.nt. Kok and Reneman, *AB* 2002, 424 m.nt. Vermeulen. In this judgment, the Court of Appeals of Den Haag ruled that the prohibition of *refoulement* under Article 33 of the Refugee Convention implies that a national asylum procedure cannot be arranged in such a way that an asylum seeker does not have an adequate possibility of being able to show that he is a refugee in the sense of the Refugee Convention. The Court of Appeals of Den Haag ruled that the AC-procedure does not violate Article 33 of the Refugee Convention because only cases that can be dealt with carefully within 48 procedural hours can be dealt with under the AC-procedure. As noted in paragraph 3.5.1, pp. 68-69, this reasoning is not persuasive.

<sup>323</sup> In *Al-Adsani v. the United Kingdom* (ECHR 21 November 2001, Reports of Judgments and Decisions 2001-XI), the Court seemed to limit the scope of the positive obligations under Article 3. However, the context of the case was totally different from expulsion cases because the applicant in the case claimed that the United Kingdom was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by Kuwaiti authorities. According to the Court, it could not be said that the United Kingdom had a causal connection with the alleged torture. Furthermore, the Court did not depart from its reasoning in *Bahaddar v. the Netherlands* and *Jabari v. Turkey*.

The above mentioned circumstances of the AC-procedure show that, unlike the time limits and formal requirements in *Bahaddar v. the Netherlands*, the time limits in the AC-procedure are so short and applied so inflexibly, automatically and mechanically, that an asylum seeker may well be denied a realistic opportunity to make his case. The short framework of the AC-procedure does not allow enough time for asylum seekers to settle in or to establish trust and confidence in the authorities. Furthermore, while it is very important that asylum seekers submit enough relevant documents during the initial procedure (see paragraph 1.6), the AC-procedure does not provide asylum seekers with sufficient time to collect evidence to make their case since it is hardly possible for them to obtain the necessary evidence from their country of origin within 48 procedural hours. Undocumented asylum seekers, therefore, will often have no reasonable chance of convincing the authorities of their asylum account during the AC-procedure. The obstacles to later statements and evidence however, compel an asylum seeker to submit all relevant facts and circumstances before the letter of intention has been sent (see paragraph 1.7).

Once the minister has decided to deal with an application under the AC-procedure, a decision that is based on the first interview and, hence, with no knowledge of the asylum motives, it is very difficult, for the asylum seeker to prove within the short time frame of the AC-procedure that his case is unsuitable for dealing with under the AC-procedure. Consequently, there is no guarantee that cases that involve a real risk of the asylum seeker being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he would be expelled will be filtered out under the AC-procedure.

Furthermore, the AC-procedure does not guarantee the rigorous scrutiny of asylum applications required by the Court. This should be considered to be at variance with the protection of the fundamental value embodied in Article 3 of the Convention.

Because of the short time limit for lodging an appeal and for determining the grounds for appeal, the obstacles to later statements and evidence and the marginal judicial review, the appeal procedure cannot always rectify these shortcomings of the AC-procedure<sup>324</sup>.

Thus, due to short time limits, which are, furthermore, inflexibly, automatically and mechanically applied, and the lack of rigorous scrutiny, the AC-procedure may deny asylum seekers the effective enjoyment of the right embodied in Article 3 of the Convention. Furthermore, since these tight and inflexible time limits also apply when showing that a particular case should not be dealt with within 48 procedural hours, there is no guarantee that cases with a real risk of the applicant being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he would be returned will be filtered out under the AC-procedure. This means that the AC-procedure is incapable of distinguishing between cases that can be carefully dealt with within 48 procedural hours and those that cannot. This does not mean that every expulsion of an asylum seeker whose application has been rejected under the AC-procedure will violate

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<sup>324</sup> See further chapter four.

(the negative obligation under) Article 3. However, because the AC-procedure implies the structural risk that applications are being rejected in violation of article 3 of the Convention, this procedure as such, taking into account the shortcomings of the appeal procedure<sup>325</sup> and the difficulties with lodging a second application<sup>326</sup>, should be considered to be in violation with the positive obligations which arise from article 3 of the Convention.

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<sup>325</sup> See paragraphs 1.7-1.8 and chapter 4.

<sup>326</sup> See paragraph 1.7.

## 4. Article 13 of the European Convention on Human Rights

### 4.1 Introduction

Article 13 of the Convention states:

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

This chapter asks whether the appeal procedure available for an asylum seeker whose application has been rejected under the AC-procedure can be considered to be an ‘effective remedy’ within the meaning of Article 13 of the Convention. It has already been argued that the obstacles to later statements and evidence and the mechanism of marginal judicial review in the Dutch appeal procedure violates Article 13 of the Convention<sup>327</sup>. This chapter does not extensively discuss these features, but rather it looks at specific aspects of the appeal procedure for applications that have been rejected under the AC-procedure in light of Article 13 of the Convention. Firstly, it examines some general aspects of Article 13 of the Convention. The relationship between Articles 13 and 35 of the Convention is described in the third paragraph of this chapter. Subsequently, this chapter explores some specific requirements of Article 13 of the Convention. The last paragraph of this chapter arrives at a conclusion on the matter.

### 4.2 General aspects

Article 13 of the Convention requires an effective remedy for everyone whose rights under the Convention have been violated. The express wording seems to require that a person establishes an actual breach of a substantive provision of the Convention. However, in *Klass and others v. Germany*, the Court found that Article 13 should be interpreted as requiring an effective remedy before a national authority for those who *claim* that their rights and freedoms under the Convention have been violated<sup>328</sup>.

This claim should be an ‘arguable one’<sup>329</sup>. In *Boyle and Rice v. the United Kingdom*, the Court said:

*However, Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention*<sup>330</sup>.

<sup>327</sup> Van Rooij 2004 and Essakkili 2005 respectively.

<sup>328</sup> ECHR 6 September 1978, Series A no. 28, § 64.

<sup>329</sup> ECHR 25 March 1983, Series A no. 61 (*Silver and others v. the United Kingdom*), § 113.

<sup>330</sup> ECHR 27 April 1988, Series A no. 131, § 52.

The Court, however, has not given a general definition of the notion of arguability. According to it, it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of a violation forming the basis of a complaint under Article 13 is arguable and, if so, whether the requirements of Article 13 are met in relation thereto<sup>331</sup>.

If an individual presents an arguable claim that he is a victim of a violation of the rights set forth in the Convention, then he should have an *effective* remedy before a national authority. This means that the authority should have the power both to decide the claim and, if appropriate, to give redress<sup>332</sup>. Article 13 does not, however, go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion. The ‘authority’ does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it can be considered to be effective<sup>333</sup>. The effectiveness of a remedy for purposes of Article 13 does not depend on the certainty of a favourable outcome<sup>334</sup>. Nevertheless, the remedy required by Article 13 must be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities<sup>335</sup>.

Accordingly, the Court’s jurisprudence reveals some of the criteria to be considered when determining whether or not a remedy is effective:

- The remedy must be of actual use. It is up to the respondent government to identify the remedies available to the applicant and to show at least a prima-facie case for their effectiveness<sup>336</sup>.
- The remedy must be accessible<sup>337</sup>.
- The authority must have the power to receive the complaint and to investigate and decide upon it<sup>338</sup>.
- The authority must have access to all relevant information<sup>339</sup>.
- The authority must be sufficiently independent of the body being challenged<sup>340</sup>.

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<sup>331</sup> ECHR 27 April 1988, Series A no. 131 (*Boyle and Rice v. the United Kingdom*), § 55.

<sup>332</sup> ECHR 6 September 1978, Series A no. 28 (*Klass and others v. Germany*), § 64; ECHR 25 March 1983, Series A no. 61 (*Silver and others v. the United Kingdom*), § 113.

<sup>333</sup> Among others, see ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Conka v. Belgium*), § 75.

<sup>334</sup> ECHR 30 October 1991, Series A no. 215 (*Vilvarajah and others v. the United Kingdom*), § 122.

<sup>335</sup> ECHR 18 December 1996, Reports 1996-VI (*Aksoy v. Turkey*), § 95.

<sup>336</sup> Ovey and White 2002, p. 390. Cf. ECHR 19 December 1994, Series A no. 302 (*Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*), § 53.

<sup>337</sup> Barkhuysen 1998, p. 122.

<sup>338</sup> ECHR 26 March 1987, Series A no. 116 (*Leander v. Sweden*), § 81.

<sup>339</sup> *Idem*. Cf. Barkhuysen 1998, p. 145.

<sup>340</sup> ECHR 25 March 1983, Series A no. 61 (*Silver and others v. the United Kingdom*), § 116; ECHR 26 March 1987, Series A no. 116 (*Leander v. Sweden*), § 81.

### 4.3 Relationship between Articles 13 and 35 of the European Convention on Human Rights

Article 35, paragraph 1 of the Convention reads:

*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*

The leading case on the exhaustion of domestic remedies principle is *Akdivar and others v. Turkey*<sup>341</sup>. In it, the Court justified this rule by stating that:

*The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention (now article 35, LS) obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system.*

(...)

*In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights*<sup>342</sup>.

Article 13 of the Convention is of importance with regard to Article 35 of the Convention. In *Akdivar and others v. Turkey*, the Court noted with regard to Article 35 of the Convention:

*The rule is based on the assumption, reflected in Article 13 of the Convention - with which it has close affinity -, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law.*

(...)

*Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness*<sup>343</sup>.

An applicant is not required to exhaust remedies that would be inadequate or ineffective. In addition, according to the 'generally recognised rules of international law,' special circumstances may mean that the applicant would not have to exhaust available domestic remedies<sup>344</sup>.

<sup>341</sup> ECHR 16 September 1996, Reports 1996-IV.

<sup>342</sup> § 65.

<sup>343</sup> ECHR 16 September 1996, Reports 1996-IV, § 65-66.

<sup>344</sup> ECHR 16 September 1996, Reports 1996-IV (*Akdivar and others v. Turkey*), § 66-67.

In determining whether or not domestic remedies can be considered to be exhausted, the effectiveness of remedies is therefore an important question. Because of this, some of the Court's jurisprudence about Article 35 of the Convention is also discussed in this chapter.

#### 4.4 Specific requirements

This paragraph explores some specific requirements of Article 13 of the Convention on the basis of relevant case law from the Court. First, it examines the requirement of compliance with the time limits that domestic law lays down. Thereupon, it considers the scope of the investigation that is required by Article 13. Subsequently, it discusses the requirement of providing a remedy with suspensive effect. Lastly, it explores whether Article 13 requires access to legal aid.

##### 4.4.1 Time limits

This paragraph examines the requirement of compliance with the formalities and time limits laid down by domestic law in light of Article 13 of the Convention.

With regard to the obligation to exhaust domestic remedies, the Court stated in *Akdivar and others v. Turkey*:

*The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism (...). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (...). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants*<sup>345</sup>.

In *Bahaddar v. the Netherlands* (see paragraph 3.4.1), the Court held:

*The Court notes at the outset that, although it has (...) held the prohibition of torture or inhuman or degrading treatment contained in Article 3 of the Convention to be absolute in expulsion cases as in other cases (...), applicants invoking that Article are not for that reason dispensed as a matter of course from exhausting domestic remedies that are available and effective. It would not only run counter to the subsidiary character of the Convention but also undermine the very purpose of the rule set out in Article 26 of the Convention if the Contracting States were to be denied the opportunity to put matters right through their own legal system. It follows that, even*

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<sup>345</sup> ECHR 16 September 1996, Reports 1996-IV, § 69.

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

*Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim<sup>346</sup>.*

This means that the obligation to comply with the formal requirements and time limits laid down by domestic law must be afforded some degree of flexibility and not be subjected to an excessive degree of formalism. The obligation is neither absolute nor capable of being applied automatically. There may be special circumstances that would mean that the asylum seeker would not have to comply with this requirement. Therefore, it is essential to consider the particular circumstances of each case as well as the general legal and political context. Moreover, time limits should not be so short, or applied so inflexibly, as to deny an applicant a realistic opportunity to prove a claim. The Court has noted this with regard to the question of the exhaustion of domestic remedies. There is no obligation to resort to remedies that cannot be considered to be effective (see paragraph 4.3). This means that an appeal procedure that does not meet the previously mentioned conditions cannot be regarded as ‘effective’ in the sense of Article 13 of the Convention<sup>347</sup>.

#### 4.4.2 *The scope of the investigation*

This paragraph discusses the required scope of the investigation in view of Article 13 of the Convention in cases in which an individual presents an arguable claim that Article 3 of the Convention has been violated.

With regard to an allegation of torture by state agents, Article 13 of the Convention requires an effective and thorough investigation<sup>348</sup>. In *Aksoy v. Turkey*, the Court noted:

*The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture (...) and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.*

<sup>346</sup> ECHR 19 February 1998, Reports 1998-I, § 45. For the Court’s reasoning as to why there had not been special circumstances in the case, see paragraph 3.4.1.

<sup>347</sup> Cf. *Spijkerboer and Vermeulen* 2005, pp. 311-312.

<sup>348</sup> ECHR 18 December 1996, Reports 1996-VI (*Aksoy v. Turkey*), § 98; ECHR 25 September 1997, Reports 1997-VI (*Aydin v. Turkey*), § 103; ECHR 28 October 1998, Reports 1998-VIII (*Assenov and others v. Bulgaria*), § 117.

*Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure*<sup>349</sup>.

An effective and thorough investigation is also required in cases in which an individual has an arguable claim that his home and possessions have been deliberately destroyed by state agents in violation of Article 3 of the Convention. In *Yoyler v. Turkey*, the ECtHR stated:

*Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (...)*<sup>350</sup>.

The right to an effective and thorough investigation under Article 13 has also been applied to certain claims falling within the scope of Articles 2<sup>351</sup>, 5<sup>352</sup> and 8<sup>353</sup> of the Convention.

In expulsion cases, the Court uses different language. In *Chahal v. the United Kingdom*, the United Kingdom wanted to expel Chahal to India, arguing that he had been involved in terrorist activities and that he posed a risk to British national security. In this case, neither the advisory panel nor the courts could review the Home Secretary’s decision to deport Chahal with reference solely to the question of risk, leaving aside national security considerations. The Court held:

*The requirement of a remedy which is “as effective as can be” is not appropriate in respect of a complaint that a person’s deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial.*

*In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3*<sup>354</sup>.

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<sup>349</sup> ECHR 18 December 1996, Reports 1996-VI, § 98. See also ECHR 25 September 1997, Reports 1997-VI (*Aydin v. Turkey*), § 103.

<sup>350</sup> ECHR 24 July 2003, appl. no. 26973/95, § 88.

<sup>351</sup> ECHR 3 April 2001, Reports of Judgments and Decisions 2001-III (*Keenan v. the United Kingdom*), § 122.

<sup>352</sup> ECHR 25 May 1998, Reports 1998-III (*Kurt v. Turkey*), § 140.

<sup>353</sup> ECHR 28 November 1997, Reports 1997-VIII (*Mentes and others v. Turkey*), § 89.

<sup>354</sup> ECHR 15 November 1996, Reports 1996-V, § 150-151.

In *Jabari v. Turkey*, the Court went a step further, stating that:

*In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned*<sup>355</sup>.

Jabari, an Iranian national who had committed adultery in Iran, had applied for asylum in Turkey on the grounds that she feared ill-treatment and death by stoning if expelled from Turkey on account of her 'crime'. Turkish authorities had rejected her application because it had not been submitted on time. Under section 4 of the Asylum Regulation 1994, Jabari should have lodged her application for asylum within five days of her arrival in Turkey. The Court said that there had been a violation of Article 13 of the Convention because Turkish authorities had not assessed Jabari's claim that she would be at risk if she were deported to Iran. Admittedly, Jabari had been able to challenge the legality of her deportation in judicial proceedings. This, however, did not entitle her to suspend the implementation of the order of deportation or to force an examination on the merits.

To conclude, in cases where an asylum seeker has an arguable claim that his expulsion would violate Article 3 of the Convention, Article 13 requires independent and rigorous scrutiny of this claim. A deportation decision against someone who asserts a violation of Article 3 of the Convention should allow for review with reference solely to risk, leaving aside other aspects, such as national security considerations.

#### 4.4.3 *Suspensive effect*

This paragraph explores whether the Court requires that the remedy provided must have suspensive effect.

In *Jabari v. Turkey* (see above), the Court ruled that Article 13 of the Convention requires that it is possible to suspend the implementation of the measure being challenged<sup>356</sup>.

In *Čonka v. Belgium*, the Court held:

*The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (...). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are com*

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<sup>355</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII, § 50.

<sup>356</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII, § 50.

*patible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (...)*<sup>357</sup>.

This was confirmed by the Grand Chamber of the Court in *Mamatkulov and Askarov v. Turkey*. The Court stated:

*It (the Court, LS) has previously stressed the importance of having remedies with suspensive effect when ruling on the obligations of the State with regard to the right to an effective remedy in deportation or extradition proceedings. The notion of an effective remedy under Article 13 requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention (Čonka v. Belgium, no. 51564/99, § 79, ECHR 2002-I)*<sup>358</sup>.

In *Čonka v. Belgium*<sup>359</sup>, the Čonka family had been expelled from Belgium on 5 October 1999, on the basis of orders to leave the territory dated 29 September 1999. The Čonkas argued that there had not been a remedy available to them to contest the alleged violations of Article 3 of the Convention and Article 4 of Protocol No. 4 that complied with Article 13 of the Convention. Belgium asserted that the Čonkas had not used the remedy available in the *Conseil d'Etat*, particularly that they had not applied for a stay of execution under the procedure for extremely urgent cases. The Čonkas, however, argued that this remedy was not sufficiently effective because it did not have automatic suspensive effect. They acknowledged that the practice was that a judgment of the *Conseil d'Etat* would be delivered before execution of the deportation order, but they argued that the law did not guarantee this and that the administrative authority was free to execute a deportation order without waiting for the judgment.

Under the Belgian system, an appeal before the *Conseil d'Etat* with regard to the merits of a case did not have suspensive effect, nor did an application for a stay of execution under the ordinary procedure. An application for a stay of execution under the procedure for extremely urgent cases did not have suspensive effect either, although a practice had developed, on the basis of an internal direction of the *Conseil d'Etat*, according to which the registrar, at the request of the judge, would contact the Aliens Office to learn the date scheduled for deportation and make arrangements so that the judgment would be delivered before that time.

The Court stated:

*81. An application for a stay of execution under the extremely urgent procedure is not suspensive either. The Government stressed, however, that the president of the division may at any time*

<sup>357</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I, § 79.

<sup>358</sup> ECHR 4 February 2005, appl. no. 46827/99 and 46951/99, § 124.

<sup>359</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I.

– even on bank holidays and on a few hours' notice, as frequently occurred in deportation cases – summon the parties to attend so that the application can be considered and, if appropriate, an order made for a stay of the deportation order before its execution. It will be noted that the authorities are not legally bound to await the Conseil d'Etat's decision before executing a deportation order. It is for that reason that the Conseil d'Etat has, for example, issued a practice direction directing that on an application for a stay under the extremely urgent procedure the registrar shall, at the request of the judge, contact the Aliens Office to establish the date scheduled for the repatriation and to make arrangements regarding the procedure to be followed as a consequence. Two remarks need to be made about that system.

82. Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.

83. Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (see, *mutatis mutandis*, *Iatridis v. Greece [GC]*, no. 31107/96, § 58, ECHR 1999-II).

However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace.

Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied.

One can conclude from this that cases that present an arguable claim that Article 3 of the Convention has been violated should be afforded a remedy with suspensive effect. If an appeal

on the merits does not have suspensive effect, then the application for a stay of execution should. The rule of law requires that the authorities are de jure obliged to defer execution of a deportation order while an application for a stay of execution is pending; a mere practice not to expel the asylum seeker pending the proceedings on the basis of internal directions, does not suffice. As the Court said, the remedy required by Article 13 must be effective in practice *as well as in law*<sup>360</sup>.

#### 4.4.4 *Legal aid*

Does the notion of an effective remedy under Article 13 of the Convention require access to legal aid? This paragraph tries to answer this question.

In cases concerning determination of civil rights and obligations under Article 6, paragraph 1 of the Convention, the Court has ruled that a state must provide legal aid when this would be indispensable for an effective access to court, either because legal representation is compulsory or because of the complexity of the procedures or the case<sup>361</sup>. Although a right to legal assistance by counsel of one's own choosing and, if necessary, the provision of this without charge is not found in Article 6, paragraph 1 of the Convention but, rather, in paragraph 3 sub c of this article, the Court has read such a right into the first paragraph of Article 6<sup>362</sup>.

However, in *Maaouia v. France*, the Court ruled that decisions regarding the entry, stay and deportation of aliens do not involve the determination of an individual's civil rights or obligations or a criminal charge against him within the meaning of Article 6 of the Convention<sup>363</sup>. Therefore, Article 6 does not apply in expulsion cases<sup>364</sup>. The Court has stated in a number of cases, furthermore, that 'the requirements of article 13 are less strict than those of article 6 of the Convention'<sup>365</sup>.

Nevertheless, Boeles writes in his dissertation on fair immigration proceedings in Europe<sup>366</sup> that the notions 'fair hearing' and 'effective remedy' express one and the same principle of effective remedies by means of legal proceedings. Outside the context of civil and criminal interests, Article 13 of the Convention should be interpreted as far as possible so that the results lead to an equally effective legal remedy as required by Article 6 of the Convention since it cannot be maintained that the interests protected by Article 13 of the Convention (which concerns remedies against violations of fundamental rights and freedoms) are less important than those for

<sup>360</sup> ECHR 18 December 1996, Reports 1996-VI (*Aksoy v. Turkey*), § 95; ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Conka v. Belgium*), § 75.

<sup>361</sup> ECHR 9 October 1979, Series A no. 32 (*Airey v. Ireland*), § 26.

<sup>362</sup> See paragraph 3.3.

<sup>363</sup> ECHR 5 October 2000, Reports of Judgments and Decisions 2000-X, § 40.

<sup>364</sup> The European Commission on Human Rights has also decided that Article 6 does not apply to matters of asylum, expulsion and deportation. For a critical comment on this approach, see Reid 1998, p. 282.

<sup>365</sup> Among others, see ECHR 18 June 1971, Series A no. 12 (*De Wilde, Ooms and Versyp v. Belgium*), § 95; ECHR 9 October 1979, Series A no. 32 (*Airey v. Ireland*), § 35.

<sup>366</sup> Boeles 1997.

which article 6 was drafted<sup>367</sup>. Therefore, norms related to a ‘fair hearing’ under Article 6 of the Convention must also be considered to be norms related to the effectiveness of a remedy under Article 13 of the Convention<sup>368</sup> because one cannot call legal remedies ‘effective’ if the fundamental principles which underlie Article 6 of the Convention, such as judicial impartiality and independence, the adversarial character of the proceedings and equality of arms, are not met<sup>369</sup>. Therefore, Boeles argues that Article 13 of the Convention may also require legal assistance<sup>370</sup>.

This requirement can also be found in some judgments of the Court. In the context of the question whether national legal remedies have been exhausted, the Court said in *Pham Hoang v. France*:

*(...) as in the circumstances of the case the refusal of an official assignment of counsel rendered the remedy in question ineffective (...)*<sup>371</sup>.

In *Chahal v. the United Kingdom* (see above), the Court stated:

*Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, inter alia, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (...). In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13*<sup>372</sup>.

In *Keenan v. the United Kingdom*, the mother of Mark Keenan complained of a violation of Article 13 of the Convention because her son had been found hanged in his cell a day after the authorities imposed further imprisonment and segregation constraints on him. The Court held:

*Concerning Mark Keenan himself, the Court observes that the punishment of further imprisonment and segregation was imposed on him on 14 May 1993 and that he committed suicide on the evening of 15 May 1993. The Commission found that the respondent State could not be liable for failing to provide a remedy which would have been available to him within a period of twenty-four hours. It is, however, the case that no remedy at all was available to Mark Keenan which would have offered him the prospect of challenging the punishment imposed within the seven-day segregation period or even within the period of twenty-eight days’ additional imprisonment. Even assuming judicial review would have provided a means of challenging the governor’s adju-*

<sup>367</sup> Boeles 1997, pp. 225-226.

<sup>368</sup> Boeles 1997, p. 318.

<sup>369</sup> Boeles 1997, p. 274 and Boeles in his case comment to ECHR 5 October 2000 (*Maaouia v. France*), JV 2000/264.

<sup>370</sup> Boeles 1997, p. 306. For another opinion, see Barkhuysen 1998, p. 145.

<sup>371</sup> ECHR 25 September 1992, Series A no. 243, § 31.

<sup>372</sup> ECHR 15 November 1996, Reports 1996-V, § 154.

*dication, it would not have been possible for Mark Keenan to obtain legal aid, legal representation and lodge an application within such a short time*<sup>373</sup>.

These judgments show that, according to the Court, Article 13 of the Convention involves the possibility of obtaining legal aid and representation. This idea fits in well with Boeles' argument that the fundamental principles that underlie Article 6 of the Convention, such as the adversarial character of the proceedings and equality of arms, also apply to Article 13 of the Convention. The principle of effectiveness (see paragraph 3.3) requires that the possibility of obtaining legal aid is both practical and effective and not simply theoretical or illusory<sup>374</sup>. However, it should be noted that legal aid and representation will only be required if it is compulsory or if the complexity of the procedure and the case is such that without legal aid the remedy could not be considered to be effective<sup>375</sup>.

#### 4.5 Violation of Article 13 of the European Convention on Human Rights?

This paragraph tries to answer the question whether the appeal procedure available to an asylum seeker whose application has been rejected under the AC-procedure can be considered to be an effective remedy in the sense of Article 13 of the Convention. To do this, it compares the appeal procedure with the specific requirements of Article 13 as described in paragraph 4.4.

In *Said v. the Netherlands*, the asylum application of Said had been rejected under the AC-procedure. The Court held that Said's expulsion to Eritrea would breach Article 3 of the Convention<sup>376</sup>. The complaint under Article 13 of the Convention had, however, been ruled to be manifestly ill-founded<sup>377</sup>.

The Court said in its decision on admissibility that it was prevented from examining the complaint under Article 6 because that provision did not apply to proceedings related to the entry, stay and deportation of aliens. As to Article 13 of the Convention, the Court was of the view that this provision does not recognize several levels of jurisdiction. The Court further stated that 'remedy' under Article 13 did not require success; rather, it meant access to an authority competent to examine on the merits. The Court held:

*Having regard to the fact that the applicant had access to, and indeed also availed himself of, an effective remedy within the meaning of Article 13 of the Convention in respect of the alleged violations of Articles 2 and 3 of the Convention, namely the right of appeal to the Regional Court of The Hague against the decision of the Deputy Minister, the Court finds that no issues arise under Article 13 of the Convention.*

<sup>373</sup> ECHR 3 April 2001, Reports of Judgments and Decisions 2001-III, § 126.

<sup>374</sup> Cf. ECHR 13 May 1980, Series A no. 27 (*Artico v. Italy*), § 33.

<sup>375</sup> Cf. ECHR 9 October 1979, Series A no. 32 (*Airey v. Ireland*).

<sup>376</sup> ECHR 5 July 2005, appl.no. 2345/02.

<sup>377</sup> ECHR 17 September 2002, appl.no. 2345/02.

From this, one could conclude that, according to the Court, the available appeal procedure for an asylum seeker whose application has been rejected under the AC-procedure does not violate Article 13 of the Convention. At the time of the decision, however, the Council of State's jurisprudence related to obstacles to later statements and evidence and marginal judicial review was relatively undeveloped<sup>378</sup>. Furthermore, the complaint in *Said v. the Netherlands* had not been formulated very precisely<sup>379</sup>. The complainant had stated that Article 6 of the Convention requires that the authorities observe a number of procedural rules when examining a claim that alleges that expulsion would violate Article 3 of the Convention. Concerning Article 13 of the ECHR, the complainant had said that this article requires that procedural rules be applied in at least two instances. Clearly, this complaint is without foundation<sup>380</sup>. The complainant, and, thus, the Court, did not pay attention to the special requirements of Article 13 of the Convention as described above. Therefore, it is still relevant to examine the available appeal procedure for an asylum seeker whose application has been rejected under the AC-procedure in light of Article 13 of the Convention.

#### 4.5.1. Time limits

The requirement of compliance with the formal requirements and time limits that the domestic law lays down, must be applied with some degree of flexibility and without excessive formalism. It is neither an absolute rule nor capable of automatic application. In *Bahaddar v. the Netherlands*, the Court stated that time limits should not be so short, or applied so inflexibly, that they deny an applicant for refugee status a realistic opportunity to prove his claim.

Under the AC-procedure, strict time limits apply for the asylum seeker and legal aid for preparing the detailed interview, discussing the reports of the interviews, submitting corrections and additional information to these reports and submitting a view with regard to the letter of intention. As chapter 3 argues, the time limits under the AC-procedure are so short and applied so inflexibly, automatically and mechanically that asylum seekers may well be denied a realistic opportunity to prove their claim. This is especially the case with regard to traumatised, mentally disturbed and minor applicants. Furthermore, short time limits, as well as their automatic and mechanical application by the authorities, make it hardly possible for an asylum seeker to demonstrate that his case should not be processed under the AC-procedure and that more investigation is necessary.

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<sup>378</sup> Spijkerboer and Vermeulen 2005, p. 228.

<sup>379</sup> Cf. M. Reneman in her case comment to ECHR 17 September 2002 (*Said v. the Netherlands*), NAV 2002/283.

<sup>380</sup> It is without foundation because the Court had already found that Article 6 of the Convention does not apply in procedures about the entry, stay and deportation of aliens (ECHR 5 October 2000, Reports of Judgments and Decisions 2000-X (*Maaouia v. France*)) and since it had already ruled that Article 13 of the Convention does not require access to court in more than one instance (on this, among others, see ECHR 14 May 2002, appl. no. 67199/01 (*Csepyova v. Slovakia*)); European Commission on Human Rights 13 October 1986, Decisions and Reports 49, p. 67 (*Zeissl v. Austria*)).

Because of this, it is crucial that there is a remedy that can repair these shortcomings of the AC-procedure. However, short time limits also apply for lodging an appeal. An appeal against a rejection of an asylum application under the AC-procedure must be lodged within one week. This time limit is applied inflexibly and mechanically, exceptions to this rule being nearly impossible<sup>381</sup> and even if the 48 hour period has been exceeded and the application has nevertheless been rejected at the application centre, an appeal must be lodged within one week<sup>382</sup>. Furthermore, in fact, the appeal must be lodged within 24 hours of the rejection of an asylum application to prevent the applicant's immediate expulsion from the Netherlands (see paragraph 2.4.2). Judges almost never accept an exceeding of this time limit either<sup>383</sup>.

In general, the hearing takes place within ten days of the appeal being lodged. It is common for immediate judgment on the merits to be given, meaning that there will again be little time for the applicant to prove his claim. This short time period will not provide the asylum seeker with the possibility of settling in, the ability to establish trust and confidence in the authorities and in his legal counsellor or the chance to prepare for the hearing and collect enough evidence. Besides, due to the obstacles to later statements and evidence, the evidence should actually already have been submitted before the issuance of the letter of intention (see paragraph 1.7).

This means that the appeal procedure cannot always repair the shortcomings of the AC-procedure, the result being that asylum seekers may be denied an effective opportunity to prove that their expulsion would violate Article 3 of the Convention.

#### 4.5.2 *The scope of the investigation*

Because the damage caused by torture or ill-treatment is irreversible and because Article 3 of the Convention embodies one of the most fundamental values of a democratic society, the Court has stated that Article 13 requires independent and rigorous scrutiny of applications that claim that expulsion would violate Article 3 of the Convention.

Under the AC-procedure, investigation has to be completed within 48 procedural hours. Given that there are not substantive criteria for dealing with cases under the AC-procedure and given that the minister seeks to maximize the percentage of applications that are decided under the AC-procedure<sup>384</sup>, the reality is that also complicated applications, which require more investigation, are being dealt with under the AC-procedure<sup>385</sup>. Even if it is not possible to finish an investigation within 48 procedural hours, an asylum seeker will not always get the procedure, and, thus, the investigation, to which he is entitled (see paragraph 2.3.5). A thorough investiga-

<sup>381</sup> Judges will almost never accept an exception to the time limit for lodging an appeal, see Ten Berge and Widdershoven 2001, p. 99.

<sup>382</sup> ABRvS 5 March 2002, *JV* 2002/143, AB 2002, 197 m.nt. Sewandono.

<sup>383</sup> Ten Berge and Widdershoven 2001, p. 99.

<sup>384</sup> *Kamerstukken II* 2004-05, 29800, chapter VI, no. 2, p. 128.

<sup>385</sup> For examples, see paragraph 2.2.3.

tion into the facts, accompanied by adequate reasoning, therefore, cannot be guaranteed within the short time frame under the AC-procedure.

Thus, it is crucial that there is a remedy for an asylum seeker whose application has been rejected under the AC-procedure and that this remedy provides independent and rigorous scrutiny if the claim alleges that deportation would violate Article 3 of the Convention.

In most cases, however, the assessment of a request for an interim measure will take place within ten days after the rejection of the application. Due to this short time period, in which the minister must submit the documents relating to the case, the asylum seeker has to submit his arguments and the minister and the asylum seeker must exchange documents, there is an increased risk of an incomplete knowledge of facts and an incorrect judgment in procedures about an interim measure<sup>386</sup>. Moreover, within the framework of an interim measure, there is usually not much time for the president to carefully investigate, since the investigation will usually only take place during the hearing<sup>387</sup>.

Furthermore, a procedure about an interim measure is a procedure with less safeguards than a normal administrative procedure<sup>388</sup>. Article 8:42 of the Awb states that in the procedure on the merits, the administrative authority has to lodge a defence within four weeks of the date on which the notice of appeal was sent to the authorities. This article does not, however, apply with regard to an interim measure. Accordingly, in most procedures on interim measures, the minister does not lodge a defence before the hearing. Article 8:58 of the Awb states that parties may submit additional documents for up to ten days before the hearing. This article does not apply with regard to interim measures either. In procedures on interim measures, parties may submit additional documents until one day before the hearing<sup>389</sup>. Article 8:60, paragraph 4 of the Awb states that parties may bring with them witnesses and experts, provided that the District Court and the other parties are informed of this no later than a week before the date of the hearing. In procedures on interim measures, witnesses and experts may be brought in without making the communication referred to in article 8:60, paragraph 4<sup>390</sup>. According to article 8:83, paragraph 1 Awb, the president may set a time limit for the administrative authority to send the documents relating to the case to the president. In urgent cases, however, it can be agreed that the administrative authority will only submit these documents at the hearing<sup>391</sup>. Thus, during the assessment of an interim measure, parties can surprise one another with new arguments, documents, witnesses and experts. The asylum seeker does not usually hear the minister's arguments before the hearing. As a consequence, the asylum seeker has less chance than in a normal procedure to prepare himself for the hearing and to prove his claim.

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<sup>386</sup> Cf. Langbroek 1996, p. 138.

<sup>387</sup> Langbroek 1996, p. 58. Presidents have not been granted the power to carry out preliminary inquiries (see Langbroek 1996, p. 62).

<sup>388</sup> Cf. Spijkerboer and Vermeulen 2005, p. 228.

<sup>389</sup> Article 8:83, paragraph 1 of the Awb.

<sup>390</sup> Article 8:83, paragraph 1 of the Awb.

<sup>391</sup> Langbroek 1996, p. 59.

Taken together, all of this means that in a procedure on an interim measure, there is no guarantee that rigorous scrutiny will be applied. These procedures are, therefore, in fact only suitable for a provisional judgment. The power to give a judgment on the merits during the assessment of an interim measure should therefore be used only sparingly<sup>392</sup>.

It can be deduced from the Court's jurisprudence that expulsion pending appeal procedure can only be allowed if it is evident that deportation would not violate Article 3 of the Convention<sup>393</sup>. The Court has ruled that, given the irreversible nature of the harm that *might occur if the risk of torture or ill-treatment alleged materialised*, the notion of an effective remedy under Article 13 requires the suspension of an order to deport<sup>394</sup>. Additionally, the Court has considered that the notion of an effective remedy under Article 13 requires a remedy that is capable of preventing the execution of measures that would violate the Convention and whose effects are *potentially irreversible*<sup>395</sup>. In *Čonka v. Belgium*, the Court stated that a remedy could not be considered to be sufficiently effective under Article 13 in a case in which a stay of execution had been refused and in which it subsequently transpired that the Court's ruling on the merits had been quashed for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination<sup>396</sup>. Thus, it can be assumed that in the Court's opinion, an asylum seeker can only be expelled pending the appeal, if further proceedings are manifestly unfounded<sup>397</sup>. Presidents of the courts should, therefore, only refuse to grant an interim measure if it is beyond reasonable doubt that the expulsion does not violate Article 3 of the Convention. However, when deciding whether or not a request for an interim measure should be allowed, the presidents of the courts actually apply in AC-cases the criteria for deciding on the merits<sup>398</sup>. Instead of assessing whether, using a beyond a reasonable doubt standard, deportation would not violate Article 3 of the Convention, they actually assess whether or not it can be said that the decision to reject the application under the AC-procedure has been taken in a careful way within 48 procedural hours, usually giving an immediate judgment on the merits<sup>399</sup>.

This means that cases that are rejected under the AC-procedure are usually assessed on the merits in procedures about interim measures, while these procedures have increased risks of incomplete knowledge of the facts and incorrect judgments and have fewer safeguards than normal procedures. The appeal framework under the AC-procedure, therefore, does not guarantee that rigorous scrutiny will be applied to an arguable claim that there is a real risk that an asylum seeker will be subjected to ill-treatment in the country to which he would be deported.

<sup>392</sup> Langbroek 1996, pp. 138-139.

<sup>393</sup> Spijkerboer and Vermeulen 2005, p. 255.

<sup>394</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII (*Jabari v. Turkey*), § 50.

<sup>395</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Čonka v. Belgium*), § 79; ECHR 4 February 2005, appl. no. 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*), § 124.

<sup>396</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I, § 82.

<sup>397</sup> Spijkerboer and Vermeulen 2005, p. 255.

<sup>398</sup> Spijkerboer and Vermeulen 2005, p. 228.

<sup>399</sup> See, for example, President of the District Court of Haarlem 23 August 2001, AWB 01/39541 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)); ABRvS 27 August 2001, *RV* 2001, 19 m.nt. Terlouw, *NAV* 2001/317-kort; President of the District Court of Groningen 21 February 2003, *JV* 2003/234; President of the District Court of Haarlem 22 November 2004, AWB 04/48023 (unpublished, available at: [www.vluchtweb.nl](http://www.vluchtweb.nl)).

Furthermore, the marginal judicial review in asylum cases and obstacles to later statements and evidence also prevents rigorous scrutiny in the appeal procedure (see paragraphs 1.7 and 1.8).

#### 4.5.3 *Suspensive effect*

According to the Court, an effective remedy under Article 13 of the Convention requires a remedy that is capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for the authorities to execute such measures until an appeal has examined the question whether or not deportation would comply with the Convention<sup>400</sup>.

In *Čonka v. Belgium*<sup>401</sup>, the Court found that Belgium's procedure for extremely urgent cases violated Article 13 of the Convention. The Court held:

*Even if the risk of error is in practice negligible (...) it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (...)*<sup>402</sup>.

The Court found that the following circumstances were relevant in deciding upon Belgium's procedure for extremely urgent cases in light of Article 13 of the Convention:

- the authorities were not required to delay execution of a deportation order while an application under the procedure for extremely urgent cases was pending, not even for a minimally reasonable period to enable the Conseil d'Etat to reach a decision;
- the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions on the proposed expulsions and to act accordingly, but there was no obligation for it to do so;
- it was merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, would contact the authorities regarding granting a temporary leave to remain, and there was no indication of the consequences that would ensue should he fail to do so; and
- the alien had no guarantee that the Conseil d'Etat and the authorities would comply in every case with the accepted practice, that the Conseil d'Etat would deliver its decision, or even hear the case, before the applicant's expulsion or that the authorities would allow a minimally reasonable grace period<sup>403</sup>.

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<sup>400</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Čonka v. Belgium*), § 79; ECHR 4 February 2005, appl. no. 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*), § 124.

<sup>401</sup> ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I.

<sup>402</sup> § 83.

<sup>403</sup> § 83.

The Court stated that *each of these factors*, would render the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied<sup>404</sup>.

An appeal against an application under the AC-procedure does not have suspensive effect<sup>405</sup>. Because of this, an asylum seeker whose application has been rejected under the AC-procedure has to ask the president of a District Court to grant an interim measure. This request does not have suspensive effect either. According to the Aliens Circular 2000, however, an asylum seeker is *in general* allowed to remain in the Netherlands to await the decision of the president of a District Court on his request for an interim measure, provided that the request has been timely submitted<sup>406</sup>. Nevertheless, an asylum seeker is not allowed to remain in the Netherlands if reasons of public order or national security are at issue or if there is a risk that he would not be allowed to return to his country of origin or transit through a third country because of, for example, an expired passport or visa<sup>407</sup>.

Thus, on the basis of policy rules, an asylum seeker is generally allowed to remain in the Netherlands to await the decision on his request for an interim measure. However, the minister is not required to always decide in accordance with the policy rule. Article 4:84 of the Awb states:

*The administrative authority shall act in accordance with the policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule.*

The administrative authority that established the policy rule is an interested party as well. Accordingly, when the consequences of the minister's acting in accordance with the policy rule would be out of proportion to the purposes of the policy rule, then he can deviate from the policy rule<sup>408</sup>. However, deviation must be exceptional and requires special circumstances.

Because the policy rule does not involve an absolute obligation to comply, because of the 'in general' wording of the policy rule and because of the exceptions mentioned in the policy rule, there is no guarantee that the authorities will always allow the applicant to remain in the Netherlands to await the judgment of the president of a District Court on the request for an interim measure. Being bound by a policy rule does not offer enough safeguards<sup>409</sup> because the autho-

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<sup>404</sup> § 83.

<sup>405</sup> Article 82, paragraph 2, sub a of the Aliens Act 2000.

<sup>406</sup> Aliens Circular 2000 C4/17.3.2. According to it, a request can be considered to have been submitted on time if it is submitted within 24 hours of the rejection of an asylum application (Aliens Circular 2000 C3/12.2.10.2).

<sup>407</sup> Aliens Circular 2000 C4/17.3.2. When there exist substantial grounds for fearing a real risk of torture or inhuman or degrading treatment or punishment, then these exceptions would violate Article 3 of the Convention because the prohibition of torture and inhuman or degrading treatment or punishment is absolute. The Court has ruled that the decision to deport someone who claims a violation of Article 3 of the Convention should be reviewed with reference solely to the question of risk, leaving aside other aspects, such as national security considerations (ECHR 15 November 1996, Reports 1996-V (*Chahal v. the United Kingdom*), § 153).

<sup>408</sup> Ten Berge and Michiels 2001, p. 188.

<sup>409</sup> For another opinion, see B.P. Vermeulen in his case comment to ECHR 5 February 2002, (*Čonka v. Belgium*), *JV* 2002/117.

rities are not always required to defer execution of a deportation order while a request for an interim measure is pending. This resembles the procedure for extremely urgent cases at issue in *Čonka v. Belgium*.

Furthermore, the Court held in *Čonka v. Belgium* that it is not possible to exclude the risk that in a system in which a stay of execution had to be applied for and would be granted at the authority's discretion, they may be refused wrongly<sup>410</sup>. If an application has been rejected under the AC-procedure, then the applicant must apply for a stay of execution by requesting an interim measure, and the decision on this will be made at the authority's discretion. Thus, the Dutch system does not exclude the risk of a decision on an interim measure being wrongly made. Furthermore, this risk increases because of the very nature of the criteria applied by the presidents of the courts with regard to assessment of a request for an interim measure. When deciding whether a request for an interim measure should be allowed in AC-cases, the presidents of the courts actually apply the criteria for deciding the case on the merits (see paragraph 4.5.2). This increases the risk that interim measures will be refused wrongly.

With regard to appeal before the Council of State, the Aliens Circular 2000 states that an asylum seeker whose application has been rejected under the AC-procedure cannot remain in the Netherlands to await the judgement of the president of the Council of State on the request for an interim measure<sup>411</sup>. Moreover, the president of the Council of State only grants an interim measure if the asylum seeker has been given notice of the date of his deportation. The Council of State, however, has said that the minister does not have to inform the asylum seeker of the date of expulsion because the power to expel flows from the law related to the rejection of an application (see paragraph 2.4.2). Because of this, the appeal procedure with the Council of State cannot be regarded as an effective remedy under Article 13 of the Convention<sup>412</sup>. However, it cannot be said that this violates Article 13 of the Convention because Article 13 does not require access to a court in more than one instance<sup>413</sup>. However, there can be consequences as relates to Article 35 of the Convention because there is not an obligation to have recourse to remedies that are inadequate or ineffective (see paragraph 4.3)<sup>414</sup>.

All of this means that there is not a guarantee that an asylum seeker whose application has been rejected under the AC-procedure will have access to a remedy that can prevent the execution of measures that contradict the Convention and whose effects would be potentially irreversible.

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<sup>410</sup> § 82.

<sup>411</sup> Aliens Circular 2000 C4/18.2.

<sup>412</sup> Cf. Spijkerboer 2002, p. 126.

<sup>413</sup> Among others, see ECHR 14 May 2002, appl.no. 67199/01 (*Csepyova v. Slovakia*); ECHR 17 September 2002, appl. no. 2345/02 (*Said v. the Netherlands*).

<sup>414</sup> Cf. Spijkerboer 2002, pp. 126-127.

#### 4.5.4 *Legal aid*

As has been argued in paragraph 4.4.4, the notion of an effective remedy under Article 13 of the Convention implies a possibility of obtaining legal aid and legal representation if legal representation is compulsory or if the procedure or the case is so complex that a remedy could not be considered to be effective without legal aid. The possibility of legal aid should be practical and effective, not simply theoretical and illusory.

In the Netherlands, legal aid is not compulsory in asylum cases. However, asylum cases and the asylum procedure should be considered to be so complex that a remedy could not be considered to be effective without legal aid. Asylum seekers do not know Dutch or the rules in the Netherlands, including the grounds for granting asylum. Furthermore, certain aspects of the asylum procedure, such as obstacles to later statements and evidence and rules with regard to undocumented asylum seekers (see paragraph 1.6 and 1.7), make the asylum procedure very complex. For a remedy in asylum cases to be effective, legal aid is, therefore, required.

Due to obstacles to later statements and evidence after the initial decision has been taken, an asylum seeker must submit all relevant facts and evidence during the AC-procedure (see paragraph 1.7). Therefore, it is important that the asylum seeker is not only able to obtain legal aid during the appeal procedure but that he is also able to do so during the AC-procedure, because mistakes made cannot be easily rectified during the appeal procedures. Thus, for the appeal to be effective, it is important to consider whether or not that asylum seeker has access to legal aid during the AC-procedure.

An asylum seeker can obtain legal aid under the AC-procedure. For several reasons, however, legal aid cannot always be considered to be effective.

There are only five procedural hours available for legal aid during the AC-procedure: two after the first interview and three after the detailed interview. During this short time period, the reports of the two interviews must be read and discussed, corrections and additional information to these reports have to be submitted, evidence must be gathered, the letter of intention has to be read and discussed and a view must be submitted. All of this is done by at least two different legal counsellors, as a result of which some of these tasks are done twice. Requests to extend these time limits are almost never granted, and the minister can issue his decision without waiting for the applicant's view.

The asylum seeker cannot meet a legal counsellor before his first interview, even though the first interview plays an important role in the asylum procedure. On the basis of the first interview, it will be decided whether or not to process the application under the AC-procedure, whether another European Union member state is responsible for the application and whether or not the asylum seeker comes from a so-called safe country of origin<sup>415</sup>. Furthermore, the applicant's

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<sup>415</sup> Doornbos 2001, p. 42.

credibility is investigated on the basis of *inter alia* statements made by the asylum seeker during the first interview. Differences between the first interview and the detailed interview are regarded as inconsistencies<sup>416</sup>.

During the AC-procedure, an asylum seeker cannot freely choose a legal counsellor. Asylum seekers at application centres are entirely in the hands of the legal counsellors present at the centre. If a legal counsellor decides not to submit corrections or additional information to the reports of the interviews or a view with regard to the letter of intention, then the asylum seeker has no alternative. Since he cannot ask for another legal counsellor, it cannot be said that he has effective legal aid<sup>417</sup>.

Since legal counsellors are scheduled in such a way that different legal counsellors are present each day, an applicant will meet at least three different legal counsellors during his application. Because of this and due to the short time limits for legal aid, it is difficult for an asylum seeker to build a trusting relationship with a legal counsellor. Consequently, asylum seekers do not always trust legal aid, and therefore, it is not always possible for legal aid to be effective.

Because of this, legal aid at application centres is not always sufficiently effective. Because of obstacles to later statements and evidence and marginal judicial review, this has consequences for the effectiveness of an appeal.

The effective possibility to obtain legal aid and legal representation for lodging an appeal is also limited for asylum seekers whose application has been rejected in the AC-procedure. As noted above, an applicant is entirely in the hands of legal counsellors present at the application centre during the AC-procedure. If the legal counsellors present do not want to lodge an appeal on behalf of the asylum seeker, then the applicant does not have a possibility of being able to lodge an appeal, meaning that he can be immediately expelled from the Netherlands. Furthermore, since most hearings take place within ten days of the rejection of an application, there is not much time for legal aid to submit arguments and additional evidence<sup>418</sup>. Finally, asylum seekers whose applications have been rejected under the AC-procedure do not have a right to reception benefits, and most of them will be deprived of their liberty, as a result of which it becomes difficult for them to keep in contact with legal counsel in order to prepare for appeal.

#### 4.5.5 Conclusion

Under the AC-procedure, a claim based on Article 3 of the Convention can be rejected within 48 procedural hours. This procedure allows only five procedural hours for legal aid. The asylum seeker can lodge an appeal against the rejection of his application with a District Court within a week. However, to prevent his immediate deportation, the applicant must ask the president of

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<sup>416</sup> Doornbos 2001, p. 27.

<sup>417</sup> Hoftijzer 2003, p. 69.

<sup>418</sup> Spijkerboer and Vermeulen 2005, p. 227.

the court within 24 hours after the rejection of his application for an interim measure. Usually, the president, applying the criteria for deciding on the merits, gives an immediate judgment on the merits. Neither the appeal nor the request for an interim measure has suspensive effect. However, the asylum seeker is in general allowed to remain in the Netherlands to await the decision of the president of the District Court. Can this system be regarded as ensuring an effective remedy within the meaning of Article 13 of the Convention?

The Court stated in *Čonka v. Belgium*:

*(...) even if the risk of error is in practice negligible (...) it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (...).*

According to the Court, the requirement of compliance with the formal requirements and time limits laid down in domestic law must be applied with some degree of flexibility and without excessive formalism. Moreover, time limits should not be so short, or applied so inflexibly, as to deny an applicant for refugee status a realistic opportunity of proving his claim. An appeal procedure that does not meet these conditions cannot be regarded as 'effective' in the sense of Article 13 of the Convention. The time limits in the AC-procedure are so short and are applied so inflexibly that asylum seekers may well be denied a realistic opportunity of proving their claims. This is especially the case with regard to traumatised, mentally disturbed and minor applicants. Because of the short time limit for lodging an appeal and for articulating grounds for appeal and due to obstacles to later statements and evidence, there is no guarantee that the appeal procedure can rectify these shortcomings of the AC-procedure.

In cases that involve a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, Article 13 of the Convention requires independent and rigorous scrutiny. However, the AC-procedure does not guarantee a thorough investigation into the facts accompanied by adequate reasoning. Because of short time limits in the appeal procedure and due to marginal judicial review in asylum cases, the District Courts and the Council of State will not always apply rigorous scrutiny. Furthermore, since most cases which have been dealt with under the AC-procedure are given an immediate judgment on the merits during the assessment on the request for an interim measure, most asylum seekers end up with an appeal procedure that has less safeguards than a normal procedure. Short time limits in the procedure dealing with interim measures increases the risk of incomplete knowledge of facts and incorrect judgments. In the appeal procedure for an asylum seeker whose application has been rejected under the AC-procedure, rigorous scrutiny of an arguable claim that there is a real risk that the applicant would be subjected to ill-treatment in the country of destination cannot, therefore, be guaranteed.

Article 13 of the ECHR also requires that there is a remedy that can prevent the execution of measures that would violate the Convention the effects of which would be potentially irre-

versible. It must be possible to suspend the implementation of the contested measure. Neither an appeal against the rejection of an application under the AC-procedure nor a request for an interim measure has suspensive effect. The Aliens Circular 2000 states that asylum seekers are in general allowed to remain in the Netherlands to await the decision of the president of the District Court. However, due to the character of a policy rule (no absolute obligation to comply), due to the wording of the policy rule ('in general') and due to the exceptions mentioned in the policy rule, there is no guarantee that asylum seekers will always be allowed to remain in the Netherlands to await the judgment on an interim measure. The authorities are not required to defer execution of deportation while a request for an interim measure is pending. This should be considered to be a violation of Article 13 of the Convention because the Court held in *Čonka v. Belgium* that such factors make the implementation of a remedy too uncertain to ensure that the requirements of Article 13 will be satisfied. Furthermore, the Court said in the same case that it is impossible to avoid the risk in a system under which a stay of execution must be applied for and under which stays are granted at the sole discretion of the authorities, of these stays of execution being wrongly rejected. Under the Dutch system, it is not possible either to exclude the possibility that a decision on an interim measure will be wrongly refused. Furthermore, this risk is increased by the criteria applied by the presidents of the courts on the request for an interim measure. When deciding whether a request for an interim measure should be allowed in AC-cases, presidents of courts actually apply the criteria for deciding on the merits. This increases the risk that interim measures may be refused in error.

Lastly, according to Article 13 of the Convention, asylum seekers should be able to obtain legal aid and legal representation under the Dutch asylum procedure, because it is of such a complexity that without legal aid the procedure could not be considered to be effective. According to the principle of effectiveness, the possibility of recourse to legal aid should be practical and effective and not just theoretical and illusory. However, because of strict time limits for legal aid during the AC-procedure, the impossibility of obtaining legal aid before the first interview and of freely choose one's legal counsellor, dependence on the legal counsellors present at the application centre and difficulty building a confidential relationship with legal aid during the AC-procedure, legal aid at an application centre cannot always be considered to be practical and effective. Because of obstacles to later statements and evidence and marginal judicial review, this has consequences for the effectiveness of an appeal. The possibility of obtaining legal aid and legal representation for lodging an appeal is also limited. Asylum seekers are fully dependent on the legal counsellors present. Furthermore, since most hearings take place within ten days of the rejection of an application, there is not much time for legal aid to submit arguments and additional evidence. An asylum seeker whose application has been rejected under the AC-procedure, moreover, does not have a right to reception benefits and is often deprived of his liberty, as a result of which it is difficult for him to stay in contact with a legal counsellor to prepare for appeal. Accordingly, an asylum seeker whose application has been rejected under the AC-procedure can theoretically obtain legal aid, but this possibility cannot reasonably be considered to be practical and effective in all cases.

Taken together, these circumstances lead to the conclusion that an effective remedy under

Article 13 of the Convention is not guaranteed for asylum seekers whose applications have been rejected under the AC-procedure and who have an arguable claim that their expulsion would violate Article 3 of the Convention. Since the requirements of Article 13 of the Convention 'take the form of a guarantee and not of a mere statement or practical arrangement', one can conclude that the appeal procedure for an asylum seeker whose application has been rejected under the AC-procedure does not fulfil the requirements of Article 13 of the Convention.

## Conclusion

The Dutch AC-procedure is an accelerated asylum determination procedure which takes a maximum of 48 procedural hours. A case can be dealt with under the AC-procedure if it is possible to carefully deal with the application within 48 procedural hours. This means that many types of cases, not only manifestly unfounded, inadmissible and clearly abusive cases, can be dealt with under the AC-procedure. About 40% of asylum applications in the Netherlands are rejected under this procedure<sup>419</sup>.

Five out of 48 procedural hours are available under the AC-procedure for legal aid: two hours after the first interview and three hours after the detailed interview. Much work must be done during these five hours: the reports of the interviews have to be read, discussed and, if necessary, corrected and completed; if necessary, more documents and evidence have to be gathered; the detailed interview must be prepared; the letter of intention has to be read and discussed; and a view with regard to the letter of intention must be submitted. This work is done by at least two different legal counsellors. If a legal counsellor is of the opinion that a case should not be dealt with under the AC-procedure, then he has to show this during these two or three hours as well. If it seems likely that a time limit will not be met, then the legal counsellor must make a timely and thorough request for an extension of the time limit. The minister, however, has a large degree of discretion in deciding whether to grant an extension. Research has shown that the work of legal counsellors is crucial because all relevant aspects of an asylum application will not always come up during the interviews and because the reports of the interviews will not always be neutral reproductions.

If his application for asylum is rejected under the AC-procedure, an asylum seeker can appeal before a District Court within a week. However, to prevent his immediate expulsion from the Netherlands, he has to request an interim measure with the president of the court and must lodge this request and his appeal within 24 hours after his application has been rejected. Neither the appeal nor the request for an interim measure has suspensive effect. However, the asylum seeker is in general allowed to remain in the Netherlands to await the president's decision. The hearing with regard to the request for an interim measure usually takes place within ten days after the request has been submitted. In determining whether or not to grant an interim measure, the presidents of the courts actually apply in AC-cases the criteria for deciding on the merits instead of assessing whether it is beyond reasonable doubt that the expulsion does not violate article 3 of the Convention. The president will usually give an immediate judgment on the merits. An asylum seeker whose application has been rejected under the AC-procedure has, in principle, no right to reception benefits.

This paper has addressed the question whether or not the AC-procedure and the available appeal

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<sup>419</sup> The number of applications that are dealt with under the AC-procedure is even higher because applications can also be granted under the AC-procedure since the end of 2004 (see further supra note 4).

procedure for asylum seekers whose application have been rejected under the AC-procedure comply with Articles 3 and 13 of the European Convention on Human Rights.

According to the Court's case law, an expulsion of an alien to a country where he would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment violates Article 3 of the Convention.

In *Bahaddar v. the Netherlands*, the Court stated that, even in a case of expulsion to a country where an asylum seeker would allegedly risk being exposed to treatment contrary to Article 3 of the Convention, the applicant should still comply with the formal requirements and time limits laid down by domestic law. However, there can be special circumstances that would relieve an asylum seeker from having to comply with national procedural laws. The Court has said that it should be borne in mind that it is difficult, if not impossible, for an asylum seeker to supply evidence within a short period of time, especially if such evidence must be obtained from the country from which the applicant claims to have fled. Accordingly, the Court has stated that time limits should not be so short, or applied so inflexibly, as to deny an applicant for refugee status a realistic opportunity of proving his claim.

In *Jabari v. Turkey*, the Court said that rigorous scrutiny should be applied when assessing an individual's claim that deportation to a third country would expose him to treatment contrary to Article 3. The Court stated in that case that automatically and mechanically applying short time limits would be at variance with the protection of the fundamental value embodied in Article 3 of the Convention.

According to the principle of effectiveness as applied by the Court, the provisions of the Convention should be interpreted and applied in such a way as to make its protections both practical and effective. The above-mentioned judgments demonstrate that the effective application of Article 3 of the Convention, can also have procedural consequences.

As chapter three argued, the time limits under the AC-procedure and the available appeal procedures are so short and so inflexibly, automatically and mechanically applied that asylum seekers may well be denied a realistic opportunity of being able to prove that their expulsion would violate Article 3 of the Convention. Furthermore, due to the short timeframe under the AC-procedure and the limitations of the appeal procedure, a thorough investigation of facts, accompanied by adequate reasoning, is not guaranteed under the AC-procedure and the appeal procedure. Therefore, the AC-procedure may deny asylum seekers the effective enjoyment of the right embodied in Article 3 of the Convention. Furthermore, since short and inflexible time limits also apply when proving that a case is not suitable for dealing with under the AC-procedure, there is no guarantee that cases with a real risk of subjecting the asylum seeker to torture or to inhuman or degrading treatment or punishment in the country to which he would be expelled are filtered out under the AC-procedure. This does not mean that every expulsion of an asylum seeker whose application has been rejected under the AC-procedure is in violation with (the negative obligations under) Article 3. However, since the AC-procedure involves a structural risk that applica-

tions are rejected in violation of Article 3, it can be said that the procedure as such violates the positive obligations that arise under Article 3 of the Convention.

Article 13 requires an effective remedy for anyone who presents an arguable claim that his rights or freedoms under the Convention have been violated. Four specific requirements of this article are of importance with regard to the appeal procedures available for asylum seekers whose application has been rejected in the AC-procedure.

First, a remedy can only be considered to be ‘effective’ under Article 13 of the Convention if the formal requirements and time limits, as laid down in domestic law are applied with a degree of flexibility and without excessive formalism and if the time limits are not so short or applied so inflexibly as to deny an asylum seeker a realistic opportunity of proving his claim. However, the AC-procedure does not always meet these requirements because the time limits are so short and are applied so inflexibly, that asylum seekers may well be denied a realistic opportunity of proving their claim. Because of the short time period for lodging an appeal and for adducing grounds for appeal and due to obstacles to later statements and evidence, there is no guarantee that the appeal procedure can repair these shortcomings.

Second, the Court has said that Article 13 requires an independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 of the Convention. Due to the short timeframe of the AC-procedure, however, the short time limits in the appeal procedure, the fact that the president will usually give immediate judgment on the merits during the assessment of the interim measure and the marginal judicial review, there is no guarantee that rigorous scrutiny will be conducted under the AC-procedure and the available appeal procedure.

Third, Article 13 requires a remedy capable of preventing the execution of measures that would violate the Convention and whose effects are potentially irreversible. However, neither the appeal nor the request for an interim measure has suspensive effect. Furthermore, an asylum seeker whose application has been rejected under the AC-procedure has no guarantee that the authorities will comply in every case with the policy rule according to which he is allowed to await the judgment of the president on his request for an interim measure. This makes the implementation of the remedy too uncertain to enable the requirements of Article 13 of the Convention. Moreover, the Court said in *Čonka v. Belgium* that it is not possible to exclude the risk that in a system in which stays of execution must be applied for and are granted as a matter of discretion that a stay of execution will be wrongly refused. Under the appeal procedure available for an asylum seeker whose application has been rejected under the AC-procedure, it is also not possible to exclude the risk that an interim measure will be refused in error. The risk of this is even larger because presidents of the courts actually apply the criteria for deciding on the merits, rather than a beyond a reasonable doubt standard, when determining whether an interim measure should be granted under Article 3.

Fourth, given the fact that the Dutch asylum procedure’s complexity is such that it cannot be said

to be effective without legal aid, Article 13 of the Convention requires the possibility to obtain legal aid and legal representation. According to the principle of effectiveness, this possibility should be practical and effective and not just theoretical or illusory. However, for a number of reasons, such as short time limits and the fragmentation of legal aid, the provision of legal aid at application centres cannot always be considered to be effective. This has consequences for the effectiveness of the appeal because mistakes cannot easily be repaired in the appeal procedure, as asylum seekers should submit all relevant facts, circumstances and documents during the AC-procedure. Furthermore, the possibility of obtaining effective legal aid and representation in the appeal procedure is also limited for asylum seekers whose applications have been rejected under the AC-procedure because of short time limits and dependence on legal counsellors present at application centres.

Taken together, this must lead to the conclusion that an effective remedy within the meaning of Article 13 of the Convention is not guaranteed for an asylum seeker whose application has been rejected under the AC-procedure and who has an arguable claim that expulsion would violate Article 3 of the Convention.

The conclusion must therefore be that the AC-procedure and the available appeal procedure for asylum seekers whose applications have been rejected under the AC-procedure do not comply with the requirements that arise from Articles 3 and 13 of the European Convention on Human Rights. An adaptation of these procedures seems therefore necessary.

## Endnotes

<sup>i</sup> Bij de beoordeling of een aanvraag geschikt is om in een aanmeldcentrum te worden afgewezen, gaat het er louter om of de staatssecretaris voornemens is om dat binnen 48 uur te doen. Deze hoeft van dit voornemen slechts af te zien, indien meer tijd nodig is om tot een beslissing te komen.

<sup>ii</sup> 2.2.1. Blijkens de geschiedenis van de totstandkoming van de Vw 2000 en de toelichting op het Vb 2000 heeft de wetgever er voor gekozen om ter bepaling of een aanvraag geschikt is om in een aanmeldcentrum te worden afgewezen, een naar tijdsduur gemeten maatstaf voor te schrijven. Daarbij heeft de gedachte voorgezet dat de maatstaf dat binnen 48 proces-uren afdoende kan worden beoordeeld of de aanvraag kan worden afgewezen, waarborgt dat slechts zaken aldus worden afgehandeld, die geen tijdrovend onderzoek vergen.

<sup>iii</sup> Dienaangaande overweegt de Afdeling dat het er bij de toetsing of de aanvraag in een aanmeldcentrum mocht worden afgewezen om gaat of het desbetreffende besluit binnen 48 uur op zorgvuldige wijze is genomen. Dit mondt uit in een beoordeling van het naar de gedane aanvraag verrichte onderzoek en de motivering van de afwijzing. De wet biedt geen grondslag voor het betoog dat bepaalde categorieën aanvragen, als door appellanten aangegeven, zijn uitgesloten van behandeling in het aanmeldcentrum.

<sup>iv</sup> De wet biedt geen grondslag voor de stelling dat bepaalde categorieën aanvragen, zoals van minderjarigen, zijn uitgesloten van behandeling in het aanmeldcentrum.

<sup>v</sup> 2.2.1. De Vw 2000, het Vreemdelingenbesluit 2000, noch de Vc 2000 staat er aan in de weg dat het horen van vreemdelingen jonger dan twaalf jaar in de aanmeldcentrum-procedure plaatsvindt.

<sup>vi</sup> Gelet hierop en op de aard van de voorlopige maatregelen, kan niet worden staande gehouden dat reeds wegens het getroffen zijn daarvan de aanvraag van de vreemdeling niet binnen de AC-procedure kon worden afgedaan, zonder in strijd te komen met de vereiste zorgvuldigheid.

<sup>vii</sup> (...) indien het tolkenprobleem in het licht van de andere aspecten van de zaak zulke ernstige vormen aanneemt, dat afdoening in een AC niet meer in de rede ligt, de asielzoeker wordt doorgezonden naar een OC.

<sup>viii</sup> 2.1.6. Hoewel het onderzoek met name op 4 februari 2004 gedurende een vrij lange periode heeft stilgelegen, kunnen de uren gedurende welke is gewacht op een tolk in dit geval niet als proces-uren als bedoeld in artikel 1.1, aanhef en onder f, van het Vb 2000 worden aangemerkt (...).

<sup>ix</sup> De zogeheten procesbeslissing is niet meer dan een interne beslissing om niet af te zien van het voornemen om de aanvraag binnen 48 procesuren af te wijzen. Deze beslissing roept voor de aanvrager geen zelfstandig rechtsgevolg in het leven.

2.4.3. Dat de - in artikel 3.111, eerste lid, van het Vb 2000 neergelegde - regel dat een vreemdeling niet eerder dan zes dagen na het indienen van een aanvraag tot het verlenen van een verblijfsvergunning aan een nader gehoor wordt onderworpen, ingevolge het bepaalde in artikel 3.112, eerste lid, aanhef en onder b, van het Vb 2000, niet van toepassing is, indien de staatssecretaris overweegt de aanvraag binnen 48 procesuren af te wijzen, maakt dit niet anders. Een dergelijk voornemen heeft weliswaar tot gevolg dat de rusttermijn niet van toepassing is, maar is daarop niet gericht. Dat gevolg volgt rechtstreeks uit laatstvermelde bepaling van het Vb 2000.

<sup>x</sup> De AC-procedure kenmerkt zich door zeer korte termijnen, ook voor het uitbrengen van het voornemen. In het kader van die verkorte procedure blijft een gedragslijn waarbij een verslag van het nader gehoor gelijktijdig met het voornemen wordt uitgereikt en voor het nabespreken van het verslag daarom ook niet apart tijd is gereserveerd, binnen de grenzen van een redelijke uitleg van de woorden "zo spoedig mogelijk".

<sup>xi</sup> 2.5. Het ligt op de weg van de rechtshulpverlener om tijdig en gemotiveerd aan de staatssecretaris, die immers verantwoordelijk is voor het verloop van de procedure, kenbaar te maken dat meer tijd nodig is voor het uitbrengen van de zienswijze dan daarvoor in de regelgeving is voorzien. Geeft de rechtshulpverlener dit evenwel niet te kennen, dan kan de staatssecretaris in beginsel ook zonder dat na afloop van de drie proces-uren een zienswijze is uitgebracht, de beschikking binnen de termijn van 48 proces-uren geven. De verantwoordelijkheid van de staatssecretaris voor een zorgvuldige besluitvorming vergt echter wel dat hij zich bezint op zijn voornemen de aanvraag via de 48-uurs-procedure af te wijzen, gegeven de omstandigheid dat niet een zienswijze voorligt.

<sup>xii</sup> *Houdt hij niettemin aan dat voornemen vast, dan ligt het op zijn weg om, voor zover het geven van de beschikking binnen de gestelde termijn van 48 proces-uren dat toelaat, de rechtshulpverlener een termijn te stellen om zijn werkzaamheden af te ronden en, voor zover nodig, het inmiddels bereikte resultaat op papier te zetten, of om toepassing te geven aan artikel 3.117, vijfde lid, van het Vb 2000.*

<sup>xiii</sup> *2.7. De mogelijkheid voor de vreemdeling om een zienswijze naar voren te brengen, moet, gelet op de onder 2.4. weergegeven bepalingen inzake de zogenoemde voornemenprocedure, die in asielzaken in de plaats is gekomen van de bezwaarprocedure, worden aangemerkt als een essentieel onderdeel van de procedure die voorafgaat aan de totstandkoming van het besluit op de aanvraag.*

<sup>xiv</sup> *De enkele omstandigheid dat een uitspraak van de rechtbank voor uitvoering vatbaar is, levert echter geen spoedeisend belang als bedoeld in artikel 8:81 van de Algemene wet bestuursrecht op. Bij dit oordeel is betrokken dat verzoeker niet heeft gesteld dat de datum van zijn uitzetting aan hem is medegedeeld en derhalve niet duidelijk is op welke termijn de uitzetting zal plaatsvinden.*

<sup>xv</sup> *Hoewel verzoeker is aangekondigd dat hij op zeer korte termijn zal worden uitgezet, ziet de Voorzitter onder deze omstandigheden geen aanleiding om het verzoek toe te wijzen.*

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