

Canadian Refugee Reforms and the revised Dutch Aliens Act – a comparison Stefan Kok

Some of the proposed changes to the Canadian system resemble the European asylum procedures, including the procedure under the Dutch Aliens Act 2000. This procedure was experimental and has influenced other EU-countries and EU-legislation. After heavy criticism, an official evaluation and two judgments of the European Court on Human Rights, Labour Party State Secretary Albayrak proposed a revised asylum procedure. The basic framework of the Aliens Act 2000, however, remains intact. For some elements of the proposals the Dutch parliament will have to pass a Bill. This will be after the general elections in June. The changes are expected to come into effect in 2011.

Below I will discuss the proposed new Dutch 8-day procedure, the background of the Dutch Aliens Act 2000 and the implementation of the Aliens Act 2000. I will compare the Aliens Act 2000 to the Canadian proposals in Bill C-11.

Proposed new Dutch 8-day procedure

A new 8-day procedure is proposed, which is a combination of the current 48-hours fast-track procedure and the regular asylum procedure which takes months or longer. The new 8-day procedure will be the 'regular asylum procedure'. This means that in principle all asylum claims will be channeled through this procedure. When no decision can be made within 8 days – because more information is needed or the claim raises complex issues - the claimant will be referred to the extended procedure (with a six month time limit, which can be extended, and with longer time limits for the appeal).

The Airport-procedure for persons directly coming from 'external' Schengen borders will follow the 8-day schedule, but it will take place in a closed detention centre.

'Preparation and rest period'

For asylum seekers who enter the Netherlands through land borders, the 8 day-procedure will start after a 'preparation and rest' period of at least six days.¹ During this period basic shelter will be given. In practice it is expected that the P&R period will be longer. This will depend on the availability of civil servants and interpreters during the 8-day-procedure. During the P & R period the claimant will receive information on the procedure from the Dutch Council for Refugees and is given the opportunity to discuss his/her case with an appointed legal advisor (free of cost).

Possibility of a medical examination

During the P & R period an additional medical examination is offered. This examination could focus on possible traumas, impediments for the interview or medical evidence. Medical aspects could be a reason to postpone or limit the scope of the hearings, although the government is reluctant to go as far. It could also mean that traumas and other medical conditions must be taken into account in the assessment of the claimant's statements during

¹ This period is not given to claimants in the closed Airport procedure, as this would prolong the period of detention. The processing of the claim will start immediately upon arrival. Once the conditions in the detention centres have been improved (in 2012), the preparation and rest period may be granted to these claimants as well.

the 8-day procedure. Medical reasons which could (temporarily) prevent the effectuation of removal orders will also be taken into account.

8 days-procedure

Once the 8-day procedure starts, there is very little time. The 8-day procedure copies the steps in the 48-working hours procedure, but spreads these out over procedural steps which take one day. The 8-day-procedure takes place in an 'application centre' (there are four of these centres in the NL). When not 'at the disposal' of the authorities, the claimant is given basic housing in an open centre (except at the airport procedure, which takes place in a detention centre).

The legal assistance will have an office in the application centres. The aim is that the claimant has only one legal advisor per procedure, but this depends on the availability of the advisor(s). Currently the applicant talks to four of five advisors in the 48 hours-fast track procedure, which is highly confusing for claimant and legal aid.

day 1 - 1st hearing by IND on identity, nationality, itinerary, documents and briefly on the substance

day 2 - preparation with legal advisor for the hearing on the substance of the claim - also check of transcripts first interview

day 3 - 2nd hearing by IND on the substance of the claim - legal advisor or representative of the Dutch Council for Refugee can attend, but IND conducts the interview. The information collected in the 1st hearing will also be used.

day 4: transcripts of interview are sent to legal advisor and claimant. Corrections and additions can be submitted.

day 5 - intended IND decision stating reasons to reject (or decision to refer to extended procedure or to grant asylum status)

day 6 - claimant's response to intended IND decision

day 7 and 8 - final IND decision (granting asylum status, rejection of claim, rejection of claim with no removal (absolute prohibition of refoulement), or referral to extended procedure)

day 8 - time limit to appeal to district courts

When, at any moment, it becomes clear that more information is needed and, hence, the application will be referred to the extended procedure, the first 4 steps will take place in the 8 day-procedure.

Judicial review after 8-days procedure

Judicial review of IND decisions made in the 8 day-procedure will normally take place within four weeks (currently two weeks in practice). This appeal has no suspensive effect, but normally this will (de facto) be granted. The government has made arrangements with the courts to ensure a speedy process for appeal, although the Courts are free to determine their own procedures. Delays in judicial judgments will have implications for the claimant's right to social assistance, which will be automatically terminated four weeks after a negative decision, irrespective of the judicial process.

When a rejection becomes final, there is an automatic termination of reception and an automatic removal order (due to a 'single procedure' and 'a decision with multiple consequences') which can be immediately effectuated. However for families with children and other vulnerable cases basic reception can be given for another 12 weeks. They will have to report regularly and will be guided through the return process.

The return process starts after a negative first instance decision. In the appeal stage the claimant is expected to prepare his/her return but is not expected to contact the authorities of the country of origin pending the appeal procedure.

Background Dutch Aliens Act 2000

When the Dutch Aliens Act came into effect – in April 2001 – there were significant backlogs: almost 60.000 claims in the administrative review process alone. There was no shared analysis of the shortcomings of the old system, but the following analyses were influential for the legislative process and the implementation of the Aliens Act 2000:

- The main problem identified by asylum experts and civil servants was that there were too many steps in the asylum process. The extra tier of administrative IND-review was held to be superfluous and in practice to lead to low quality first instance decision making.
- The Immigration and Naturalization Service (IND) had not been able to cope with high numbers of asylum claims in the '90s and needed more resources and quality incentives.
- There was an increasing criticism that, in order to avoid removal, applicants could lodge new applications (either on new asylum grounds, compassionate grounds or regular admission grounds such as family life, study or medical reasons). The result was that claimants could stay in the asylum and migration system for many years. However, the long asylum procedures did also contribute to the fact that for many asylum claimants new country of origin information became relevant, that there were more ties with the Netherlands and that there were more medical problems due to uncertainty and inactivity.
- It was held by some that – despite legislation on undocumented applicants - there was no incentive for applicants to submit all documents which could be available, as courts continued to look at the substance of each claim and did not focus on a lack of documents on identity, nationality or itinerary. Also, courts did not hold it against an applicant that evidence was submitted late in the procedure or in a subsequent request.
- Some critics held that the courts' examination in the appeal stage was too 'full'. Judges were replacing the assessments of the claim by government agencies with their own assessments on credibility and relevant country of origin information.

After broad consultation rounds with academic experts, judges, civil servants, NGO-s and refugee lawyers, a new Aliens Act 2000 was adopted which entered into force April 1, 2001.

Instruments of the Aliens Act 2000

Like the Canadian Refugee Reforms in 2010, the Dutch Aliens Act's aim was to reduce multiple applications and multiple procedures. The main instruments are:

- A single asylum status on multiple asylum grounds
- A simplified (and partly accelerated) procedure;
- a single decision with automatic effects (multiple consequences);
- A 'watershed' between asylum and regular migration;

A single asylum status on multiple asylum grounds:

The uniform status was introduced to avoid multiple procedures on different protection grounds. The status can be based on four grounds and on family unity:

a) the 1951 Geneva Convention;

- b) art. 3 ECHR/art. 3 UN-CAT/art. 15 of Directive 2003/83/EC;
- c) compassionate grounds related to the situation in the country of origin (traumas arising from persecution, vulnerable groups);
- d) indiscriminate violence in large scale human rights crises
- e and f) partner or spouse of persons falling under A-D

Asylum claims are assessed in the order: a) till f). The granting of an asylum status on a 'lower ground' cannot be appealed. The granting of an asylum status is not further motivated. However, the applicant can ask for access to his file, which includes the reasons for not granting a 'higher' ground. This can become relevant for a withdrawal of status.

The single or uniform asylum status grants the same rights to all holders of this status, irrespective of the ground on which it is granted. It gives full access to social benefits, employment, study and family unity. The asylum status is initially temporary. The status can be withdrawn during five years based on changed circumstances (cessation). After five years a permanent asylum status can be applied for.

The c- and d-ground are considered 'national' and discretionary². They are also under fire, as they are held to go far beyond what is required by international law (due to the full set of rights of the uniform asylum status).

A simplified (and partly accelerated) procedure:

There is a 48 working hours-fast track procedure at the start of the asylum procedure. Any claim can be processed in this procedure³, and the outcome can be granting of status, a rejection or referral to the 'regular' procedure. A negative decision in this procedure can be appealed in a fast track judicial procedure (in practice two weeks). When it is decided not to process a claim in the 48 hour-procedure or when no decision can be made to reject or grant the claim within 48 hours, the claim will be processed in the regular procedure.

There is a one instance decision by the immigration and naturalization service (IND), which replaces the two tier IND-decision.⁴ There is one judicial appeal instance (the District Courts)

² The 'indiscriminate violence cause' of the d-ground is now considered to be incorporated in art. 15c of the EU's Qualification Directive, and therefore falls under the B-ground (international obligations); it may be abolished. Protection to persons fleeing protection would then only be granted EU-wide, possibly after the intervention of the European Court of Justice.

³ This was a new development, as before the Aliens Act 2000 there was a 'manifestly unfounded criterion'. Compare art. 23 (3) of the EU's Procedures Directive which reflects and allows for this practice. The European Commission proposed the deletion of this article.

⁴ The administrative review by commissions consisting of civil servants was abolished. A simpler 'intended decision' procedure prior to the 1st instance decision replaced this. In this procedural 'pre-step' there is no hearing but a preliminary and more basic IND-motivation of the intended grounds for rejection. The applicant is given the opportunity to respond and give clarifications. In practice this means that, compared to the review, there is less opportunity and less time for claimants to give additional evidence and clarifications

with automatic suspensive effect.⁵ There is a limited right to higher appeal (before the Council of State), both for the claimant and the state.⁶

When the situation in a country of origin is highly volatile a decision moratorium and a removal moratorium can apply. This prevents multiple procedures based on new country of origin information.

A single decision with automatic effects ('multiple consequences');

The single decision with multiple consequences was introduced to avoid multiple application procedures on removal and termination of social assistance. A final rejection (including when an appeal may not be stayed) includes a four week 'departure period'⁷, after which there is an automatic removal order and automatic termination of reception and other social assistance⁸.

The removal order can be postponed if the ex-claimant is not able to travel due to medical reasons (availability of medical care is not a factor per se), or if the country of origin is unstable ('removal moratorium').

An exception to the automatic removal order is granted to persons who are not admitted because of art. 1F/public order/national security but who cannot be returned because of prohibitions of refoulement. Neither they nor their dependent family members are entitled to a legal stay and benefits.

A 'watershed' between asylum and regular migration;

Asylum and other admission grounds are strictly separated and cannot be part of a combined decision. This was to avoid 'mixed' applications or combined applications. A legal stay pending or following 'regular' procedures will lead to an automatic rejection of the asylum claim and vice versa.

Apart from the a-f grounds for an asylum status, there is no admission in asylum cases based on general compassionate and humanitarian grounds which are unrelated to the reasons for leaving one's country. In regular migration cases there are specific humanitarian grounds, such as medical reasons, and (extended) family unity. There is a clause in the Aliens Decree which allows for a discretionary admission on humanitarian and compassionate grounds.

5 In the fast track procedure appeal does not have automatic suspensive effect, although in practice this is automatically granted without the need of an extra court decision

6 Higher appeal must be based on complaints about specific aspects of the judgment of the District Court (but not on facts).

7 This period is not given in the fast track procedure: a negative decision has automatic effects for reception and removal. Only the removal is suspended in the appeal stage. Social assistance is denied.

8 When the Aliens Act 2000 was discussed it seemed that the termination of reception would be part of the single decision. The Council of State held that in the single decision the consequences of a termination of social assistance did not have to be taken into account separately. Termination of social assistance followed automatically from a rejection of the asylum application.

It is possible to apply for regular migration status after an asylum procedure.⁹ However, pre-entry visas requirements, administrative fees and passport requirements will apply. Exemptions of these requirements on humanitarian grounds are discretionary (though also laid down in guidelines), and are very rarely granted.¹⁰ An application for regular status does not give rights to the social benefits which are granted to asylum seekers.

The implementation of the Aliens Act 2000 since 2001

The Aliens Act's implementation was influenced by the following developments:

1. The Council of State, the new highest court in asylum cases, gave a large discretion to the Dutch state (and its agency IND) in order to effectively deal with asylum requests. The burden of proof is largely incumbent on the applicant (there is no truly shared duty to establish the facts, other than through an often inquisitorial IND-hearing and a notification of an intended rejection):
 - a. The District Court cannot question the decision to process asylum requests in the 48 hours fast track procedure, but instead has to 'marginally' examine the outcome of this procedure in light of general principles of due process;
 - b. Where the applicant does not give evidence, the District Courts are ordered to only marginally scrutinize the establishment of the facts and the assessment of the applicant's credibility by the IND;
 - c. When applicants are not fully documented (on identity, nationality, itinerary and asylum claim) and have no satisfactory explanation for this, their unsubstantiated statements have to be coherent, consistent, detailed and 'positively convincing'. Whether they have done so, is an IND-assessment which can only be marginally scrutinized by the courts. A similar shift of the burden of proof applies for persons from safe third countries.
 - d. Country of origin reports of the Dutch state are considered expert opinions, which can be relied on by decision makers, unless the applicant gives objective evidence from other sources which contain other conclusions¹¹;
 - e. 'New facts and circumstances' submitted in the appeal stage or in subsequent applications do not have to be taken into account when these existed at the time of the application (I.e. the IND decision) and 'could and therefore should have been submitted'. The courts must refrain from examining such subsequent claims because of the principle of 'ne bis in idem' (in the sense of 'res judicata').
2. In order to deal with the backlogs the IND and the Courts were given more resources. It was also widely held that a general amnesty was necessary to offer timely solutions for applicants whose files were moved from backlog to backlog. However, the Dutch political situation changed drastically after 9/11 and the amnesty became a highly

⁹ In its political program for the 2010 elections the Liberal-Conservative Party (VVD) proposed to delete these;

¹⁰ These stringent conditions are problematic, for example when the applicant is required to apply for a pre-entry visa from his/her country of origin, but is not able to do so because of medical/mental condition or failure to obtain travel documents).

¹¹ After *Salah Sheekh vs the Netherlands* more weight should be given by the courts to country information on vulnerable groups, such as minorities;

controversial issue. It was only in 2007 that a new government regularized 26,000 applicants who claimed asylum before 2001 – after a long period of campaigning, protests and media coverage. Many of the ex-claimants had been in the Netherlands for many years.

3. Since the late '90s there has been political pressure on the decision making and the return regime. The political situation of 2002 increased this and brought along a paradigm change: 'protection in the region' was the 'preferred solution', 'national asylum procedures were not for the most deserving, were too costly and could too easily be abused'.¹²
 - a. Policies became very restrictive since the late '90s but draconian in 2002. The IND processed many requests – in a certain period up to 60% - in the fast track procedure, making full use of the freedom granted by the Council of State. The judicial scrutiny was marginal and courts could not intervene, because of the new views of the Council of State;
 - b. Termination of reception was implemented without looking at personal consequences (very elderly persons, families with children, single women without a network were denied all social assistance and housing, often after only 4 or 5 days in the fast track procedure). In practice municipal authorities increasingly subsidized basic shelter by NGO's;
 - c. Detention of asylum claimants who entered via the external borders became standard and could be further prolonged to establish the applicant's identity and nationality. The judicial scrutiny of the IND decision to prolong detention was marginal. It is not uncommon that asylum applicants who entered via the external borders, are detained for months.
 - d. Initially many asylum claims were processed (rejected) in the 48-hours fast track procedure. Between 2002 and 2004 of all claimants (in 2001: 33,000 applicants, in 2002: 19,000 applicants) 40-50% were rejected in this procedure. This percentage gradually declined because of 'restraint' by the IND and because more refugees came from areas considered generally unsafe (Iraq and Somalia).
 - e. The IND improved its logistical processes. It gained more political and public respect and influence, and can probably act more independently. This still depends on asylum numbers and the efficiency of the process. There is, in other words, an 'asylum management'.
 - f. Despite 'voluntary return' incentives, the return policies continue to be problematic.
 - i. Frequently changing policies with respect to conflict areas (southern Iraq and Somalia – the main countries of origin in 2009) and uncertain situations in post-conflict countries result in 'underground situations' rather than permanent status or returns.
 - ii. Although the consequences of a lack of documents (identity, nationality, itinerary and asylum request) can be detrimental for the outcome in the asylum procedure, most asylum applicants are still partly undocumented and are unable or unwilling to obtain documents.

¹² The efforts to 'strengthen protection in the region' have, however, not been successful. The Dutch political parties which were critical of the national asylum systems are now more cautious on this.

- iii. In practice termination of reception has replaced forced returns. The new Returns Agency has not been successful.

Evaluation of the Aliens Act 2000

The Dutch asylum procedure under the Aliens Act 2000 was successful in reducing the numbers of new applications – although other factors also played a role (less asylum requests in Europe, the negative public debate on asylum/migration/integration in the Netherlands, the irregular labour market in southern Europe, etc.).

Aspects of the Aliens Act 2000 were copied by other countries and were incorporated in the EU's Procedures Directive.

The asylum and return procedures under the Aliens Act 2000 were widely criticized, including by Human Rights Watch in its report 'Fleeting refugee' of 2003, but also by judges of the District Courts. The state appointed 'Scheltema Commission' which evaluated the Aliens Act 2000, concluded in 2005 that there were serious concerns about the accelerated procedure, whereas the regular asylum procedure was still too long in many cases.

In 2005 and 2007 the European Court of Human Rights found the Netherlands to breach art. 3 ECHR in two asylum cases: *Said vs the Netherlands*, resp. *Salah Sheekh vs. the Netherlands*. A main reason was that the Dutch country of origin reports had been too one-sided and that other information could not be taken into account by the courts due to the 'marginal scrutiny'.

In the revision of the Aliens Act 2000 which is now proposed, some of the elements of the Aliens Act 2000 are mitigated, but the system of the Aliens Act 2000 itself is not significantly changed. Even more, the fast track procedure will be considered the regular procedure.

The fact that asylum seekers still lodge subsequent applications under the Aliens Act 2000, has led to political debates on further restricting the possibility to re-apply. However, this could be contrary to the system of the Procedures Directive (art. 32 and 34) and jurisprudence of the European Court of Human Rights (*Bahaddar vs. the Netherlands*). Some political parties propose a reduction of legal aid to asylum claimants in subsequent procedures.

Comparison with the Canadian refugee reforms

Some of the Canadian government's proposals are similar to the Dutch Aliens Act or may result in similar problems. Much will depend on the judiciary. The main features of the (proposed and current) Dutch asylum procedure are:

- Interviews and decisions by civil servants in a very short timeframe (8 days);
- 2nd IND-interviews based on a first collection of information by an IND-civil servant;
- A higher burden of proof for the applicant and focus on documents;
- Restrictions to submitting evidence and raising new grounds and compassionate grounds after the first instance decision;
- A 'watershed' between refugee claims and 'regular' humanitarian/compassionate claims;
- Restrictions to social assistance after a rejection of the claim;
- The duty of the applicant who claim is rejected to organize his/her own departure, but he or she can apply for 'voluntary' return incentives.

Many of these features are similar to the Canadian proposals.

Clause 2. Medical Information

The proposed Dutch asylum procedure seems to give more safeguards to counterbalance the speed of the interview process. It will give the applicant the opportunity to have an additional medical examination on traumas, torture and other problems which could interfere with the hearing or which could be relevant for the decision making. However, the speed of the asylum process makes it difficult to detect traumas and to repair negative decisions.

Clause 3. No possibility to request temporary resident permit within 12 months after rejection & Clause 15. No Application for Protection within 12 months after rejection

The Dutch asylum procedure with its 'single asylum decision with multiple consequences' and its 'watershed' has similar results. However, the Dutch asylum procedure does not make it entirely impossible to request a suspension of removal, to lodge a new request for asylum or to request a 'regular' status after a rejection of the asylum claim:

- In exceptional cases where new facts or circumstances arise, the claimant has a judicial recourse against an imminent removal; in this case – despite the 'decision with multiple consequences' - the removal is seen as a separate decision which can be appealed (art. 72 (3) Aliens Act 2000);
- the claimant can re-apply for asylum based on new facts and circumstances which are relevant for the asylum claim. The facts and circumstances may not have existed at the time of the first application.¹³
- The claimant can apply for a regular migration status based on humanitarian and compassionate grounds. The admissibility procedure has been somewhat mitigated: the pre-entry visa requirement, passport requirement and legal fees may be waived on humanitarian grounds. A new 'M-50 application procedure' sifts out some of these claims.

Clause 4: Humanitarian and compassionate grounds

This clause of the Canadian reforms has many elements of the Dutch 'watershed'. However, in the Dutch system there is the possibility to apply for a regular migration status after a rejection of the asylum claim and there is no 12 month waiting period. See above (under 3):

- The proposal under Section 25) (1.2 under b) copies the Dutch imperative rejection ground on multiple requests (on 'asylum' and 'regular migration grounds');
- The Proposal under Section 25) (1.3) copies the watershed between 'asylum related humanitarian and compassionate grounds' and 'regular' humanitarian and compassionate grounds'.

The watershed has been criticized in the Netherlands, as it led to inefficiency, uncertainty, harsh termination of reception and formal rejections based on admissibility. The Dutch government has now – together with its proposals for the 8-day period - proposed parallel procedures, in which medical, family, or age related claims will be decided on in procedures

¹³ The Dutch requirements may not be in line with EU law. Under EU law (and maybe Dutch case law – this seems to shift) states can require that the new facts and circumstances must significantly add to the likelihood that the claimant qualifies for asylum – compare art. 32 e) of the Procedures Directive (2005/85/EC), art. 35 8) of the amendments proposed by the European Commission (21st of October 2009, COM (2009) 554 def). See also d the ECtHR in Bahaddar vs the Netherlands.

which can run parallel to the asylum procedure (either own initiative decisions or decisions upon request).

Section 25 (1.2. under b and c) of the Canadian proposal is very rigid and could lead to persons refraining from applying for asylum, although they have an arguable claim. It could also lead to breaches of international prohibitions of refoulement.

Clause 5: Own initiative humanitarian status

This clause resembles the Dutch own initiative status on certain humanitarian grounds (unaccompanied minors and persons who cannot return due to circumstances beyond their control).

It could also be compared to the 'own initiative' humanitarian 'c-ground' decision in Dutch asylum procedures. Under the Dutch single asylum procedure an asylum claim is also considered to be a request for humanitarian status on which the IND decides 'own initiative' (after the IND has established that the applicant is not a refugee or a protected person under art. 3 ECHR, art. 3 CAT, art. 7 ICCPR and art. 15 of Directive 2003/83/EC). The Canadian proposal could essentially adopt this model. If it does, the consequences of the proposed Section 25) sub (b) and (c) could be somewhat mitigated.

In the Dutch proposals 'Towards a modern migration policy' it was proposed that own initiative humanitarian status procedure are given a separate procedure, but this has not been incorporated in the Modern Migration Policy Bill which was proposed in 2009 and which is under discussion.

Clause 11 and clause 13. Burden of proof and evidence submitted in the appeal stage

Clause 11 seems to 'a priori' require documentation without specific instructions following from the rules of the Board. Although it is somewhat unclear if clause 11 is intended to so, a similarly unclear clause in the Dutch Aliens Act 2000 (art. 31) turned out to be detrimental for many asylum claimants in the Netherlands. The result was that, under the Council of State's interpretation, the burden of proof shifted onto the asylum seeker. The asylum seeker does not receive guidance as to what evidence to submit, nor is he or she given time for this in the fast track-procedure. During first and second IND-interviews applicants are often put under pressure to explain a lack of documents.

In the Dutch asylum procedure undocumented asylum seekers (who do not provide evidence for parts of their claim or their itinerary/identity/nationality) must make statements which are detailed and consistent in order to compensate for lacking evidence. As IND-interviews are often 'inquisitorial' the applicant has only limited influence on what questions are asked, on how much time is given for his statements, on the quality of the interpreter and on how his/her account is transcribed. The possibility to submit 'corrections and additions' should counterbalance this, but their status is lower than that of the transcripts of the interview (as they could be influenced by legal assistants) and there is little time for the asylum seeker. UNHCR's Handbook (par. 195 and further) is not considered binding in the Netherlands and art. 4 (1), (2) (5) of the EU's Qualification Directive (2004/83/EC) on 'cooperation between applicant and examiner' and the benefit of the doubt' has not led to a meaningful shared duty to establish the facts.

Clause 13 of Bill C-11 is almost identical to art. 83 of the Aliens Act 2000. This article intended to reduce procedures by allowing the courts to take evidence into account in the

appeal stage. However, the Dutch Council of State's jurisprudence made it the duty of the applicant to submit all evidence that is available at the time of application (before the 1st instance decision and as early as possible). The applicant is held responsible for being undocumented at that time. Thus, evidence which was available at the time may not be taken into account in the appeal stage by the courts. The consequence of this case law was that this evidence often could not be assessed at all.

In the Netherlands it is now recognized by the Dutch government that the Dutch legislation and jurisprudence were too rigid. Art. 83 of the Aliens Act 2000, on facts submitted in the appeal stage, will be amended so that courts can make an 'ex nunc assessment', i.e. allowing courts to take into account information that was submitted later, but also new country of origin information and new government guidelines. This does not necessarily mean that the courts will assess the claim in light of this information, but rather that the state (IND) is invited to do this.

Clause 12. Safe Country of Origin

The proposal on Safe Countries of Origin is taken from other jurisdictions than the Dutch (the UK). The Dutch system does not deny applicant's from 'safe countries of origin' a full right to appeal. This would be contrary to Directive 2005/85/EC. Art. 31 of this Directive gives applicants from 'safe countries' the right to rebut the safety of the country of origin. Art. 39 of the Directive gives the right to an effective remedy (art. 39). In the Netherlands the applicant must give documented evidence of the lack of safety in order to rebut the presumed safety, especially about a lack of internal protection. There is normally a possibility to appeal – although in clear cut cases where there is no arguable claim whatsoever - this may be rejected. Such rejections are extremely rare.

The Dutch legislation seems to be in line with the EU's Procedures Directive, which allows states to require 'substantial grounds' from the applicant to show that the applicant's country is not safe. The UK is – at least under the current minimum standards of the Procedures Directive - allowed to maintain lower standards than the Directive's, but the European Commission has now proposed to delete this possibility (proposed art. 34 of (COM) 2009 554 def).¹⁴ This means that, if the Commission's proposals are adopted with a qualified majority in the EU Council of Ministers, the UK system will be incompatible with EU-asylum law.

Under the ECHR the right to an effective remedy may be limited to claims which are 'arguable'. The right must be available in law and in practice, allowing a competent national authority to deal with the substance of the claim under the ECHR within a reasonable period of time and enabling it to grant appropriate relief¹⁵. The EU's Court of Justice (ECJ) has not been asked to interpret the effective remedy in the context of EU asylum law, but the ECJ is likely to follow the European Court of Human Rights in this. An a priori limitation of appeal and access to a procedure which does not guarantee suspensive effect of the appeal could be contrary to the right to an effective remedy for persons with an 'arguable claim'.

¹⁴ Even under the current Directive it is, however, questionable whether general EU law would allow restrictions to legal remedies in stronger cases.

¹⁵ (Wouters, International Legal Standards for the Protection from Refoulement)

The Canadian proposals are clearly below the EU standards and ECHR standards, unless the Federal Court offers an effective remedy. The Canadian proposals are probably contrary to art. 14 ICCPR as they seem to deny suspensive effect to appeal, unless the Federal Court provides this.¹⁶

Clause 13

The proposed Section 110) (3) would be similar to the current Dutch judicial procedure, which in practice is based on documents and not on hearings. Sometimes Dutch judges decide to hear the applicant, but the marginal scrutiny of the facts prevents them from taking an active role with respect to the facts and the applicant's credibility.

The Dutch procedure allows for the Court to take into account documentary evidence that is submitted later (although currently with many restrictions – see above). In that case the Court will ask the parties to comment on the documents and take a more active role. It is expected that this judicial role will increase under the proposals to amend art. 83 Aliens Act 2000.

Clause 23 IRB representation

Although (and because) the Dutch system is rigid and its time-limits far too short, it gives applicants legal assistance free of costs and interpretation services in all relevant procedural steps before the IND and the Courts.

Clause 26 Decision making by civil servants

Interviews and decision making by civil servants does not necessarily lead to a pressure on the quality of decision making, but the government has more control over logistics and decision making.

The European experience is that in hierarchical civil service systems there is a greater tendency to conduct inquisitorial interviews and to reject a claim, as the civil servant is also the 'gate keeper', is more anonymous and knows there still is a court procedure to reverse a rejection. In order to avoid inconsistencies and to avoid quashed decisions, decision making may become more centralized, computerized and standardized (like the Dutch IND's 'decision trees').

Procedural counterbalances, intensive trainings, qualification requirements for civil servants and a more rigorous judicial scrutiny are needed for procedural fairness, but may not offer the same guarantees of impartiality as a (quasi-)judicial (politically appointed) authority.

The Canadian system will have an 8-day period for the interview. As in the Dutch system, the time of the decision is crucial for submitting evidence (proposed Section 110 (4), depending on the interpretation of this Section. The Dutch 8-day procedure goes further than the Canadian procedure, as even the decision may be made within this period of 8 days. It is expected that in 40-50% of all cases in the Netherlands a decision will be made within 8 days. The other cases will be referred to the 'extended procedure'.¹⁷

¹⁶ See Wouters International Legal Standards for the protection from refoulement, p. 574 on CAT and HRC's case law.

¹⁷ Questions were asked by NGO-s and the Dutch Senate whether this system is in line with the EU procedures Directive and the amendments proposed to this by the European Commission. The Directive allows states to have an accelerated procedure which is an exception to the regular procedure. The Dutch asylum procedure makes a fast track procedure

The combination of fast tracked asylum procedures, inquisitorial hearings, restrictions to submitting additional evidence in a later stage and a 'marginal' judicial scrutiny can, of course, be very problematic.

The Dutch proposed medical examinations upon request seem to give more safeguards for applicants who could be traumatized. Similar proposals are made by the European Commission in its amendments to the Procedures Directive. These proposals are considered an improvement, although some medical experts fear that a focus on traumas shortly after the applicant's arrival might be too soon and re-traumatizing.

The Dutch system has developed some counterbalances through a very effective system of legal assistance and interpretation services. The legal assistance is free of cost in all stages of the procedure. There is a possibility of a 'preparation' for the interview with a legal advisor, there is a possibility for the legal advisor or an NGO-representative to attend the interview, and there are 'corrections and additions' following the transcripts of the interviews as well as the possibility to submit a response to an intended rejection. These instruments intend to improve the quality of the first instance decision. However, the pressure on the legal advisors is high, their role during hearings is limited and the time to obtain evidence is also very limited, especially in the 48 hours-procedure. The marginal judicial scrutiny also means that the legal assistance has lost its instruments in the appeal stage. Many asylum lawyers have left the field, also because of frustration about their limited role.

Could the Canadian decision making be fast- tracked like the Dutch asylum procedure? There do not seem to be minimum time-limits in the Canadian legislation which would prevent the Canadian government from introducing 'general' fast track procedures. When the first instance decision making is in the hands of civil servants fast-tracking ultimately becomes a political decision and a logistical matter (unless the judiciary intervenes, for example by requiring observance of UNHCR Excom Conclusion 30).

In how far the changed hearing and decision making process in Canada will affect the quality of decision making and the overall fairness of the procedure will ultimately depend on the civil servants and even more the judiciary. The Dutch 'Council of State' (the highest Court in administrative cases) went along with the government's aim to reduce multiple asylum applications based on unsubstantiated claims, new evidence or compassionate grounds. Why it did so, is still unclear. Eventually it was the European Court of Human Rights which put an end to some restrictive decision making (indirectly: see *Said vs the Netherlands* and *Salah Sheekh vs. the Netherlands*).

the 'regular procedure'.