

CHAPTER 5

STEREOTYPING AND ACCELERATION GENDER, PROCEDURAL ACCELERATION AND MARGINALISED JUDICIAL REVIEW IN THE DUTCH ASYLUM SYSTEM

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When deciding which statements need to be proven, and when proof has been delivered; and when deciding which statements and which behaviour are considered credible, it is necessary to use certain normative standards. These standards are hard to make explicit, and most often they are not. In the first section of this chapter, I will show the subtle and blatant ways in which evidence assessment is shaped by gendered notions of interview officials, decision makers, and legal representatives of asylum seekers.

The slippery nature of evidence assessment makes review and appeal procedures very important. Precisely because the issue is so problematic, the precise nature of the review or appeal procedure available to asylum seekers may well be decisive for the outcome of their procedure. In the second section, I will describe recent Dutch case law on proof and credibility, which allows for a considerable expansion of the use of the accelerated asylum procedure, and argue that this body of case law is at considerable tension with the European Convention on Human Rights. In a final section, I will draw the two strings of this chapter together. The stereotyping described in paragraph 1 will probably increase in the new Dutch asylum system, which makes the 'exceptional' accelerated procedure into the normal procedure. Because of time pressure, interviewers, decision makers and lawyers will be more prone to have recourse to stereotypes because stereotyping is helpful in allowing for quick decisions. Also, time pressure will make effective judicial control less likely.

Abstracted from the particularities of the Dutch context, the main propositions of this chapter concern the necessarily constructed nature of flight motives; the contested nature of that construction; and the influence of the law on proof and credibility on the contested construction of flight motives. When discussing law on proof and credibility, I will address both Dutch domestic law and case law of the European Court of Human Rights. One aspect of the review of case law from the European Court will be a new reading of its decisions regarding Article 13 ECHR.

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5.1. GENDER

First, I want to emphasise that evidence assessment is thoroughly gendered, by presenting a piece of research from my book *Gender and Refugee Status*.¹ In doing research for that book, one of the things I did was to select 252 files of single female asylum applicants from six countries. The women concerned applied for asylum in 1994, and I collected the files in 1996. Hence, the cases are quite old. However, there is no reason to presume that the phenomenon I want to describe here, the gendered nature of credibility assessment, has changed significantly over time. The text was written in 1999, and has not been updated with more recent data. The presentation in this chapter summarises the main findings set out on pages 45–106 of my book.²

In legal practice, the cases of women are presumed to be different from those of men. Their motives for undertaking activities or for refraining from them, their motives for leaving the country, the motives of the people maltreating them - all are portrayed as specific for women in interview reports, decisions, and in documents by the legal representatives of female asylum applicants. The special nature of women's cases is constructed along the lines of three dichotomies which are interrelated. These dichotomies oppose the following terms:

<p style="text-align: center;">emotions ↔ ideas family ↔ public sphere body ↔ mind</p>
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I will analyse the role of these dichotomies on three levels. First, I will see which role they play in ascertaining the *credibility* of the applicant's statements. A preliminary issue in the asylum procedure is the labelling of an applicant as credible or not. For a statement to be credible, it must first of all not be inconsistent. Applicants may provide conflicting statements about dates, places and persons. Such inconsistency is subject to a familiar critique, namely that asylum applicants may be afraid of officials or simply nervous. In addition, some inconsistencies may be the result of cross-cultural miscommunication. An entire body of literature has grown up around the issue of how these problems are further complicated by the issue of gender.³ These issues nevertheless fall outside the scope of this chapter, as I have not observed the interviews.⁴ I analysed only written documents and will therefore investigate how credibility is constructed within these documents.

¹ T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000).

² For a comparable analysis see H. Crawley, *Refugees and Gender. Law and Process* (Jordans, Bristol, 2001) pp. 201–233.

³ For an overview, see *ibid.*, pp. 201–209.

⁴ For an extensive analysis of Dutch interview practice, see the contribution of Doornbos to this collection, *infra* Chapter 6.

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Second, I will address the role the dichotomies play in establishing whether the applicant engaged in a *politically relevant act* in the country of origin. The persecution ground ‘political opinion’ was of central importance in the cases in my sample (and in Dutch practice more generally).⁵ The idea of refugees as ‘political refugees’ is nevertheless nowhere expressed in the form of a requirement in policy documents or individual decisions. Despite this lack of explicitness, it is the persecution ground which the vast majority of the cases turn on, which makes the meaning of the term ‘political’ crucial for the determination of asylum claims. Moreover, the content of the persecution ground ‘political opinion’ is not identified in a positive manner in asylum decisions. In order to delineate the concept, thus, we must focus on cases in which it is articulated what does not count as a political opinion.

And third, I will investigate the role these dichotomies play in establishing whether the threat the applicant faces in her/his home country is to be considered as *persecution*. Something can only constitute persecution if it is sufficiently serious. But it turns out that acts which in themselves are serious enough are not considered to be persecution because they are either too general, and belong to the general situation in the country of origin, or they are too specific, and constitute personal harm. Especially with regard to sexual violence and violence in the family which are considered as private, hence in principle outside the realm of persecution.

It should be noted that the dichotomies overlap (for example, emotions and family overlap, while mind and ideas do as well). Also, not all three dichotomies have effects on all three levels.

5.1.1. *Emotions vs. Ideas*

The first dichotomy I will address is the emotions/ideas distinction. Women are associated with emotionality, men with rationality. However, this association at times takes on the form of a normative assumption about the way in which women (and men) display emotions. As we will see, credibility is established in part on the basis of rather precise notions about how a credible women deals with her emotions during the asylum interview. Also, things women do are presumed to be driven primarily by emotions, not ideas. For example, women who express emotions related to the violent death of their sons, brothers or husbands are considered as grieving mothers, not as human rights activists.

5.1.2. *Credibility*

Emotions play an important role in ascertaining the credibility of an applicant. In order to be considered credible, applicants must show the appropriate emotions at the appropriate moments. An applicant who does not show any emotion when speaking of sexual violence is deemed incredible; a restrained display of emotions is

⁵ T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht* (Nederlands Centrum Buitenlanders, Utrecht, 1995/1997/1999) p. 152.

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deemed eminently credible; and showing an excess of emotions is seen as play acting. In the following section, three examples of just how precise the expectations of interview officials are on this point will be presented.

A Zairian woman says she was arrested together with her one-year-old son on account of both distributing pamphlets and because her husband was active for the opposition party PDSC. She was detained for four days and raped by five soldiers. She was released after the intervention of a doctor, because her baby was ill. In the passage of the interview where she describes in short and factual words that she was raped, the interview official notes: 'The applicant showed no sign of any emotion'. The flight story is considered incredible.

One of the few cases in which a Zairian applicant was found credible concerns a market vendor who was arrested together with her husband because she refused to accept a new bank note. In prison, her husband was shot in front of her eyes, and the applicant was tortured and raped. At two points, the statement of the applicant is interrupted by a remark of the interview official. When she tells about the death of her husband, he writes:

When the applicant tells about the murder of her husband, she cries in a composed way. The crying has something apathetic, as if something in her is dead.

When the applicant describes the rapes, the interview official notes:

The translator found it hard to give a good and literal translation.

The applicant was granted a humanitarian residence permit.

In the case of a Turkish Kurdish applicant born in 1950, the interview report is of a kind that I have never seen before. It is atypical in its (seemingly) literal rendering of the applicant's words, and in the scarcely veiled mocking of the applicant. The flight story is about her problems as a result of the activities of her sons. The report is interspersed with remarks of the interview official, such as:

Remark interview official:

to the translator she puts the question: Can't you help me?

or

Remark interview official:

to the translator she said the following: Tell her that I do not tell lies and that I never will.

Then this passage follows:

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Remark interview official:

the applicant at this moment – 10.55 hours – goes into a kind of epileptic fit and falls from her chair immediately onto the ground. Before lying still on her side, she makes jerky movements. From this moment on, she is not approachable. At 11.08 hours, the applicant slowly regains consciousness. She says she has a headache and swallows a painkiller she brought herself. Her scarf is now tied around her head to combat the headache.

She states:

I now have pain in my shoulder.

Remark interview official:

at about 11.12 hours, the applicant has yet another comparable fit after which, sitting on the ground, she falls sideways. At 11.30, telephone contact is sought with the medical service of the refugee centre. The doctor of the centre, *, says that in the case of Ms. * there is no physical ailment but an experience which can be expressed in a serious form of hysteria. Therefore, as a doctor, he found it necessary to be present at the remainder of the interview, as a rare exception.

Remark counsel [a refugee council worker, TS]:

The applicant becomes emotional and regularly has fits when she speaks of her two sons, * and *. Such a talk is a relief, on the one hand, but afterwards she has attacks like this which may last as much as 20 minutes.

When, two weeks later, the interview is resumed in the presence of a doctor, things don't go smoothly. The applicant repeatedly and emphatically criticises the interview official. Apparently, the translator translates literally, which has a 'comic' effect. Examples are:

To your question of how he [i.e. one of the applicant's sons] knew about the whereabouts of his brother, I answer you, that you don't give your ear to me!

Remark interview official:

the applicant intends to say with this that I, the interview official, do not listen.

or

Give me ears!!

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Forget about the door. [The applicant has mentioned a door being kicked in by soldiers eight lines earlier.] I am going to speak about wheat and butter!

or

Give me your ear; I have become an actress and I should in fact be on TV. What I have experienced even a cooked chicken hasn't experienced.

The applicant has one more fit that lasts about 10 minutes. The flight motives are deemed incredible.

In sum, applicants should display emotion but not too much. The evocative formulation which the interview official uses in the case of the Zairian woman considered credible is informative in this respect. She believed this applicant because she was almost overwhelmed by her emotions but made an effort to control them. What makes the other Zairian applicant incredible is her complete lack of (recognisable) emotion, while the Turkish applicant is simply seen as (over-)acting.

5.1.2.1. *What is Political?*

Emotions are also crucial in distinguishing political acts from non-political acts. The most prominent category of motives considered non-political are motives involving emotions or mere personal preferences.

Women who have tried to trace *missing relatives* (sons, husbands) or protested against their disappearance are portrayed as people inspired by grief or by a longing to be reunited with their beloved ones.

A widowed Sri Lankan Tamil based her claim on the fact that she had publicly protested against the execution (by the LTTE) of her only child, a son. The decision does not consider her protest political activity, hence it is implicitly seen as an expression of personal grief:

The applicant, who has stated that she has never been a member or sympathiser of an organisation which opposed the government in the country of origin, personally never experienced problems from the side of the Tamil Tigers. She has declared that her son was killed by the Tamil Tigers, but it has not been established that as a result of this the applicant has personally experienced problems. The circumstance that the applicant says she was visited by Tamil Tigers does not change this, as this statement is based solely on presumption and has not been substantiated in any way.

In cases of missing relatives, the dominant perception is that this is a personal problem and thus, as a consequence, not political. This emphasis on personal tragedy clearly has a depoliticising effect: it zooms in on suffering and not

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resistance. Yet the Tamil mother just mentioned can easily be perceived as a protester. In fact, one Zairian case shows the transformation of such a 'mater dolorosa' into a character we can and do recognise as a political activist: The crazy mother from Plaza Del Mayo in the 1970s. Initially, the application was rejected because the applicant had not been politically active; after review she was granted a refugee status.

The interview reports of Iranian applicants show that interview officials are keenly aware of problems surrounding *improper dressing*. The issue is apparently addressed in a standard question, as many of the applicants mention such problems (including being lashed) in isolated passages after the immediate flight motives have been dealt with. The only case in which dress was considered the expression of a political opinion concerned a Turkish Kurdish protest singer who wore a coloured scarf during a concert.

I wore a shawl with the colours green, yellow and red. The police, who supervised us, came to me and confiscated my shawl and ID card. They thought that the colours of the shawl symbolised the Kurdish community. I wore this shawl as an accessory, but of course I also wore it because I am proud to be Kurdish.

As this event was not the cause of her flight, which occurred years later, the issue was not thematized in the procedure.

The only example of a case in which the imposition of a dress code is not portrayed as irrelevant is a Bosnian case.

A woman of Croat ethnic background living in an area dominated by Muslim troops receives anonymous telephone calls.

'In an angry tone, they told me I didn't belong here and had to leave. Either I had to dress like a Muslim woman, with a scarf, long sleeves and a skirt down to my ankles, or I had to leave. I was very afraid when they called and I hung up quickly. They threatened to rape me if I wouldn't listen.'

These facts are followed by more examples of ethnic cleansing of which the applicant was a victim.

Transgression of a dress code is not seen as a conscious act of defiance. At most, a dress code is seen as a discriminatory practice (which may then be dismissed as related to a law of general application). As in the cases of relatives who have disappeared, the sympathetic view focuses on the victimisation of the women and not on their disobedience. The case of the Kurdish woman wearing a scarf with the Kurdish colours is depicted as a different case altogether. She is not transgressing a dress code; she is wearing a clearly delineated political symbol. Transgression of dress codes other than by wearing something like a party scarf is seen as whimsical, careless or a matter of a mere preference for one kind of clothes over another. In the

interview report of the Bosnian claimant, however, the imposition of dress codes is depicted as consistent with the other forms of ethnic cleansing.

The Case of Betty

A final example of flight motives being considered emotional and not political consists of cases pertaining to the Chinese *one-child policy*. I will extensively describe one case which represents many aspects of other Chinese one-child cases. The particular combination of factors makes the case atypical but nevertheless illustrative of how the Dutch authorities reacted to one child cases in the sample.

The applicant, whom I will call Betty, was born in 1963. In 1985, she married to a man five years her senior. Her first child, a son, was born in 1985 and was followed by a daughter in 1987. The children are still in China with a brother-in-law. In mid-1992, Betty was eight months pregnant with her third child. When three women and two men from the Bureau for family planning entered Betty's house for inspection, Betty's husband pushed one of the civil servants from the stairs. The man had to be brought to the hospital; Betty later learned that the man's legs were permanently paralysed. Betty was taken to the hospital and given an injection. An hour later, she experienced pains in her stomach. After 24 hours, the baby had still not come out and Betty lost consciousness. When she regained consciousness, the abortion had taken place and Betty had been sterilised. A week later, she was allowed to leave the hospital.

During her stay in the hospital, her husband had fled. Betty cannot explain why he wasn't arrested immediately after he had pushed the civil servant from the stairs. A few days after coming home from the hospital, the Security Service handed her an arrest warrant for her husband. He was charged, Betty says, with deliberately acting against the family planning policy and assaulting a Family Planning executive. Betty was repeatedly visited by a son of the injured man; the son said he would take revenge if she did not tell him where her husband was. On one occasion, he wrecked the furniture; on another occasion, he threatened her with a knife. An acquaintance who had received a letter from Betty's husband told her that he was in Hong Kong and would probably go to The Netherlands. When, shortly after, a Security Service official visited her and said that she would be prosecuted as an accomplice to her husband if she didn't say where he was, Betty fled. After applying for asylum, she asked a social worker in the refugee camp in The Netherlands to help her find her husband, but he has not been found.

After a negative initial decision, the case was brought before an independent advisory board. An extended quote from the interview report provides insight into how the board views the issue of forced abortion.

In China, it was no problem that she [Betty] had two children. In 1987 that was still allowed. It is not allowed to have a third child. To the question of why she got pregnant under these circumstances, the applicant replies that she loves children and that she got pregnant by coincidence. She hoped to be able to have the baby and to be able to pay money to the

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authorities in order to keep it. A mother does not want her child to be removed. To the question of whether she knew that this would lead to problems, the applicant answers that it is hard to say. Sometimes it is possible to ask the authorities for permission to have a third child. She had not asked for permission. In her village, one could wait until after the birth of the child. After that, one just had to wait and see. The authorities do not use fixed rules.

The applicant is confronted with the fact that the Chinese authorities do use fixed rules. This has happened for a long time. The applicant then says that such rules may exist, but at a local level one is dependent on whether or not the rules are applied by the authorities. This depends on the situation.

She did not request permission to have the baby during the pregnancy, because the family planning people hold a campaign once or twice a year in China. She had hoped that such a campaign would not occur during her pregnancy. If that should happen, she hoped she would still be able to keep the child in one way or another. To the question of what was the problem with asking permission to keep the child before the child was born, the applicant replied that she could not do that because she would not have received permission to keep the child. She is sure of that, as she was breaking the rules. The child would have been removed. She had hoped that she would be lucky and be able to have the baby with help of her friends. She didn't dare to report herself.

The board's opinion, which was adopted by the State Secretary, motivates the rejection of Betty's application in the following manner.

[I]t is taken into consideration that the statement that she has been forced to undergo an abortion and been sterilised, even if one can presume her statements to be correct, is no ground for refugee status, if only because the abortion and sterilisation cannot be related to one or more of the grounds mentioned in Article 1(A) of the Convention. In addition, the applicant was conscious of the policy – which is identical for everybody – on family planning in China and she consciously took the risk of not being allowed to keep the child. In so far as she fears being punished by the authorities in China on account of that, it is remarked that these sanctions, as is clear from the statements of the representative of the Minister of Foreign Affairs during the hearing, are primarily of an economic nature.

In so far as the applicant fears persecution because of her husband's problems with the authorities, his act is considered a civil offence (injury) not based on political motives and no clues can be found in the statement of the applicant that the authorities attribute to him [the husband] a political opinion they find disfavoured. As a consequence, it is not plausible that the applicant will be attributed a political opinion which the authorities find disfavoured and will lead to acts of persecution. That the son of the civil servant involved purportedly threatened her (and her

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husband) does not change this, if only because it cannot be understood why the applicant could not reasonably have invoked the help of the Chinese authorities to deal with the postulated threat which has not been established to rest on political motives ...

[...]

With regard to the postulated abortion and sterilisation, it is considered that it has not been established that she was traumatised thereby to such an extent that a residence permit on humanitarian grounds could not reasonably be denied.

The State Secretary's decision to adopt the board's reasoning adds that the arrest warrant for her husband, which Betty's lawyer submitted during the review procedure, does not change the fact that 'this case concerns prosecution for a civil offence'.

The complex manner in which pregnancy is portrayed should be noted. The first thing to note in this respect is that the report pays attention to Betty's reason for wanting to get pregnant and remain pregnant. The issue might have been considered as trivial but in Betty's case, wanting (or wanting to keep) a child while knowing that this can lead to problems is portrayed as stupid. The board speaks of a risk of forced abortion being consciously taken.

The manner in which the problems of Betty's husband are addressed should also be noted. Betty says her husband injured a civil servant in a conflict over the implementation of the one child policy. The fight is nevertheless not portrayed as the expression of a political or religious opinion but as an emotional reaction. The punishment that the husband can expect is normal prosecution and not persecution. A remarkable aspect of Betty's case is that the Chinese authorities charge her husband with more than just the 'civil offence'. According to the arrest warrant, he is also charged with 'serious sabotage of family planning' and not just the injury of a civil servant. Nevertheless, this is also construed as a civil offence.

An essential element in the negative attitude towards cases relating to the one child-policy cases is that a violation of demographic policies is *not* construed as the exercise of a human right or the expression of a political opinion; rather, the violation of demographic policies is seen as governed by emotions and intimate desires: the wish for a child, objections to abortion and protective male rage against the one child authorities. There are also hardly any signs of other participants (particularly refugee lawyers) trying to reconceive these matters in terms of conscience or politics.

5.1.3. *Family vs. Public Sphere*

The second dichotomy I want to address is the distinction between the family and the public sphere. The family is considered to be a sphere of freedom from State intervention. That is the way the right to family life is constructed in, for example, human rights provisions such as Article 8 ECHR. However, the legal institution of

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the family is a creation of the State, and it is the subject of detailed regulation in family legislation. The way in which the family is regulated makes a difference. In very rough terms, regulation which will be labelled as non intervention in mainstream legal thought (such as no penalisation of sexual violence between spouses, or not granting rights to children vis-à-vis their parents) will be beneficial to the stronger party in family relations, generally the husbands and the parents. The grounds on which divorce can be granted, and the regulation of custody rights, will be of crucial importance for the decisions women can or cannot make when they want to leave a marital relationship. Although the desire to keep the State out of the family makes sense in some contexts, it may easily obscure the fact that the regulation of the family by (State created) law has power effects, and may be the subject of contestation.⁶ As we will see, legal practice sticks to the mainstream view about the private nature of the family, and labels things that occur within the family as per se outside the realm of refugee law.

5.1.3.1. Credibility

When a female applicant has a family, the interview report devotes attention to the applicant's behaviour towards her husband and children before, during and after flight. If the behaviour of the applicant is considered inappropriate, this is taken as an indicator of incredibility. The behaviour used as the norm may be specifically Western and is often traditional by any standard. Female claimants leaving their families behind are considered incredible. Such an assumption is often only clear from the interview report and simply remains unmentioned in the decision. On occasion, however, the issue may be mentioned in the decision, as in the following decision in a Turkish case.

It is surprising that the applicant has left her children behind in Turkey, as she has stated she left Turkey partly out of concern for the well-being of her children. It is not deemed probable that the children of the applicant will benefit from the departure of their mother abroad. This damages the statements of the applicant.

Later, the applicant was caught smuggling her children into The Netherlands illegally. Subsequently, she was admitted as a refugee.

In exceptional cases, unbecoming behaviour may play a central role in arguing that the applicant has other motives for leaving her country than the ones she pretends to have.

In an Iranian case, the applicant based her claim on fear of persecution for keeping a human rights record. The State attorney argues:

⁶ This point has been made in the classical articles of Frances Olsen, *see her* The Family and the Market: A Study of Ideology and Legal Reform, 96 *Harvard Law Review* (1983) pp. 1497–1528, and The Myth of State Intervention in the Family, 18 *University of Michigan Journal of Law Reform* (1985) pp. 835–864.

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It seems more likely that the applicant left her country because of the personal problems with her husband and the reunification she desired with her old love *, whom the applicant's father forbade her to marry. The applicant indicates in the interview that she is not particularly interested in whether her husband is still alive.

The Court dismissed the claim and found it probable that the applicant left the country because of 'problems in her private life'.

Conversely, 'proper' behaviour is typically rewarded with credibility and vivid descriptions of the behaviour. Most notable are the portrayals of women grieving the death of a husband or a son, where interview officials often display almost literary skills.

5.1.3.2. *What is Political?*

Refugee claims in which *problems with husbands or fiancés* play a central role or claims in which an applicant has refused to start a relationship with a man are always dismissed as being about 'problems of a personal nature' or 'personal problems'. In the words of one decision: 'The Refugee Convention is not intended to provide protection in such a situation'. The idea that private problems cannot lead to refugee status is very apparent. In several cases, the interview reports show the interview official saying this to the applicant and suggesting in so many words that she withdraw her application.

Cases with 'personal problems' standing central are thus routinely dismissed. In most cases, the statements of the applicants noted in the interview report also do not refer to their refusal to marry, remain married, or stay in an abusive relationship in political terms. Interview officials do not see the conflicts which the applicants are part of as potentially of a political nature. Nevertheless, in Iranian cases, a humanitarian permit may be granted.

In one Iranian case, concerning a woman born in 1956, the interview report was lively and dramatic. The applicant and her husband chose each other for marriage and were married in the early 1980s. The husband, an engineer, did very well and became quite successful. Because of this, he also relied more and more on his prestigious and very religious family living in the holy city of Qom. The applicant, who by then had a daughter, was completely absorbed by her in-laws. She could hardly bear it. Her husband refused a divorce. She established contact with an opposition group and acted as an informer and courier. Her husband found out and, in order to prevent embarrassment, had his wife supervised all day. Shortly thereafter, he divorced her. He was appointed custodian of the child and, after a transitional period, the applicant was denied any contact. When she was caught secretly visiting her child at school, she was followed by the local Komiteh. She escaped arrest by fleeing over the rooftops. She then abducted her child and fled. With regard to refugee status, the decision argues:

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It is noted that the problems the applicant has invoked, which are characterised by problems in the private sphere, cannot lead to refugee status as the aforementioned does not fall under one of the grounds mentioned in the Convention.

Dissatisfaction with the general situation in Iran does not lead to refugee status.

The applicant is granted a residence permit on humanitarian grounds without further motivation.

Problems labelled as private are seen as too general (family law is a law of general application) or too specific (personal problems). A case like that of the Iranian woman described above is not viewed as one in which the family constitutes the site of a conflict about politics and religion in which the man's position of superior power was created by (State made) family law.

In the literature, persecution on account of the activities of *male relatives* is often found characteristic for the flight motives of women. Although I initially shared this idea, my material suggests that such a flight motive is at least partly the result of the problems of male relatives being privileged over those of the applicants themselves. The sample contains quite a few examples of women with flight motives perceived as being inspired (in part) by the problems of their male relatives. In the case of a Zairian applicant, moreover, the facts are explicitly conceptualised as being about persecution on account of kinship *instead* of political activities.

According to the interview report, the woman said that her husband was active for the opposition party PDSC. As a part of this, the couple made a day trip to Brazzaville, the capital of Congo Brazzaville which is located on the Congo River opposite Kinshasa. The applicant had a film with photographs of tortured prisoners in her handbag. They were arrested, the film was found and the applicant was interrogated, tortured and raped.

The decision argues among other things that, as far as they are credible, the flight motives suggest that the attention of the authorities was directed more towards her husband than herself, so she has no personal fear of persecution.

The perception of the facts in this case focuses on the husband at the expense of the applicant herself. It was the applicant who smuggled the film, and the imposition of the kinship perspective in the decision goes against the facts. Such a perspective simply blocks the case as being seen as about the applicant's own activities. This tendency has also been noted in a study from the Research Centre of the Dutch Ministry of Justice. When interview officials and decision makers from the Immigration and Naturalisation Service were asked if it made a difference whether an asylum applicant was male or female, they initially responded that it should not make a difference. Later, however, they added that 'With women I go into the husband's problems more thoroughly, because these are mostly the reason for

departure', or 'With women I mainly look if she has left the country on account of problems of her own or only on account of problems of her husband'.⁷ The researchers argue that this idea is confirmed by their research, which shows fear of persecution on account of the activities of male relatives to be a frequent flight motive in their sample.⁸ This conclusion is flawed, however, as it is based on the flight motives reported in the interview report. In other words, the reported frequency of this flight motive may simply reflect the preconceived opinions of interview officials.

Something comparable occurs in cases of relatives of disappeared male family members, as we saw earlier. Because these women's activities focus on missing relatives, they are presumed to be about the family, hence not public activities.

5.1.3.3. *What Constitutes Persecution?*

In a case concerning a woman who considers herself a Bosnian national but has a Croatian passport and is married to a Croat, sexual violence in their relationship stands central to the claim. The couple are from Vukovar, where the parents of the woman moved from Bosnia-Herzegovina. The husband started to rape her and to cut her with a knife while they were staying in a refugee camp in Germany. After their return to Croatia, they stayed in a refugee camp. The abuse became worse. The applicant didn't dare to report the abuse to the police, and says: 'I think the war has made my husband crazy'. The initial decision argues that the applicant could have sought protection against the abuse from the Croatian authorities.

This case looks very much like cases of inter-ethnic violence or ethnic cleansing (which have led many Muslims to leave Croatia). In cases of applicants from former Yugoslavia, this was sufficient ground for granting refugee status. Given that, in this case, the perpetrator (an 'ethnic Croat') and the victim are married, however, the woman is constructed as a victim of private violence. In fact, political, religious and ethnic conflicts like the one described here are seen as merely personal precisely *because* they occur in the context of the family. The family is apparently only personal, only private, only emotional.

5.1.4. *Body vs. Mind*

Another dichotomy at work in asylum practice is the distinction between body and mind. This one is relevant in particular in cases concerning sexual violence. Sexual violence against women is considered to be a physical act of the perpetrator directed against a woman's body. The woman is considered to be a random victim of male lust, unless it can be established that it was directed specifically against her. Sexual

⁷ J. van Wetten, N. Dijkhoff and F. Heide, *De positie van de vrouw in de asielpcedure* (WODC, Den Haag, 1998) pp. 28–29; *cf.* *ibid.* pp. 38–39

⁸ *Ibid.*, p. 63.

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violence only becomes persecution if it can be established that it was used as a means for a particular goal. Thus, the burden of proof in cases concerning sexual violence tends to be higher than in cases of other forms of torture, because in those cases the presumption of lust directed at a body is absent.

There are many examples of cases in which sexual violence is viewed as the act of a private person, and not the police officer or soldier involved. This line of reasoning can take several forms. It may remain implicit altogether; it may be vaguely formulated as 'The applicant has become the victim of acts of aggression based on arbitrariness' (as in a Zairian case in which a market vendor said she was raped and had an abortion as a result); or it may be formulated explicitly and take the following form:

In so far as the applicant has nevertheless been the victim of rape, it is considered that in and of itself this is no ground for the opinion that she has a well-founded fear of persecution in the sense of the aforementioned Convention. After all, in light of everything that has been considered above, it is not probable that this has been a consequence of negative attention directed at her personally by the Zairian authorities and that it has occurred on account of political reasons. More likely, the applicant has become the victim of a civil offence, which cannot be a ground for refugee status.

This argument is most frequent in Zairian cases. Whether it is related to the fact that reports of rape were most frequent in the Zairian cases is hard to say. We can conclude, however, that there is a strong and general (although possibly variable) tendency to consider sexual violence a private act related to phenomena on the side of the perpetrator (such as drunkenness or lust) and not the setting (such as detention, interrogation, suspicions regarding the victim's political loyalties). This conclusion is even more striking in light of the Bosnian cases, where (the threat of) rape is unflinchingly viewed as part of ethnic cleansing.

The way in which cases related to the one-child-policy are dealt with shows a comparable notion that a physical act like getting pregnant excludes conscious motivation required for relevance in the sphere of asylum law. Forced abortion and sterilisation are not considered as possibly retaliation for the enjoyment of human rights, but as administrative acts enforcing existing norms. This may well be linked to the perception of childbearing as merely physical. It is remarkable that the idea that the State should not interfere in the family, prevalent in the family/public sphere dichotomy, is absent here.

5.1.5. Ethnicity

Ethnicity is a theme of a different nature than the dichotomies dealt with above. Gender and ethnicity are mutually constitutive, *i.e.* what it means to be male/female is in part defined in ethnic terms, and what it means to be white, black, Asian, Muslim and so on is in part defined by gender. In this section, I will limit myself to showing that gendered constructions work differently if asylum applicants are from different countries.

5.1.5.1. *Credibility*

There seems to be a relation between ethnicity and credibility. Bosnians were often not asked about their flight motives apparently because they were considered self-evident. When Bosnian applicants were interviewed, credibility was not raised. In Zairian cases, incredibility is routinely invoked against applicants; in 23 of the 37 Zairian cases in the sample, credibility was a central argument given for rejecting the claim. The cases of Turkish, Iranian, Chinese and Sri Lankan applicants fall somewhere in between. In these cases, incredibility is regularly invoked but is not a standard issue.

A quantitative indication of the generally negative attitude towards Zairian applicants is the frequency of standard text blocks in the male form in interview reports concerning female applicants (see Table 1). This is actually inconsequential and merely a matter of pressing the wrong buttons, but it is nevertheless interesting to see that it occurs more frequently with respect to some nationalities than others. The fact that such gender errors occur in Zairian cases confirms my impression that these reports tend to be sloppy. The finding that Iranian interview reports contain numerous gender errors initially came as a surprise. Such sloppiness, nevertheless, seems to fit with the claims of those who criticised the Dutch policy on Iranian claimants; they argued that the procedure as a whole was sloppy because Iranian applicants were not returned up until 1995. This meant that both civil servants and lawyers found little was at stake in such cases and thus became careless.⁹

Table 1 *Gender errors in interview reports*

Country of origin	Relevant cases	Gender errors
Bosnia-H	14	0 (0%)
China	75	0 (0%)
Iran	39	6 (15%)
Sri Lanka	16	0 (0%)
Turkey	22	0 (0%)
Zaire	36	8 (19%)

A factor that may further complicate things is language. All of the applicants with the exception of the Zairians were interviewed in their mother tongue. Most of the Zairians (29) were interviewed in French, which is the official language in Zaire. Going by the names of the translators (which is an unreliable source, but the only one I have), in only four cases was the translator a Zairian; in the other 25 cases, the translator had a Dutch or a French name. In the only case where the interview report provides fully coherent flight motives, the French translator was probably Zairian. In seven other cases, Lingala was the interview language. In five of these cases, the translator appears to be a native speaker. In the two other cases, the translator was a

⁹ Spijkerboer, *supra* note 1, pp. 32–33.

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man with a Dutch name. Finally, in one case, with the interview in Swahili, the translator was probably a native speaker (see Table 2).

Table 2 Interview language in Zairian cases

language	Zairian translator	non Zairian translator	Total
French	4	25	29
Lingala	5	2	7
Swahili	1	0	1
total	10	27	37

My thesis is that, especially in Zairian cases, interview officials *expect* incoherent flight motives. For this reason, they do not normally try to clarify problematic statements. Quite to the contrary, when confronted with the incoherent flight motives of a Zairian applicant, they consider this as typical for the unreliability of Zairian applicants. I would illustrate this with one case, in which the interview report fits the general picture of the Zairian cases. What makes the case interesting in the present context is the submission of a medical report from Amnesty International with perfectly coherent flight motives which are not so much in contradiction with those recorded in the interview report but, rather, a consistent version of them.

The Case of Karen

In the case of an unmarried woman born in 1967, whom I will call Karen, the name of the Lingala-Dutch translator suggests a Zairian background. The interview report of four pages begins with half a page of standard text in the male form. This is followed by the text below (with punctuation and capitals as in the original):

Reason for asylum application

I was arrested on * At a prayer service. I lead the choir. After the service I brought the girls outside to hold a meeting. It was about 9 PM. We saw range rovers driving they came from the direction of *. They surrounded us. We were with 15 girls. There were about 10 range rovers. About 20 soldiers were in them. We were put in the cars and taken to the town of *. There we were brought to a military camp and put up in a large hall.

The next morning on * [date, one day after the arrest] we were called into a little office one by one. Our identity papers were asked for. My father is village chief. He is a member of the party Abaco. This party is for the tribe Bacongo This party is against Mobutu. It was said that Mobutu is not to be made fun of by my father and that they would teach him a lesson. I would never see him again. For the rest nothing was said or asked.

THOMAS SPIJKERBOER

I was raped on the nights of * and * [the first nights of her detention] by 05 soldiers. I was blindfolded. Both nights by 05 soldiers. For the rest I don't know who they are.

The next day on * [date, two days after the arrest] I was brought to the zone * in Bas-Zaïre, to the prison there. I was brought there alone. I do not know where the other 15 girls are.

In this prison I was beaten with a thread that soldiers use as belt and in order to descend of a thread (a cordelet). This was on * [date, two days after the arrest] at the moment that my identity was passed on in the prison. And that was told about my father. I have a scar of this on my left shoulder. (seen by the interview official, A dark spot the size of a quarter with a T-shaped scar in it) I was put in a small cell alone.

Now and then I was interrogated. About five times. I was then beaten and kicked but that was not so terribly hard. I was questioned about

- What was said at the meetings of my father.
- If he was against Mobutu
- If during my arrestation I wanted to organise something against Mobutu.

I tried to explain that I only wanted to hold a meeting for the church and not for something else. I was not able to see the prison well because I was put in the cell and taken out of the cell in the dark. There was illumination with candles.

I was helped to flee on * [about 2 months after the arrest]. A soldier helped me escape at 07.00 hours. He released me because we both spoke kigongo. He had pity on me, in view of my situation. He thought that maybe I might be murdered in that prison. As far as I know there were no other reasons to release him.

The remainder of the interview report is taken up by formalities (family, documents) and by the travel route of the applicant. Towards the end, the following standard text block is included.

I have nothing to add to the statement I have given. I have told everything that can be relevant for the determination of my claim. I have had sufficient opportunity to tell my story. I have told the truth. I have understood and comprehended the translator well. The questions were also clear to me.

This interview report is remarkable on several points. The punctuation is sloppy. When Karen speaks in full sentences, if at all, they are suggestive of the composition of a young child. Almost every other sentence contains linguistic oddities (which I have tried to translate). What Karen was beaten with is obscure until one consults the entry *cordelette* in a French dictionary; the word means little cord. And, of course, the last word of the extended quote should be 'me' instead of 'him'. These language oddities suggest that the translator did not speak Dutch very well, or that

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the interview official was not very accurate. Nevertheless, the interview official (and, as we will see, the decision maker) did not conclude that there was a language problem but a credibility problem.

Due to the sloppiness of the interview report, the flight story went largely unresolved. Karen was arrested with her choir after a service. Did the soldiers only arrest the choir? If so, what might have been their motive for, apparently, directing ten Range Rovers to a church choir? Might they indeed have thought that this was a political gathering? And: If the aim of the soldiers was to intimidate her father, why didn't they arrest her father? Finally, just how Karen escaped, what the motive of the soldier who helped her was and what risks she faced in prison remain unclear.

The corrections submitted by a Refugee Council worker clarify these issues. The thing Karen was beaten with is a torture instrument, a kind of whip. The soldier who released her is the son of a close friend of her father. He knew that the soldiers in the prison had decided Karen had to be killed for agitating against Mobutu. Karen's father, a village chief in the region 'Bas-Kongo', was a member of a group that stands up for the interests of the region. Other village chiefs regularly met at the house of the family, and Karen had attended these meetings. And finally: Meetings of more than, say, five people and hence meetings such as that of the choir are seen as a threat to the regime.

Although noting that corrections had been submitted, the decision is based on the disorganised flight motives provided in the interview report. Karen was arrested along with fourteen others, it says, and there was therefore no action directed against her personally. The statements about her escape are incredible; it is incomprehensible that a single soldier could get her out and unlikely that he should take such a risk solely because he spoke the same language and pitied her. Karen only undertook minor activities, so her fear of being persecuted on account of them is not well-founded. And it is strange that while she was arrested for organising a religious gathering, she was interrogated about her father's political activities. Finally, her statements about her father's activities are insufficiently concrete.

In the review application, a doctor from the Medical Examination Group of Amnesty International gives a lengthy (1½ page single spaced) version of the flight motives, which I will summarise. Karen's father was a village chief and the leader of the entire region of Bas-Zaïre. He was harassed by the Zairian authorities because of his political activities; the Mobutu regime wanted to keep the region in its sphere of influence because of its natural resources. The father was regularly arrested, beaten and released shortly after. Two of Karen's brothers had been arrested several times as well. Karen was arrested after directing her choir and talking with the choir outside the church. Soldiers accused them of holding a meeting in order to prepare a march against Mobutu. After initial interrogation in a camp and the soldiers found out who she was, only Karen was transferred to a prison. Here she was interrogated and tortured. Karen was raped in the camp during three nights by several men. The police officer who helped her escape was the son of a friend of her father and held a senior position. Karen got pregnant as a result of the rapes (which was her first sexual contact) and has the child with her.

The case was referred to the ACV and was still pending when I saw the file. The point in this case is that coherent and compelling flight motives existed, as shown by the medical report. However, the interview report is so sloppy that the attitude of the interview official is very plausibly a cause of the incoherent flight motives in the report, regardless of actual incoherence of Karen's account. The Amnesty report contains a completely coherent version of the same facts. The incredulous attitude of the interview official and the decision maker in Karen's case are indicative of the attitude encountered in the great majority of the Zairian cases which were part of the sample.

5.1.5.2. *What is Political?*

In some cases, applicants are assumed to have left the country of origin because of *discontent with the general situation*. This attribution was particularly frequent in Iranian cases, but also found in two Turkish cases and one Zairian case.

The idea that applicants have fled the general situation in Iran is almost routinely invoked in cases where women have problems presumably caused by their improper behaviour.

An Iranian applicant who, according to the interview report, was tortured, raped and condemned to death by lapidation on account of working late at night together with a male colleague is first confronted with the argument that she has not substantiated her flight story. Then the decision goes on:

But whatever one may conclude about the detention and the sentence, this cannot lead to the conclusion that the applicant is a refugee in the sense of the Convention, as there is no persecution on account of one of the enumerated grounds. The incidents are a consequence of legislation in force in Iran, and therefore the applicant bases her case on the general situation in the country of origin. This in itself is insufficient for a well-founded appeal to refugee status.

In such a manner, the argument that what happened to the applicant is part of the general situation and the attribution of the general situation as a flight motive coincide.

The two Turkish cases in which attribution of flight motives occurs are both about women who, according to the interview report, claim persecution on account of the activities of their husbands. One example follows.

An illiterate Kurdish woman born in 1971 was investigated several times in a hospital in order to determine whether she had recently had intercourse with her husband who had gone to northern Iraq to fight for the PKK. The decision argues:

The problems that the applicant, according to her own statements, has experienced are related to the general situation in Eastern Turkey, which is characterised by conflicts between the Turkish authorities and Kurdish resistance fighters. In this respect it has not been established that the

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Turkish authorities pay specific attention to the particulars of the applicant.

Dissatisfaction with the general situation in the country of origin in itself is insufficient grounds for a well-founded fear of persecution in the sense of the Convention.

In the Zairian case, the flight motives are clearly political but still attributed to dissatisfaction with the general situation in the country of origin.

According to the interview report, the applicant has said she was arrested and detained for one and a half months following a UDPS (an opposition party) manifestation. The initial decision finds the story incredible because the applicant says she was released in exchange for sex with a guard. The Court finds that it appears from what the applicant has stated that her application 'is based primarily on the general situation in Zaire which, the applicant says, is characterised by total arbitrariness of the authorities, of which she has become the victim'.

These examples illustrate how flexible the 'general situation' argument is. Analytically, the attribution consists of two steps. The first step is to characterise a phenomenon as part of the general situation. 'Total arbitrariness of the authorities' in Zaire, harassment of the relatives of political activists in Turkey, discrimination of women in Iran are construed by decision makers as part of the general situation; in other words: as normal there. The second step is to decide that, having found no other compelling reason for the applicant to leave the country, the reason must have been the general situation. The question is why, in these cases, the decision makers do not simply limit themselves to rejection of the flight motives as insufficient but add an argument on the 'general situation'. My tentative conclusion is that the additional argument is intended to provide some minimal recognition of the fact that the applicant indeed had a problem in her country of origin – an insufficient problem, but nevertheless a problem. This seems to be the predominant characterisation of the flight motives of Iranian women fleeing problems on account of improper behaviour. In the other cases, the argument seems to be applied at random.

5.1.5.3. What Constitutes Persecution?

The idea that the acts of violence undergone by the applicant are random acts and therefore lack the discriminatory character required by the refugee definition was routine in Sri Lankan and Zairian cases. In these cases, the interview reports construct the acts of violence as random in part because the applicant is simply not asked about the possible causes of the acts. Constructing the acts of violence or fears that the applicant has experienced as random lends a character of irrationality or naturalness to them. The applicant is seen as just fearing the lack of good order, the Hobbesian state of nature.

In the Sri Lankan cases examined, the majority of the acts of violence are presented as happening out of the blue, with no clear cause and simply being part of what happens in civil wars. The interview reports show no indications of specific questions on how the rapes or assassinations came to happen. It may very well be that in some or many of the cases, the violence indeed occurred out of the blue. But the interview reports also show the interview officials to expect this. In many cases, the acts of violence are rather extreme and it is not at all obvious that they were random. Nevertheless, the acts are treated as random in the interview reports; no further questions are asked; and both the decision makers and many of the lawyers appear to accept this. It is not just a matter of the technical skills of the interview official, as illustrated by the case of Anne, because the interview report was of a very high quality in that case. A comparable 'randomisation' of the violence occurs in Zairian cases. In the cases from the other countries in the sample, the argument that the acts of violence were random acts occurs but not as routinely as in the Zairian and Sri Lankan cases. We may conclude that the 'randomisation' of violence (*i.e.*, acts of violence interpreted as random without consideration of a realistic alternative) is specific to particular countries. Zaire and Sri Lanka are considered countries with a weak State and resulting chaos.

There is a stark contrast between the perceived random nature of acts of violence in Zairian and Sri Lankan cases and, on the other hand, the perceived systematic nature of comparable acts in Bosnian cases. Although of course one may argue that this is due to the different nature of the respective conflicts, it is remarkable that especially in the Sri Lankan context violence which took place in a civil war along ethnic lines was never considered as directed at anybody in particular, while in Bosnian cases the directed nature of the violence was taken for granted.

5.1.6. Conclusion

It should be noted that the way in which the dichotomies operate are not compelling in any way. In passing, I remarked that the family is considered a natural site of non-intervention by the State when family conflicts are considered as inherently private, while State intervention in Chinese one child cases is considered equally as obvious. Also, at times applicants may succeed in changing the perspective on their cases. Thus, a Zairian woman who was at first considered as a grieving woman was recognised as a refugee once she was perceived as an activist relative of a disappeared person. Comparably, the Turkish woman whose credibility was damaged by the fact that she had left behind her children was considered credible when she was caught smuggling her children into The Netherlands. Credibility, political activities and persecution are constructed in part by gendered and ethnic notions. They do not per se work against women. They work to the benefit of women who succeed in fitting the mould, and to the detriment of women who don't. It seems that for Zairian women it was particularly difficult (but not impossible) to do so, and for Bosnian women it was relatively easy. However, the use of

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(sometimes blatant) stereotypes turns out to be crucial in fact finding, credibility assessment and deciding what has been proven.

5.2. LIMITING JUDICIAL SCRUTINY OF CREDIBILITY ASSESSMENT¹⁰

Since 1 April 2001, the highest Dutch court in immigration appeal cases, the Council of State, has developed a jurisprudence that subjects administrative acts to minimal judicial scrutiny in immigration matters. One of the instruments to this end concerns evidence. The relevant practice consists of a combination of very restrictive lines of case law on (a) the accelerated procedure, (b) undocumented asylum seekers, (c) the possibility to submit statements or evidence after the initial decision, and (d) a restricted judicial scrutiny. My guess is that comparable strategies exist in other countries as well, although I expect that the Dutch Council of State case law is a rather comprehensive version. In my analysis, this practice is contrary to basic human rights standards. I will first describe this practice, and then sketch ways of challenging it.

5.2.1. Dutch Practice

5.2.1.1. Accelerated Procedure

The jurisprudence of the Council of State can only be assessed fully when one is aware that about 50 per cent of all asylum applications are now being processed in the accelerated procedure, which takes 48 working hours (*i.e.* hours between 8 AM and 10 PM). In practice, these applications are turned down in three to five days after they have been submitted. Asylum applicants get two hours to prepare for the interview with a legal counsel, and three hours to discuss the report of the interview with their counsel, as well as the document in which the arguments are given on the basis of which the administration intends to turn down the application. Translators are consulted by telephone, and they are replaced regularly (I have understood this happens every 45 minutes). The lawyers work in shifts (two shifts per day). As a consequence, the asylum seeker will not be assisted by one single counsel. The Council of State has held that the accelerated procedure can be used for any asylum application; it is not only fit for manifestly unfounded or clearly abusive applications, but for any application which the administration can reject within the relevant time limit.¹¹ Of course, the risk of accelerated procedures is that applicants

¹⁰ This paragraph reflects my research about the case law of the Council of State, *see my Het hoger beroep in vreemdelingenzaken* (Sdu, Den Haag 2002) and *De Afdeling en de rechtsstaat. Het hoger beroep in vreemdelingenzaken, 77 Nederlands Juristenblad* (2002) p. 2082–2088.

¹¹ Afdeling bestuursrechtspraak van de Raad van State 7 August 2001, *Jurisprudentie Vreemdelingenrecht* 2001/259. This is contrary to case law from before 1 April 2001, *see Rechtbank 's-Gravenhage (rechtseenheidskamer) 2 June 1999, Jurisprudentie Vreemdelingenrecht* 1999/164. Additionally, it is contrary to ExCom Conclusion 30 (XXXIV, 1983). The European Commission proposal for a Directive on minimum norms for asylum

may have insufficient time to come forward with their statements, and may have insufficient time to collect evidence. This risk is exacerbated by the absence of a criterion that limits the application of the accelerated procedure to manifestly unfounded cases. Even with such a criterion, an accelerated procedure is problematic from a human rights perspective, but an accelerated procedure without such a criterion does not have any guarantees to prevent rejection of applications which have not been substantiated as a result of trauma or lack of time to collect evidence. The enormous time pressure, combined with the lack of a possibility to build a confidential relation with a legal counsel, makes it quite possible that (especially in 'deserving' cases) essential elements of the flight motives will not be put forward.

5.2.1.2. *Undocumented Asylum Seekers*

Since 1999, the Dutch legislation on aliens contains a provision concerning undocumented asylum seekers. It initially held that an application would be considered as manifestly unfounded if an applicant has not submitted relevant documents, unless the applicant can establish that the he/she cannot be blamed for this.¹² The apparent strictness of this provision was mitigated during the legislative process, because under heavy pressure from parliament the Government repeatedly and unambiguously stated that, even when the requirements for the application of this provision were fulfilled, the flight motives of the applicant would still be examined substantively as well. This led to a practice in which incorrect application of the provision could lead to annulment of a negative decision, while correct application did not bar access to a meaningful examination of the asylum claim. In other words: the legislation backfired, and led to a better procedural position of applicants than they had before.¹³ In the new Aliens Act 2000, basically the same provision appeared, making a lack of documents a circumstance to be taken into account in the assessment of an asylum claim.¹⁴ This more careful reformulation seemed an improvement compared to the 1999 formulation, because it obviously is a relevant factor whether or not an applicant has documents.

5.2.1.3. *Marginal Scrutiny*

However, combined with the marginal scrutiny introduced by the Council of State, this provision turns out to be fatal for a substantial share of asylum applications submitted in The Netherlands. In Dutch administrative law, a distinction is made

procedures formally does not allow the application of the accelerated procedure to any asylum application, but makes it applicable on so many grounds that it does not meaningfully restrict its application, COM (2002) 326.

¹² Article 15c sub f Vreemdelingenwet.

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

¹⁴ Article 31 para. 2 sub f Vreemdelingenwet 2000.

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between full and marginal judicial scrutiny of administrative acts.¹⁵ Full scrutiny implies that the court can basically replace the decision of the administration by its own. The classical example of an issue subject to full scrutiny is the interpretation of the law. Marginal scrutiny implies that the court will only annul an administrative act if it is unreasonable. Classical examples of administrative acts subject to a marginal scrutiny are acts based on 'policy freedom' (e.g., the law says that the administration *may* give a permit in a certain situation) or acts based on 'evaluation freedom' (e.g., the law says that the administration may give a permit if *in its opinion* not giving an opinion would be unduly harsh). The Council of State has argued that the decision of the Minister of Aliens Affairs that flight motives are not credible is to be subject to a marginal scrutiny. At first sight, this seems an unlikely position. The statements of an applicant are true, or not; the administration's decision that they are not credible can be correct, or not. Did the Council of State adopt a thoroughly post-modern position, holding that veracity is a matter of perspective?

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

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

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

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

¹⁵ There is debate as to whether more and less marginal varieties of marginal scrutiny can be distinguished. This is an extremely exciting debate, however I will omit it here, as it is not relevant in our context.

In applying this policy, the administration has 'evaluation space'.¹⁶ The administration is better equipped to evaluate the credibility of unsubstantiated flight motives, because it has much more experience in this than the judiciary.¹⁷

The Council of State has given concrete indications about the effects of the marginal scrutiny in combination with the fact that the applicant was undocumented. It held that, if the negative decision is not based on one of the factors mentioned in Article 31 para. 2 Vw 2000 (which are factors discrediting the asylum applicant), the issue to be addressed by the Minister is whether the flight motives are consistent on main points, not improbable, and in accordance with what is generally known about the country of origin.¹⁸ However, if the negative decision is based on one of these factors, of which being undocumented is the main one, this has as an effect that the determination that the applicant's flight motives are not credible is hardly subject to meaningful judicial scrutiny.

It has to be noted that, in principle, asylum seekers are required to have documents on four points: identity, nationality, travel route and flight motives.¹⁹ The Council of State has ruled that it is up to the Minister to decide which documents should have been submitted in the particular case.²⁰ This means that, even when an asylum seeker has submitted documents testifying to her/his identity, the lack of travel documents may be held against her/him.²¹

In fact, it seems that the lack of documentation has become an independent ground for rejecting asylum applications. I am inclined to think that the role of documentation in the Dutch asylum procedure is not part of a communicative discourse, in which the question would be whether the lack of documentation damages the credibility of the applicant. It seems more likely that the issue of documentation is addressed in a corrective discourse. The overarching aim is to give future applicants an incentive not to destroy their documents, and to get the message to smugglers that if they advise or force their clients to do so, their applications will

¹⁶ This term is usually used for evaluations of a factual nature about which debate is possible between reasonable persons, but which are nevertheless subject to a full judicial scrutiny. Apparently, the Council of State here holds that administrative acts deploying 'evaluation space' can be subject to a marginal scrutiny.

¹⁷ Afdeling bestuursrechtspraak van de Raad van State 27 January 2003, *Jurisprudentie Vreemdelingenrecht* 2003/103.

¹⁸ Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/451; vgl. Afdeling bestuursrechtspraak van de Raad van State 25 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/454.

¹⁹ *Vreemdelingencirculaire* 2000, C1/5.8.2.

²⁰ Afdeling bestuursrechtspraak van de Raad van State 31 October 2002, *Jurisprudentie Vreemdelingenrecht* 2003/2; Afdeling bestuursrechtspraak van de Raad van State 16 May 2003, *Jurisprudentie Vreemdelingenrecht* 2003/293.

²¹ Afdeling bestuursrechtspraak van de Raad van State 23 September 2003, *Jurisprudentie Vreemdelingenrecht* 2003/406.

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be rejected. In such a discourse, individual asylum seekers are sacrificed at the altar of general policy aims.²²

5.2.1.4. Freezing the Case

The final element is the introduction of a formal blockade to introduce further statements or evidence after the initial decision has been taken, even if it has been taken in the accelerated procedure. In this way, the case is ‘frozen’ at the moment the applicant is interviewed; after that moment, it is only possible to introduce further facts or evidence if it was impossible to introduce them at an earlier moment, most notably because the fact had not yet occurred or the evidence did not yet exist. Central in this respect is the Council’s interpretation of Article 4:6 of the General act on administrative law (Awb), which holds (a) that a person applying for the same thing for the second time must submit new facts, and (b) that, if he fails to do so, the administration may dismiss the second application out of hand.

The Council of State holds that if the administration dismisses a second application out of hand, the court can only examine whether or not the applicant has submitted new facts. If the court concludes that no new facts have been submitted, the appeal must be rejected by the court. This means that the court is precluded from examining whether the administration could reasonably dismiss the application out of hand, notwithstanding the fact that Article 4:6 Awb stipulates that the administration *may* do so in the absence of new facts, and not that it *must* do so. This must be so, the Council argues, because if the court would examine whether it was reasonable to reject a second application in the absence of new facts, it would in fact examine the validity of the decision taken on the first application, and this first decision has already become final.²³

The crucial question then is: what is new? The answer the Council gives is an extremely restrictive one. It qualifies as ‘new’ only such facts that have occurred or evidence that has been produced after the first decision was taken, or if they could not possibly have been introduced before the first decision. If a woman does not dare to disclose immediately that she has been the victim of sexual violence, or if an applicant has arrived without an arrest warrant, this fact or document may be taken into account by the administration later on during the procedure (or during a second procedure), but regardless of whether the administration does so, the court can only

²² For the differences between communicative and normative approaches, see Zahle’s contribution in this volume, *supra* Chapter 2.1.

²³ Afdeling bestuursrechtspraak van de Raad van State 4 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/219. The Council of State applies a further procedural rule in such a way that even during the appeal procedure against the first negative decision, the applicant cannot submit additional statements or evidence, unless they are new, *e.g.* Afdeling bestuursrechtspraak van de Raad van State 3 August 2001, *Jurisprudentie Vreemdelingenrecht* 2001/258. Yet another procedural rule is applied in such a way that, in fact, after an applicant has been interviewed, no additional statements or evidence can be submitted, unless they are new, Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/452.

examine whether new facts were submitted, and in the absence of new facts, must reject the appeal. This means that the administration has a discretionary power (will a fact or document that was submitted too late, and which does not constitute a new fact in the formal sense, be taken into account?) which is not subject to judicial review.

The Council has made two openings. First, if an applicant during the interview preceding the first decision mentions there are things she cannot express, or if an applicant mentions that evidence is underway, it may be unreasonable to take a first decision without waiting for further statements or evidence.²⁴ Second, the Council has held that under special, individual circumstances it may be necessary not to apply the rules freezing the case after the asylum interview.²⁵ It remains to be seen to what extent these openings can in the future substantially mitigate the effects of the general line of the Council. By the time of writing, the Council had not used these openings to mitigate the harshness of its line of case law.

5.2.1.5. *Summing up*

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

1. The asylum applicant does not (fully) disclose relevant facts, due to trauma, disorientation or related factors;²⁶
2. The asylum applicant does not submit documents, because they were either left at home (it was risky to bring them, or the applicant could not foresee that a birth certificate might come in handy) or were destroyed or handed over to the smuggler (my impression is that smugglers put pressure on applicants in order to leave no trace of the travel route);
3. The administration makes mistakes due to temporal pressure.

It is less likely that errors on these points will be corrected by the judiciary if the decision of the administration on credibility is subject to a marginal (instead of a full) scrutiny. Thus, both the administrative and the judicial phase of the asylum procedure risk being flawed. If the asylum procedure contains a formal blockade against introducing facts and evidence in later stages of the procedure (when the applicant has recovered a bit, or when s/he has succeeded in obtaining evidence

²⁴ Afdeling bestuursrechtspraak van de Raad van State 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/294.

²⁵ Afdeling bestuursrechtspraak van de Raad van State 5 March 2002, *Jurisprudentie Vreemdelingenrecht* 2002/125; Afdeling bestuursrechtspraak van de Raad van State 6 November 2002, *Jurisprudentie Vreemdelingenrecht* 2002/448. The Council may have applied this exception once, in Afdeling bestuursrechtspraak van de Raad van State 24 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/280, which however is so obscurely motivated that it does not give certainty about this.

²⁶ Compare the contribution of Herhily to this volume, *infra* Chapter 7.

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from the country of origin), this minimises the possibilities of repairing mistakes made in the initial procedure.

5.2.2. *An Excursion: It's a thin line²⁷ . . . between fact and law*

The case law of the Council of State is based, on some points, on the distinction between fact and law. In light of Vedsted-Hansen's contribution to this volume,²⁸ I will summarily address this distinction.

The Council of State has held that the administration's assessment of credibility (*i.e.* about the facts submitted by the applicant) is subject to a marginal scrutiny.²⁹ This implies that the administration's decision about the interpretation of the refugee definition in general (when does discrimination constitute persecution)³⁰ and the application of the refugee definition to the established facts of a particular case (given these facts, does the applicant have a well-founded fear of being persecuted?) are subject of full scrutiny.³¹ Of course, this gives rise to the question where the line between facts and the law has to be drawn. Because of the substantial effects of labelling something as fact or law, this has become subject of debate.

In the Dutch asylum procedure, the applicant gets the opportunity to submit corrections and additions to the interview report. The question whether the administration should have accepted these as true is subject to marginal scrutiny.³² If an asylum seeker has established that there have been acts of persecution (*i.e.* the applicant has been shot at) and that there is a persecution ground (*i.e.* the applicant has refused to co-operate with the Pasdaran), it also has to be established that there is a link between the persecution and the ground. On the issue of whether there is such a link, the administration's decision is subject to marginal scrutiny.³³

A rather puzzling decision holds that the interpretation of the statements of the asylum seeker (also formulated as the way in which the administration has understood the statements) is subject to marginal scrutiny.³⁴ In the context of the – sparse – argumentation in the rest of the decision, the question at stake seems to be what is the essence of the applicant's flight motives.

²⁷ Words and Music by Richard Poindexter / Robert Poindexter / Jackie Members.

²⁸ See Chapter 4 *supra*.

²⁹ Afdeling bestuursrechtspraak van de Raad van State 9 July 2002, *Jurisprudentie Vreemdelingenrecht* 2002/275.

³⁰ Afdeling bestuursrechtspraak van de Raad van State 4 September 2002, *Jurisprudentie Vreemdelingenrecht* 2002/359.

³¹ Afdeling bestuursrechtspraak van de Raad van State 15 November 2002, *Jurisprudentie Vreemdelingenrecht* 2002/469.

³² Afdeling bestuursrechtspraak van de Raad van State 28 August 2002, *Jurisprudentie Vreemdelingenrecht* 2002/355.

³³ Afdeling bestuursrechtspraak van de Raad van State 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/293.

³⁴ Afdeling bestuursrechtspraak van de Raad van State 21 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/448.

The Council has quite often quashed a decision of the District Court because it had applied a full instead of a marginal scrutiny.³⁵ For example, the District Court had stated that the administration had *incorrectly* held the flight story not to be true, while it should have applied the test whether the administration could *not reasonably* hold the flight story not to be true. Only recently the Council had to deal with cases in which the District Court did use the right formulation.

The Council elaborated its decision of 27 January 2003, and distinguishes between the situations in which the administration has applied article 31 para. 2 Aliens Act 2000 (esp. the fact that the applicant is undocumented), and situations in which it has not done so (see above, text accompanying fn. 15).

If the applicant was not undocumented, it is not sufficient if the negative decision contains scattered remarks mentioning that elements of the flight story are surprising or remarkable while these remarks are not combined into a conclusion about the incredibility of the flight story.³⁶ In this situation, the negative decision must contain an explicit reaction to precise, detailed and documented statements of an applicant countering the administration's initial conclusion that the flight motives were not true.³⁷

However, if the decision holds that Article 31 para. 2 Aliens Act 2000 is applicable (and if this is accepted by the court), less is required of the decision, and there is less scope for the court to examine the arguments given in the negative decision.³⁸

In sum, the Council of State considers quite a few aspects of decisions as being in the domain of facts, subject to a marginal scrutiny. Moreover, what is especially unclear, is the line between, on one hand, the application of the refugee definition to the individual case (full scrutiny) and, on the other hand, the interpretation of facts and the existence of a nexus between persecution and persecution grounds (both marginal scrutiny). The set of decisions of August 2003 strongly suggests that, if one of the elements mentioned in Article 31 para. 2 Aliens Act 2000 applies (as will be the case in the overwhelming majority of the cases), findings of fact by the administration can hardly ever be touched by the judiciary.

³⁵ E.g. Afdeling bestuursrechtspraak van de Raad van State 15 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/249.

³⁶ Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/451.

³⁷ Afdeling bestuursrechtspraak van de Raad van State 25 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/454.

³⁸ Afdeling bestuursrechtspraak van de Raad van State 11 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/441.

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5.2.3. *Compatibility with the ECHR*

It is debatable whether the present-day Dutch asylum procedure is compatibility with human rights standards.³⁹ I will shortly summarise the arguments raised until now.

5.2.3.1. *Rigorous Scrutiny; Undocumented Asylum Applicants*

When evaluating claims holding that expulsion would be a violation of Article 3 ECHR, the European Court of Human Rights (hereinafter the 'Court') has held ever since the *Vilvarajah* decision that

The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.⁴⁰

In its *Jabari* decision, the Court went one step further and held that it is not only the Court's examination that must necessarily be a rigorous one, but that the State party's examination of a claim also must be a rigorous one:

The court further observes that, having regard to the fact that article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by article 3.⁴¹

At first sight, this seems contrary to the Court's case law on Article 13 ECHR in British immigration cases. In the *Soering* decision, the Court accepted the British judicial review procedure as an effective remedy in the sense of Article 13, although the applicable criteria in that procedure suggest a marginal scrutiny of acts of the administration. But, using a phrase which has been repeated in all of the later cases on the point, the Court took into consideration that

³⁹ See for comparable criticism Human Rights Watch: *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, Vol 15, No. 3 (D), April 2003, and UNHCR: *Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations*, July 2003, available at <www.vluchtweb.nl>, not on UNHCR's website.

⁴⁰ ECtHR 30 October 1991, *Soering v. United Kingdom*, A 161; comparable passages can be found in ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V, para. 96; ECtHR 2 May 1997, *D. v United Kingdom*, Reports 1997-III, para. 49; ECtHR 7 March 2000, *T.I. v. United Kingdom*, application 43844/98; ECtHR 6 February 2001, *Bensaid v. United Kingdom*, Reports 2001-I, para. 34.

⁴¹ ECtHR 7 July 2000, *Jabari v. Turkey*, application 40035/98.

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According to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.⁴²

The Court added that in the judicial review procedure, Soering's claim under Article 3 would have been given the most anxious scrutiny in view of the fundamental nature of the human right at stake.⁴³ In fact, the Court's position is not that a marginal scrutiny of a claim under Article 3 is acceptable under Article 13 ECHR, but it accepts the construction that no reasonable State Secretary could decide to deport someone if it has been established before a national court that the deportation would be a violation of Article 3 ECHR. Thus, a rigorous scrutiny cloaked in marginal terms is acceptable because of the substance of this test. It comes as no surprise then that in the *Jabari* decision the Court ruled that

given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.⁴⁴

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

In sum, it is clear from the case law of the European Court of Human Rights that the claim by an alien that her/his deportation would result in a violation of Article 3 ECHR must be given a rigorous scrutiny by the domestic courts (or the quasi judicial body constituting the effective remedy). The Court has not excepted the issue of credibility in this respect. I think it is obvious that a marginal scrutiny of

⁴² ECtHR 7 July 1989, *Soering v. United Kingdom*, A 161, para. 121. This phrase was repeated in ECtHR 30 October 1991, *Vilvarajah and others v. United Kingdom*, A 215, para. 123; ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V, para. 148; ECtHR 2 May 1997, *D. v United Kingdom*, Reports 1997-III, para. 70; ECtHR 6 February 2001, *Bensaid v. United Kingdom*, Reports 2001-I, para. 55; ECtHR 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II, para. 77.

⁴³ This phrase was repeated in *Vilvarajah*, para. 125, and in *D.* para. 71.

⁴⁴ ECtHR 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII, para. 50.

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the kind practiced in the Netherlands cannot be considered a rigorous scrutiny.⁴⁵ Hence, as a result of the case law of the Council of State on this point the Dutch asylum procedure is in violation of Article 13 ECHR.

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

5.2.3.2. Accelerated Procedures and Freezing

The massive use of the accelerated procedure with its strict time limits creates tension with the European Convention on Human Rights. In its *Bahaddar* decision, the Court ruled that applicants in principle must comply with domestic procedural rules, because these enable the national jurisdictions to discharge their case-load in an orderly manner. But the Court added:

It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.⁴⁶

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

In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be

⁴⁵ The Council of State, however, has recently argued precisely that: the marginal scrutiny on the point of credibility is part of a judicial scrutiny that, taken as a whole, is to be considered as a rigorous one, Afdeling bestuursrechtspraak van de Raad van State 11 December 2003, *Jurisprudentie Vreemdelingenrecht* 2004/52.

⁴⁶ ECtHR 19 February 1998, *Bahaddar v. The Netherlands*, Reports 1998-I.

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considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.⁴⁷

Although these decisions are not about an accelerated procedure, one can draw the conclusion that it should not be a priori fatal to an asylum claim if an applicant has not come forward with a complete statement due to trauma or stress, or if s/he has not succeeded in collecting all evidence before the end of the accelerated procedure. However, in the Dutch context, such delay is usually fatal due to the case law of the Council of State on freezing. It should be noted that, in fact, the phenomenon of freezing in effect means the introduction of a concealed time limit for submitting facts. In the Turkish context of the *Jabari* decision, the application had to be made within five days after entry, but once that had been done facts could be introduced during a longer period of time. In the Dutch context, there is no formal time limit for submitting an asylum claim, but once it has been submitted there is a strict (and in 50 per cent of all asylum cases: very short) time limit for submitting facts.

Domestic rules excluding subsequent statements and subsequent evidence are rules about the relevant moment in time for judicial assessment. On this point, the Court has been consistent and emphatic. In Article 3 cases, the relevant moment in time is the moment of expulsion or, if expulsion has not yet taken place, the moment of the Court's examination. The Court *will assess all the material placed before it and, if necessary, material obtained of its own motion*.⁴⁸ The argument that evidence has only been submitted in the procedure before the Court itself while it could have been produced earlier (medical statements of Amnesty International) has been rejected.⁴⁹ Therefore, it is clear that the European Court of Human Rights will take into account later statements and later evidence (provided, of course, that they are considered credible) even when a domestic court does not.

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

⁴⁷ ECtHR 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII.

⁴⁸ E.g. ECtHR 20 March 1991, *Cruz Varas v. Sweden*, A 201; ECtHR 30 October 1991, *Vilvarajah and others v. United Kingdom*, A 215; ECtHR 15 November 1996, *Chahal v. United Kingdom*, Reports 1996-V; ECtHR 29 April 1997, *H.L.R. v. France*, Reports 1997-III; ECtHR 6 March 2001, *Hilal v. United Kingdom*, Reports 2001-II.

⁴⁹ ECtHR 9 July 2002, *Venkadajalasarma v The Netherlands*, application 58510/00.

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applied; it basically disregarded the freezing rule, examined evidence that had been submitted too late by domestic standards, and concluded that Hilal's expulsion would be a violation of Article 3.⁵⁰

5.3. CONCLUSION

On the basis of the above, I think it is crucial that the appeal procedure provides for a critical space that enables the courts to evaluate the way in which the administration has dealt with proof and credibility. No matter how well the interview was done, no matter how understanding the decision maker has been, stereotypes may have played a crucial role in the procedure. The appeal procedure should be the occasion to scrutinise this, and it should not be watered down on the assumption that the administration has developed such expertise that the courts cannot match it. Also, it is crucial to be acutely aware that the asylum seeker, even in a very sensitive procedure, is the *object* of the procedure. The interviewer and interpreter have considerable power over the applicant, the use of which must be the subject of close scrutiny. The inequality in power cannot be done away with by a sensitive and sensible asylum procedure.⁵¹

This suggests that the first part of the procedure, in which the administration seeks to establish the facts of the case, should be inquisitory in nature. It should be characterised by informality and a quest for material truth. An effort should be made to win the trust of the applicant.⁵² However, in the ideal typical version of this kind of procedure, there is no one looking for reasons to dismiss the application. This may well undermine the role of the investigator and/or the decision maker, who may be seduced into acting as the adversary of the applicant. Although this formulation is too strong, something like it can be seen in first instance decision making in The Netherlands, as the above has shown.⁵³ A thorough, inquisitory first instance procedure can be brought about by the training of civil servants and by soft law guidelines for conducting interviews, and for collecting and assessing evidence.

The second part of the procedure, to the contrary, should be adversarial in nature, because this maximises the space for a critical examination of both the applicant's statements and the administration's way of dealing with them. It is not necessary for the applicant to trust the representative of the administration in the appeal phase of the procedure. The two sides will each argue for their position, and

⁵⁰ See more extensively J. van Rooij, *Procedure versus Human Rights* (Vrije Universiteit Amsterdam, 2004, also available at www.rechten.vu.nl/documenten).

⁵¹ See more generally on this issue Spijkerboer, *supra* note 1, pp. 45–55, and R.F. Barsky, *Constructing a Productive Other. Discourse Theory and the Convention Refugee Hearing* (John Benjamins, Amsterdam and Philadelphia, 1994).

⁵² See the contributions of Byrne (*infra* Chapter 10) and Noll (*infra* Chapter 8) to this volume.

⁵³ See more extensively C. Rousseau, F. Crépeau, P. Foxen and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' 15 *Journal of Refugee Studies* (2002) 1.

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thus enable the judge to remain impartial.⁵⁴ A problematic aspect of the adversarial model is that it requires formal procedural rules. The case law of the Dutch Council of State shows that such formal procedural rules may be made to work in such a way that they prevent the courts from effectively scrutinising administrative decisions in asylum cases, as I have shown in section 2 of this chapter.

⁵⁴ *Ibid.*

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