

# Subsidiarity and ‘Arguability’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases

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## Abstract

The European Court of Human Rights’ case law on judicial review in asylum cases is not entirely consistent. However, it can be interpreted as consistent if two presumptions are accepted. First, that, as the Court’s role should be subsidiary to that of domestic courts, domestic judicial review should at least be of the same quality and substance as the European Court of Human Rights’ review. Secondly, that the Court distinguishes between arguable and non-arguable cases not just in the context of Article 13 ECHR and of the admissibility of applications, but that this distinction is central to its entire case law about the asylum procedure. This analysis results in a coherent doctrine on deadlines for submitting evidence, the burden of proof, the intensity of judicial review, and suspensive effect. If the Court understands its case law in this way, it can prevent it from becoming, in some respects, a court of first instance.

## 1. Introduction

In a number of judgments and decisions the European Court of Human Rights has ruled upon asylum procedures. This article focuses on case law relevant for the requirements for judicial review in asylum cases. The Court has developed its position on asylum not only in cases concerning the right to an effective remedy (Article 13, ECHR) and cases concerning the exhaustion of domestic remedies (Article 35, paragraph 1, ECHR) but also in its considerations about Article 3 itself.<sup>1</sup>

This article addresses the consequences that the Court’s case law has on four points: the deadlines for submitting evidence (part 3); the burden of proof (part 4); the intensity of judicial review (part 5); and the suspensive effect of appeals (part 6). The main argument is that the Court’s case law is

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<sup>1</sup> The background to this article is the debate in the Netherlands about the compatibility of the Dutch Council of State’s position on the role of the judiciary in asylum cases with the case law of the European Court of Human Rights. See, J. van Rooij, ‘Asylum Procedure versus Human Rights’, Vrije Universiteit Amsterdam 2004; S. Essakkili, ‘Marginal judicial review in the Dutch Asylum procedure’, Vrije Universiteit Amsterdam 2005; and, L. Slingenbergh, ‘Dutch Accelerated Asylum Procedure in the Light of the European Conventions on Human Rights’, Vrije Universiteit Amsterdam 2006 (all available at <<http://www.rechten.vu.nl/documenten>>).

somewhat inconsistent, but that it could be interpreted as consistent if two presumptions are accepted. The first relates to the subsidiary role of the European Court of Human Rights (addressed in part 2, as well as in the Conclusion). The second is that the Court distinguishes cases in which there is an arguable claim under Article 3, and those where the claim is not arguable. This idea is developed through the article, and is addressed in the Conclusion. As will be seen, both presumptions are based on the Court's case law, but are applied here more expansively than the Court has so far done.

The context for this article is the tendency of European States to try to sidestep the substance of asylum claims by means of procedural sophistication. Part of this process is that national courts, unusually among institutions, do not seek to increase their power, but confine themselves as much as possible and scrutinise as little as they can. Because the examination of asylum claims at the national level focuses less and less on the substantive, the pressure on the Strasbourg organs increases. Asylum seekers increasingly have good reasons to feel that the European Court of Human Rights will subject their application to an examination which is considerably more substantial than the examination by national courts. That is not an acceptable situation for the European Court of Human Rights, if only for practical reasons (that is its case load). In order to reverse the trend towards passivity of national courts, the European Court of Human Rights may have no other option than to relinquish its traditional reluctance to intervene in national procedural laws. It will take direct action by the European Court of Human Rights to ensure that domestic courts do not leave it to Strasbourg to uphold the Convention. Only if the Court forces national courts into a substantially more active role in this regard will it be able to revert to its traditional stance of non-intervention in procedural matters. This is the central argument of this article: short-term Strasbourg activism will be required in order to enable its usual – and desirable – passivity on this point in the longer term.

At the outset, three disclaimers seem necessary. This article does not address the Procedures Directive.<sup>2</sup> Although the Directive is certainly relevant for asylum procedures in Europe, and in part addresses the issue under consideration here, it has not yet played a role in the case law of the European Court of Human Rights. The question of whether the criteria laid down in the Procedures Directive are compatible with the Court's case law requires an analysis of a different nature to the one undertaken here.<sup>3</sup> Also, the article does not address judicial review in national security cases, with the particular issue of the confidentiality of crucial information. Although this is clearly a relevant topic, the case law of the European Court of Human Rights on this issue can best be understood in relation to case law regarding similar issues arising in

<sup>2</sup> Directive 2005/85/EC, OJ 2005, L326.

<sup>3</sup> See, e.g., H. Battjes, *European Asylum Law and International Law* (Leiden 2006), ch. 6.

immigration cases under Article 8 ECHR. Incorporating these judgments would detract from the main lines of case law under review in this article. An issue that gets little attention is how the case law under review here fits with the general case law of the European Court of Human Rights. Although a more comprehensive analysis of the Court's approach to domestic procedural law certainly merits attention, the focus of this article is much narrower.

## 2. General issues

Before the focus turns to the four concrete issues mentioned above, the relationship between Articles 13, 35, and 3 ECHR and their relevance for asylum procedures will be examined.

As Article 6 ECHR is not applicable in migration cases,<sup>4</sup> Article 13 ECHR is the provision that is relevant for the appeal rights in asylum cases. There are some general issues concerning Article 13, which are not central in the Court's case law on asylum procedures, that must be mentioned briefly in order to prevent misunderstandings. The text of Article 13 seems to provide the guarantee of an effective remedy in the domestic legal system only if the rights set forth in the Convention have been violated. If the provision was taken literally, it would be purely supplementary in nature and would not have independent value. In its jurisprudence, however, the Court has held that Article 13 has a wider field of application. It gives the right to an effective remedy not only when Convention rights have been violated, but also when a person has an arguable claim that this was indeed the case.<sup>5</sup> For brevity's sake, this will not be mentioned every time it is relevant. Furthermore, Article 13 does not require the effective remedy to consist of a court, in the formal sense of the word. However, the Court has interpreted the term 'national authority' in such a way that, even if it is not a court, it must have a court-like character in terms of independence and competence.<sup>6</sup> Since the difference between a court and a non-judicial national authority is not relevant for this argument, the national authorities that are to provide the effective remedy will be referred to as courts.

Article 35 requires applicants to first exhaust domestic remedies before applying to the Court. As the Court held, *inter alia*, in its *Schenk*<sup>7</sup> decision, the purpose of the requirement of exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing, or putting right, the violations alleged against them before those allegations are submitted to the Court.

<sup>4</sup> *Maouia v. France* (Grand Chamber Judgment), (2000), European Court of Human Rights, Rep. 2000-X.

<sup>5</sup> Van Dijk and others (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerp, 2006), at 1000.

<sup>6</sup> *Ibid.*, 1006 and following.

<sup>7</sup> *Schenk v. Germany* (Decision), (2007), European Court of Human Rights.

That rule is based on the assumption, reflected in Article 13 of the Convention – with which it [that is, Article 35] has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus, the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements, and time-limits laid down in domestic law (see, among other authorities, *Selmouni v France*, (Judgment), (1999), European Court of Human Rights, Rep. 1999-V, paragraph 74).<sup>8</sup>

The requirement that applicants use available legal remedies in the national system is based on the notion that States should have the opportunity to redress the alleged wrong on their own, before being required to answer to an international supervisory body. This is a general rule of international law, and not particular to the ECHR. This means that the Court's case law on Article 35, paragraph 1, may contain considerations about what, in the Court's view, are the requirements for a remedy to be considered effective. To a certain extent, the Court's case law on Article 35, paragraph 1, and Article 13 will run parallel.

The supervision which the Court exercises is subsidiary to the national system's safeguarding of human rights.<sup>9</sup> Therefore, as far as possible, the Court should not have to address issues which are new compared to the procedure in the national system, and it should not have to apply a level of scrutiny that exceeds the scrutiny a case has been subjected to in the national system. If the Court were to do that, it would become a court of first instance on those points. Conversely, therefore, it can be concluded, that if the Court addresses an issue or applies a particular kind of scrutiny, this should already have taken place in the national system. The national system as a whole should be constructed in such a way that it can provide at least the same level of judicial supervision as that provided by the Court. If that is not the case, it would always make sense for individuals to apply to the European Court of Human Rights, because that Court would provide something (that is a particular kind of judicial supervision) that the individual is unable to obtain at the domestic level. That would mean turning the Convention system on its head. From this, it is clear that the way in which the Court supervises the application of Article 3 by State Parties has consequences for domestic remedies.

<sup>8</sup> See also, *Akdivar v Turkey* (Judgment), (1996), European Court of Human Rights, Rep. 1996-IV; *Handyside v United Kingdom* (Judgment), (1976), European Court of Human Rights, Ser. A vol. 24.

<sup>9</sup> *Schenk v Germany* (Decision), (2007), European Court of Human Rights; *Handyside v United Kingdom*, para. 48; *Akdivar v Turkey*, para. 65; *Selmouni v France* (Judgment), (1999), European Court of Human Rights, Rep. 1999-V, para. 74.

This does not imply, however, that the domestic courts should apply exactly the same criteria that the Court uses. In asylum cases, the Court has to decide whether or not a deportation would violate Article 3; and, in doing so, give a final decision on the merits of the case. However, this is not what national courts usually do in conflicts between individuals and the administration. Due to the particular division of roles in the domestic system between legislator, administration, and judiciary, the national courts will generally avoid taking substantive decisions, and merely supervise (a) correct interpretation of the law; (b) the reasonableness of decisions; and (c) conformity with procedural requirements. If a domestic administrative court finds fault on one or more of these points, it will normally not replace the administration's decision with its own. Instead, it will quash the decision and instruct the administration to take a new decision, based on the proper interpretation of the law as given by the domestic court; within the limits of reason as defined by that court; and in accordance with procedural requirements as set out by that court. That is a different perspective on cases than that of the European Court of Human Rights, which cannot quash decisions but has to decide whether or not a violation of the Convention has occurred.

Therefore, domestic courts do not necessarily have to replicate in a formal way the scrutiny exercised by the Court. However, they should operate in such a way as to ensure that the national remedy provides scrutiny of at least as good a quality as that provided by the Court. Obviously, States are free to provide a more encompassing judicial scrutiny, but not a lesser one.

Therefore, the following sections will refer to case law concerning: Article 13, which explicitly sets standards for domestic asylum procedures; Article 35, which implicitly sets such requirements; and Article 3, because the structure of the Convention system implies that the substance of domestic judicial supervision should not fall below the standards which the Court uses for its own supervision.

### 3. Deadlines for submitting evidence

One of the issues in asylum law is whether, after the initial stage of the asylum procedure, asylum seekers can submit new evidence (like arrest warrants or medical reports), and facts that they did not disclose before (such as traumatising events). On the one hand, accepting later evidence and new facts hinders an efficient asylum procedure, because this will take more time and capacity. On the other hand, it is possible that relevant evidence simply could not have been submitted earlier, for example, due to clinical memory problems, or because of shame or fear of being overwhelmed by emotion. There is no case law of the European Court of Human Rights under Articles 13 or 35 dealing with this, but in its case

law on Article 3, the Court addresses how it examines the compatibility of deportation with Article 3.

### 3.1 The relevant moment in time

With respect to the issue of late evidence, two matters are vital. First, what is the relevant moment in time in judicial review? It may be that courts will have to decide whether the asylum application was well-founded *at the moment it was submitted*. It may also be that the courts will enquire whether the refusal of asylum was legal *at the moment the decision to do so was taken*. Yet another possibility is that courts will decide as to the situation *at the moment of its own decision* (an *ex nunc* assessment). The issue of which moment in time is relevant is related to the position of courts vis à vis the administration. If the position of courts is not to decide on the merits of asylum claims, but to decide on the legality of the administrative decision, then an *ex nunc* assessment is problematic, because courts may take into account evidence of which the administration could not have been aware. Only if courts are competent to assess the substantive merit of an asylum application themselves, would an *ex nunc* assessment be a plausible option.

The act which may contravene Article 3 ECHR is the deportation, which may expose the alien to a real risk of inhuman treatment.<sup>10</sup> Therefore, in cases before the European Court of Human Rights the moment of deportation is the relevant moment in time for the Court's own assessment. If the alien has already been deported, the existence of the risk must be assessed primarily with reference to those facts that were known or ought to have been known to the deporting State at the moment of deportation. The Court may have regard to information that came to light subsequent to deportation, but this can only be relevant for confirming or refuting the appreciation of the deporting State on the existence of the risk at the moment of deportation.<sup>11</sup> In the *Vilvarajah* case, three of the five complainants had actually suffered inhuman treatment after deportation to Sri Lanka; for them, the risk they complained of had materialised. However, the Court held that the deporting State neither could nor should have foreseen that this would happen, and found no

<sup>10</sup> Cf. *Saadi v Italy* (Judgment), (2008), European Court of Human Rights, para. 126: 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment'.

<sup>11</sup> *Cruz Varas* (Judgment), (1991), European Court of Human Rights, Ser. A vol. 201, para. 76; *Vilvarajah* (Judgment), (1991), European Court of Human Rights, Ser. A vol. 125, para. 107; *Nsona v the Netherlands* (Judgment), (1996), European Court of Human Rights, Rep. 1996-VI, para. 92 (c); *Mamatkulov and Askarov v Turkey* (Grand Chamber Judgment), (2005), European Court of Human Rights, para. 69; *Saadi v Italy*, para. 133.

breach of Article 3.<sup>12</sup> If, on the other hand, the applicant has not yet been deported, the material point in time is that of the Court's consideration of the case – in its *Salah Sheekh* judgment, the Court used the term *ex nunc*.<sup>13</sup>

### 3.2 Time-limits

The second matter, relevant to the question of whether later evidence or facts can be taken into account, are the procedural rules on this point. It may be that documents have to be submitted within a certain number of days of the court hearing; it may be that repeat applications can be dismissed without a fresh assessment unless the applicant submits facts or evidence dating from after the first asylum procedure. Such rules are related to concepts of procedural fairness (late submission of evidence makes it impossible for the other party to respond), as well as efficiency (applicants should be stimulated to submit all relevant facts and documents at once).

In its case law about exhaustion of domestic remedies, the Court has consistently held that 'even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with'.<sup>14</sup> If a domestic remedy has not led to a court decision about the substance of the claim because of a procedural mistake by the applicant, this is held against him. In such cases, the application will be declared non-admissible because domestic remedies were not exhausted.<sup>15</sup>

However, the Court has held that there may be special circumstances that absolve an applicant from the obligation to comply with such rules. This will depend on the facts of each case. In the context of Article 3, the Court ruled:

The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 [now 35] must be applied with some degree of flexibility and without excessive formalism (see the above-mentioned *Cardot* judgment, p. 18, paragraph 34). It has further recognised that the rule of exhaustion is

<sup>12</sup> *Vilvarajah*, para. 112.

<sup>13</sup> *Chahal v United Kingdom* (Judgment), (1996), European Court of Human Rights, Rep. 1996-V, para. 86; *Ahmed* (Judgment), (1996), European Court of Human Rights, Rep. 1996-VI, para. 43; *H.L.R. v France* (Judgment), (1997), European Court of Human Rights, Rep. 1997-III, para. 37; *D. v United Kingdom* (Judgment), (1997), European Court of Human Rights, para. 50; *Bensaid v United Kingdom* (Judgment), (2001), European Court of Human Rights, Rep. 2001-I, para. 35; *Salah Sheekh* (Judgment), (2007), European Court of Human Rights, para. 136.

<sup>14</sup> *Bahaddar* (Judgment), (1998), European Court of Human Rights, Rep. 1998-I, para. 45.

<sup>15</sup> See, for a complaint that had been lodged out of time, *I. and C. v Switzerland* (Decision), (1984), European Commission of Human Rights, D.R. 38 at 90. The Commission equally found an applicant had not exhausted domestic remedies where he had filed an appeal, but without the assistance of a lawyer as required by domestic law, *Le Compte v Belgium* (Decision), (1976), European Commission of Human Rights, D.R. 6 at 90.

neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see the above-mentioned *Van Oosterwijk* judgment, p. 18, paragraph 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.<sup>16</sup>

Specifically in relation to asylum cases, the Court considered:

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 (...) such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.<sup>17</sup>

The notion that domestic procedural rules must provide the applicant with 'a realistic opportunity to prove his or her claim' is consistent with the International Court of Justice's position that domestic procedural rules 'must enable full effect to be given to the purposes for which the rights accorded under this article are intended'. In its *LaGrand* judgment, the International Court of Justice held that a domestic rule stating that a treaty provision could only be invoked at a particular stage of the procedure, *de facto* constituted a procedural barrier which made the treaty provision ineffective.<sup>18</sup> In its *Jabari* judgment, the European Court of Human Rights disapproved of an absolute requirement that an asylum application be submitted within five days after the applicant's arrival in the country, barring which the substance of the application was not assessed: 'the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention'. The Court found it contrary to Article 13 that the domestic court limited itself to the issue whether Jabari had indeed submitted her asylum application after expiry of the five day term.<sup>19</sup>

When it comes to the Court's own examination of applications based on Article 3, it must be borne in mind that the Court examines whether the deportation would be contrary to Article 3. It makes its own judgment and, as seen above, it does so *ex nunc* when the deportation has not yet taken

<sup>16</sup> *Akdivar v Turkey*, para. 69.

<sup>17</sup> *Bahaddar*, para. 45.

<sup>18</sup> *LaGrand* (2001), International Court of Justice, para. 91.

<sup>19</sup> *Jabari v Turkey* (Judgment), (2000), European Court of Human Rights, Rep. 2000-VIII, para. 40.



place. It is logical, then, that the Court can take into account information which was not known to the respondent State at the moment it decided to deport the alien. The Court may even collect information on its own initiative (see below). The Court's case law makes it clear that it finds the moment at which evidence was submitted immaterial, as long as the evidence is reliable.

A stark example of this is the *Hilal* judgment.<sup>20</sup> In this case, the only documentary evidence the Tanzanian applicant submitted during the administrative phase of his asylum procedure was the membership card of a political organisation. Only after his appeal against a negative decision had been rejected by a domestic court, in part on account of lack of documentary evidence, did he obtain and submit a copy of his brother's death certificate and a medical report about the circumstances of his death, as well as a summons from the police to his parents (paragraph 17). At a later stage, the applicant submitted a medical report about his treatment in hospital following his detention (during which he was allegedly tortured), which was dated several months before he left Tanzania (paragraph 21). Apparently, during the procedure at the European Court of Human Rights, the applicant produced an expert opinion stating that these documents were genuine (paragraph 63). Instead of holding it against the applicant that he had not submitted this evidence in time for the normal national appeals procedure, the Court notes that the appeal has been dismissed, *inter alia*, on account of a lack of substantiating evidence, but that since then further documentation has been produced (paragraph 62). Without attaching specific importance to the late submission of key documents, the Court proceeds to assess their genuineness, and their evidentiary value.

Another example, where the Court used elements unknown to the national authorities when they decided to remove an alien, is the *Chamaiev* judgment. The Court found the removal to be contrary to Article 3 on the basis of elements that dated from after the removal decision had been taken and, hence, that were unknown to the authorities at that moment.<sup>21</sup>

This does not mean that the Court pays no regard to the moment in which a statement is made, or at which point evidence is submitted. However, it considers this in an exclusively substantive (as opposed to formal) manner. In its *Nasimi* decision, the Court did reproach the applicant for only raising his

<sup>20</sup> *Hilal v. United Kingdom* (Judgment), (2001), European Court of Human Rights, Rep. 2001-II.

<sup>21</sup> 'En l'espèce, la Cour doit rechercher si, compte tenu de nouveaux éléments pertinents, ignorés des autorités géorgiennes deux ans auparavant, l'exécution de la décision d'extradition du 28 novembre 2002 ne risque pas d'entraîner pour M. Guélogaïev des conséquences contraires à l'article 3 de la Convention. (...) A la lumière de tous ces éléments postérieurs au 28 novembre 2002, la Cour estime que les appréciations ayant conduit à une décision favorable à l'extradition de M. Guélogaïev il y a deux ans ne suffisent plus pour exclure à l'égard de celui-ci tout risque de mauvais traitements prohibés par la Convention', *Chamaiev* (Judgment), (2005), European Court of Human Rights, Rep. 2005-III, para. 361 and 367 (emphasis added).

alleged torture a year after his application for asylum; and the late submission of documentary evidence only after his asylum application had been rejected twice. Together with internal inconsistencies in Nasimi's statements, the Court found that there were strong reasons to call into question the veracity of his statements, and concluded that there were no substantial grounds for believing he faced a real risk of being subjected to treatment contrary to Article 3 upon deportation.<sup>22</sup>

### 3.3 Consequences for domestic law

How do these judgments translate into requirements for domestic law? The Court has formulated a rule and an exception in its *Bahaddar* judgment. According to the Court, procedural rules should normally be complied with; this implies that the content of procedural rules is a matter for domestic law. However, the automatic and mechanical application of domestic procedural rules should not deny asylum seekers a realistic opportunity to prove their claim; procedural rules must enable full effect to be given to Article 3. In its *Jabari* judgment, the Court found the application of an absolute time limit of five days for submitting an asylum claim, regardless of its merits, contrary to Article 3. This suggests that the problem is not primarily in the rules themselves (procedural rules are formal by their very nature), but in their application.

If the subsidiary role of the European Court of Human Rights is taken into account, it may be emphasised that it is primarily for the *domestic* appeals system to enable full effect to be given to Article 3. Nevertheless, as a consequence of the *ex nunc* assessment by the Court in many cases, it is obvious that the Court may be forced to take into account issues that arose only after the lodging of the application with the Court. However, the Court can hardly accept domestic courts excluding evidence by applying procedural rules, regardless of the merits of a case, and so leaving it up to the application procedure in Strasbourg to provide the applicant with a realistic opportunity to prove their claim.

The tension between the supremacy of domestic law on procedural issues on the one hand, and on the other hand the requirement of effectiveness and the subsidiary role of the European Court of Human Rights is hard to resolve. Dismissing asylum applications (including repeat applications) on formal grounds regardless, of their substance, is not acceptable, as is clear from the *Bahaddar* and *Jabari* judgments. At the same time, though, the essence of procedural rules is that they can be applied without having regard to the substance of a case. One way of resolving this tension may be termed a 'dual focus' approach. Asylum applicants must comply

<sup>22</sup> *Nasimi* (Decision), (2004), European Court of Human Rights. Cf. *Cruz Varas v Sweden* (Judgment), (1991), European Court of Human Rights, Series A vol. 201, para. 78.

with procedural rules like anybody else. However, even if applicants do not abide by procedural rules, an eye must be kept on the merits of the application. Procedural rules should not automatically be held against them if deportation would violate Article 3. The domestic remedies must allow for judicial scrutiny of arguable claims under Article 3, even if applicants have made procedural ‘mistakes’.<sup>23</sup>

It may be argued that this undermines the idea of formal procedural rules. That is certainly so. However, as the Court has held in its *Akidvar* judgment, due allowance must be made for the fact that these particular procedural rules are being applied in the context of machinery for the protection of human rights.<sup>24</sup> Because of this context, the prohibition of inhuman treatment, which is *ius cogens*, may take precedence over the procedural autonomy of States in cases which give rise to concern as to the compatibility of deportation with Article 3. In addition, making the application of procedural rules in some way conditional on the merits of the case itself is the only way to reach a compromise between the procedural autonomy of State parties on the one hand, and the subsidiary role of the Court in examining applications based on Article 3 on the other.

#### 4. The burden of proof

The European Court of Human Rights has consistently held that deportation is contrary to Article 3 if there are substantial grounds for believing that there is a real risk of treatment contrary to Article 3.<sup>25</sup> Inhuman treatment specifies the type of treatment the alien should face: mere unpleasant experiences are not enough; treatment must reach a minimum level of severity. Real risk specifies the degree of likelihood required for the applicability of Article 3 in these cases: inhuman treatment does not have to be probable, as the Court ruled in *Soering*,<sup>26</sup> but a mere possibility is not sufficient (*Vilvarajah*). Substantial grounds specifies the standard of proof: the applicant does not have to prove that there is a real risk of inhuman treatment, but he or she has to do more than indicate that there may be reasons to believe a real risk may exist. In practice, the degree of likelihood and the standard of proof may be hard to distinguish.

Yet another issue is the burden of proof: who has to fulfil the standard of proof? Who has to adduce the substantial grounds? Who has to do the

<sup>23</sup> It should be noted that procedural mistakes were made in *Bahaddar* and *Jabari*, but these were related to the substance of the case and were not merely errors of their lawyers, or other purely procedural mistakes.

<sup>24</sup> *Akidvar*, para. 69.

<sup>25</sup> Cf. the recent *Saadi v. Italy* (Grand Chamber Judgment), (2008), European Court of Human Rights, para. 125.

<sup>26</sup> *Soering v. United Kingdom* (Judgment), (1989), European Court of Human Rights, Ser. A vol. 161.

work of submitting evidence? In its *Said* judgment,<sup>27</sup> the Court ruled that it is ‘incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail’. Referring to *Bahaddar*, it emphasised that ‘direct documentary evidence proving that an applicant himself or herself is wanted for any reason by the authorities of the country of origin may well be difficult to obtain’ (paragraph 49). More explicitly, in its *Shikpohkt and Shole* decision, the Court stated:

Neither applicant has submitted any direct documentary evidence proving that they themselves are wanted for any reason by the Iranian authorities. That, however, cannot be decisive *per se*: the Court has recognised that in cases of this nature such evidence may well be difficult to obtain (*Bahaddar v the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 263, § 45). To demand proof to such a high standard may well present even an applicant whose fears are well-founded with a *probatio diabolica*.<sup>28</sup>

In the *Saadi* judgment, the Court likewise ruled that ‘It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3’ (paragraph 129).

From the Court’s case law under Article 3, it is clear that, to start with, the applicant has to submit consistent statements about what happened in the country of origin (*Said*, paragraph 51). It does not require complete consistency. In the case of *N. v Finland*,<sup>29</sup> the Court expressed ‘reservations about the applicant’s own testimony (...) which it considers to have been evasive on many points and is not prepared to accept every statement of his as fact. In particular, his account of the journey to Finland is not credible’ (paragraph 154). However, on the basis of the overall evidence (which included statements by other asylum seekers), the Court found the applicant’s account about his experiences in the country of origin ‘sufficiently consistent and credible’ (paragraph 155). The Court’s terminology in its *Nasimi* decision, referring to assessing the ‘general credibility’ (or in this case: the lack thereof) of the statements of the applicant, points in the same direction: there may be inconsistencies; part of an applicant’s statements may even be incredible; but the core of the statements must be sufficiently consistent and credible – a flexible standard.

<sup>27</sup> *Said v the Netherlands* (Judgment), (2005), European Court of Human Rights, para. 49.

<sup>28</sup> *Mawahedi Shikpohkt and Mahkamat Shole v the Netherlands* (Decision), (2005), European Court of Human Rights.

<sup>29</sup> *N. v Finland* (Judgment), (2005), European Court of Human Rights.

The Court has not only given general statements about dealing with the problems asylum seekers may have in submitting corroborative evidence. Its case law also provides concrete examples. In *Said*, the Dutch government had objected to the fact that the applicant had only submitted general evidence, and no evidence relating to him personally. The Court stated: ‘Even though this material does not relate to the applicant personally but concerns information of a more general nature, it is difficult to see what more he might reasonably have been expected to submit in the way of substantiation of his account’ (paragraph 51). In *N. v. Finland*, the Court undertook a fact finding mission to Finland in order to interview people (paragraphs 7–9), in order to ‘carry out its own assessment of the facts’ (paragraph 152). The Court’s delegates took testimony from the applicant, his common-law wife, another asylum seeker and a Finnish civil servant. This suggests that, when the Court initially found there were insufficient grounds for concluding N.’s deportation was contrary to Article 3, it did not simply dismiss the application but instead pursued its own enquiries. Apparently, there is a threshold falling short of establishing substantial grounds for believing there is a real risk of inhuman treatment upon deportation. If an asylum applicant passes that lower threshold, the Court finds it necessary to conduct a full investigation in order to decide whether there are substantial grounds.

From standard case law, it is clear that it is not just up to the applicant to submit evidence. If this were so, it would be incomprehensible that the Court also collects evidence *proprio motu* (that is, on its own initiative). Ever since its *Cruz Varas* judgment, the Court has held that the Court will not only assess a case in the light of all the material placed before it, but also, on necessary, of material obtained on its own initiative (*‘proprio motu’*).<sup>30</sup> In *Salah Sheekh*, the Court elaborated on this point. The Court explained that it would seek to obtain material on its own initiative, in particular, where the applicant or a third party provides reasoned grounds which cast doubt on the accuracy of the information relied on by the deporting State. The Court:

[M]ust be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow

<sup>30</sup> In doing so, the Court relied on one of its classic Article 3 cases, *Ireland v. United Kingdom* (Judgment), (1978), Series A vol. 25, para. 160; *Thambibillai v. the Netherlands* (Judgment), (2004), European Court of Human Rights, para. 61; *Venkatajalasarma v. the Netherlands* (Judgment), (2004), European Court of Human Rights, para. 63; *Cruz Varas*, para. 75; *Vilvarajah*, para. 107; *Hilal*, para. 60; *H.L.R. v. France*, para. 37; *Mamatkulov and Askarov v. Turkey*, para. 69; *Shamayev*, para. 336; *Said*, para. 49; *Salah Sheekh*, para. 136.

an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources.<sup>31</sup>

The Court's flexible attitude on the burden of proof and on collecting evidence *proprio motu*, fits with the general procedural principle underlying the Court's case law, holding that the procedure must provide a realistic opportunity to prove a claim, or, to use phraseology of the ICJ, that it must enable full effect to be given to the purpose of Article 3. This article will try to formulate in more concrete terms the common thread running through the Court's precedent.

The initial burden of proof lies with the applicant, who has to give consistent and credible statements. These statements may contain problematic aspects (*N. v. Finland*); it cannot be specified in general terms when these problems undermine the applicant's general credibility. Asylum seekers must also submit documentary evidence where this can reasonably be expected (*Said*). Again, what can be reasonably expected has to be decided on a case by case basis: in *Said*, lack of individual evidence was not held against the applicant, while in *Nasimi*, together with dubious statements, it was.

When the applicant fails to comply with the initial burden of proof, the application can be dismissed. When he or she does comply with the initial burden of proof, the burden of proof seems to shift to the respondent State. The Court, then, wants to 'be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by [relevant] materials' (*Salah Sheekh*, paragraph 136). In *Saadi*, the Court held that, where the applicant has adduced evidence capable of proving that there are substantial grounds for believing that deportation would mean exposure to a real risk of being subjected to treatment contrary to Article 3, it is for the Government to dispel any doubt about it (paragraph 129).<sup>32</sup> It is unclear what the threshold is. It seems likely that, roughly speaking, it is equal to the 'arguability' or a *prima facie* standard used under Article 13, and in the framework of admissibility (compare *Nasimi*); other standards are conceivable, but they would be hard to distinguish from the 'arguability' standard. In this respect, it is relevant to note that in *Saadi* and *NA v. United Kingdom*, the Court does not say that the Government has to dispel any doubt about a claim if *it has been established* that deportation would be contrary to Article 3. Instead, it says that the Government has to rebut if the applicant has adduced evidence *capable of*

<sup>31</sup> *Salah Sheekh*, para. 136; cf. *Saadi v. Italy*, para. 128.

<sup>32</sup> Cf. *NA v. United Kingdom* (Judgment), (2008), European Court of Human Rights, para. 111.

*proving* this, which indicates a threshold below establishing substantial grounds for believing so.

Once the threshold has been passed, the respondent State has to engage in active investigations to establish that the application is, nevertheless, ill-founded – it has to ‘dispel any doubts’ about the applicability of Article 3. This implies a high standard of proof; if any doubt remains, the conclusion is not that the applicant has not established that deportation is contrary to Article 3, but, quite the reverse, that the applicant must not be deported. The State cannot merely point to insufficiencies in the applicant’s statements or documentary evidence. The Court’s attitude in *Salah Sheekh* and *N. v. Finland* is indicative of what can be required of the authorities. If evidence held against the applicant is contested, further investigations must be undertaken. If statements by the applicant give rise to questions, further interviews have to be conducted. True: in these cases it was the Court itself that did this, but because of the subsidiary role of the Court it is primarily up to the contracting States to carry out such investigations. However, once a case reaches the Court, it will have to carry out such investigations itself, since it is not competent to quash and refer back, but only to decide whether the Convention has been violated.

What is the implication for domestic courts? It is useful to distinguish between applications in which the threshold of ‘arguability’ has, or has not, been reached. In cases where the threshold has *not* been reached (that is, where the applicant has *not* ‘adduced evidence capable of proving that there are substantial grounds for believing that deportation would mean exposure to a real risk of being subjected to treatment contrary to Article 3’), domestic courts can limit themselves to supervising the procedure. They must ensure that the applicant has had a realistic opportunity to prove the asylum claim. Presumably, this includes a proper hearing, possibilities to correct misunderstandings, safeguards for vulnerable claimants (victims of violence, minors, applicants in dependent positions), and a real possibility to argue that, in fact, the threshold has been passed. Courts must, furthermore, supervise the borderline between arguable and non-arguable claims. This may be difficult in some cases, but courts can limit themselves to that. The burden of proof for establishing that the case is an arguable one rests with the applicant.

However, as soon as the threshold has been reached, domestic courts cannot limit themselves to supervising the procedure, and must deal with the substance of the case. The burden of proof then shifts to the administration, and domestic courts have to do the same thing that the European Court of Human Rights did in the *Salah Sheekh* case, that is: to ensure ‘that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by [relevant] materials’. This implies that the administration has to rebut the claim of the applicant, even though the claim has not been substantiated in the ordinary sense of the word, but has

merely been established to be arguable. Due to the nature of Article 3, and the problems asylum seekers have in providing evidence, the burden to 'dispel any doubt' is triggered much more easily than usual in administrative law.

For both stages, the guiding principle remains the obligation to provide asylum seekers with a realistic opportunity to substantiate their claim. This follows from the effectiveness principle.

## 5. The intensity of judicial review

When faced with a case concerning a government act (such as deportation) courts generally can ask themselves at least two questions. They can ask whether the government was correct in finding the act legal. The object of enquiry is the government decision to undertake that act. In this case, the domestic court will replace the government's opinion with its own, but it may exclude facts or arguments which were unknown and could not have been known to the authorities at the moment they took the decision. This issue was dealt with above. However, courts may ask themselves another question, which leads to a significantly less intense form of review. In this case, the domestic court asks whether the government could reasonably decide to undertake the act. The domestic court will only intervene if the decision is unreasonable, either in substance (for example, the balance of interests should clearly have been decided otherwise), or procedurally (for example, the individual did not have a fair hearing). Whereas in response to the first question only one outcome will be acceptable to the domestic court (namely: the correct one), in response to the second question several outcomes may be acceptable (namely: all reasonable ones).

Interestingly, the European Court of Human Rights uses the same term for the scrutiny which it applies itself in Article 3 cases, and for the scrutiny it requires, on the basis of Article 13, domestic courts to apply in Article 3 cases. Since its *Vilvarajah* judgment, the Court has consistently held that its own examination of the existence of ill-treatment in breach of Article 3 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 (paragraph 108). This was reconfirmed in the recent Grand Chamber judgment in the *Saadi* case.<sup>33</sup> Since *Jabari*, the Court has held that, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialised, and the importance of Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim under Article 3 (paragraph 50). The fact that the Court uses the

<sup>33</sup> *Saadi v. Italy*, para. 128.



term ‘rigorous scrutiny’ both for its own scrutiny and for the scrutiny it requires from domestic courts, suggests that these should be identical. However, that idea becomes problematic when one pays close attention to the Court’s case law.

### 5.1 Rigorous scrutiny by the Court

In its case law, the Court acknowledges the difference between more and less intense forms of scrutiny. For example, in cases concerning Article 6 of the Convention, the Court has developed the position that its duty is to ensure the observance of the Convention by States, not to deal with errors of fact or law allegedly committed by a national court, ‘unless and in so far as they may have infringed rights and freedoms protected by the Convention’.<sup>34</sup> It has ruled, in contrast, that notwithstanding its subsidiary role, in cases concerning Articles 2 and 3, ‘the Court must apply a particularly thorough scrutiny, even if certain domestic proceedings and investigations have already taken place’.<sup>35</sup>

In two 1991 asylum judgments the Court seemed not to apply a rigorous scrutiny, but instead to supervise national fact finding in a more distant way. In the *Cruz Varas* judgment it attached importance to the experience of the Swedish authorities in evaluating asylum claims, and to the fact that the national authorities had conducted a thorough examination (paragraph 81). The

<sup>34</sup> *García Ruiz v Spain* (Grand Chamber Judgment), (1999), European Court of Human Rights, Rep. 1999-I, para. 28; cf. *Herbst v Germany* (Judgment), (2007), European Court of Human Rights, para. 83; *Tamminen v Finland* (Judgment), (2004), European Court of Human Rights, para. 38; *K-H. W. v Germany* (Judgment), (2001), European Court of Human Rights, Rep. 2001-II, para. 44; Van Dijk, above n. 5, 585, n. 512. In a number of cases, in Article 6 cases, the Court attached importance to the fact that British judges have particular knowledge of and experience with the jury system, see, *G.C. v United Kingdom* (Judgment), (2001), European Court of Human Rights, para. 36, cited in *Snooks and Dovey v United Kingdom* (Decision), (2002), European Court of Human Rights, also an Article 6 case; also cited in *Betson and Cockram v United Kingdom* (Decision), (2005), European Court of Human Rights.

<sup>35</sup> *Aktas v Turkey* (Judgment), (2003), European Court of Human Rights; cf. *Ribitsch v Austria* (Judgment), (1995), European Court of Human Rights, Ser. A336; *Avsar v Turkey* (Judgment), (2001), European Court of Human Rights, 2001-VII. Unusual, however, is the admissibility decision in the *Damla* case (*Damla and others v Germany* (Decision), (2000), European Court of Human Rights). Here, the Court considered both that its examination in cases concerning Article 3 must necessarily be a rigorous one, and that factual matters are primarily a matter for national courts (its general, removed position developed in cases concerning Article 6). Because the facts had already been evaluated carefully by national courts in three asylum procedures, and in the absence of indications of arbitrariness in this respect, the Court concluded that no substantial grounds had been shown for believing that the applicants would face a real risk of treatment contrary to Article 3 upon return to the country of origin. One explanation for this departure from its Article 3 case law may be that the Court erroneously used a standard text block from Article 6 cases for an Article 3 case. However, apart from this explanation, it is puzzling that in *Damla*, the Court formulates a standard that seems even more restrictive (fact finding by national courts cannot be reviewed by the Court ‘unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them’) than the standard position in Article 6 cases (the Court will not deal with errors of fact and law by national courts ‘unless and in so far as they may have infringed rights and freedoms protected by the Convention’, see above). Because of the eccentricity of the Court’s considerations when compared to the rest of its case law, the considerations from the *Damla* decision seem to be an error.

*Vilvarajah* judgment contains a similar passage (paragraph 114). The Court has not repeated this kind of consideration since 1991. Notwithstanding its deference to national authorities in its *Cruz Varas* and *Vilvarajah* judgments, in these, and many other cases, the Court at the same time explicitly held that its examination of a risk of ill-treatment in breach of Article 3 must necessarily be a rigorous one in view of the absolute character of Article 3.<sup>36</sup> The Court's assessment of the facts is indeed often rigorous, as can be illustrated by a number of cases. Specifically, when the credibility of the statements of an asylum seeker is at stake, the Court itself will assess the credibility:

[I]n the opinion of the Government, the applicant's account of his arrest, of the reasons for it, and of his escape, is so implausible as to invalidate his claim of having deserted from the army. This being so, the Court must proceed, as far as possible, to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings (*Said*, paragraph 50).

In its *Hilal* judgment, the Court deals extensively with the credibility of the applicant's statements, as well as with the authenticity of the documents he has submitted, and on both points rules in favour of the applicant. The same pro-active attitude is clear from the *N. v Finland* judgment,<sup>37</sup> where the Court, 'in order to carry out its own assessment of the facts' appointed two Delegates<sup>38</sup> who went to Finland and took testimony from the applicant, his common-law wife, another asylum seeker and a Finnish civil servant. The Court, after considering that the applicant's own testimony before the Delegates was evasive on many points, reached detailed conclusions. It was not prepared to accept every statement of the claimant as fact, and finds the core of N.'s flight motivation to flee credible, but not the account of his journey to Finland (paragraphs 154-6).<sup>39</sup> In the *Nasimi* decision, the Court assesses the statements

<sup>36</sup> *Vilvarajah*, para. 108; *Chahal* para. 96; *D. v United Kingdom*, para. 49; *T.I. v United Kingdom* (Decision), (2000), European Court of Human Rights, Rep. 2000-III. The Court's assessment; *Bensaid v United Kingdom*, para. 34. Cf. the Court's case law in French, 'Pour déterminer s'il y a des motifs sérieux et avérés de croire que l'intéressé court un risque réel de traitements incompatibles avec l'article 3 en cas d'extradition, la Cour adopte des critères rigoureux et s'appuie sur l'ensemble des éléments qu'on lui fournit ou, au besoin, qu'elle se procure d'office', *Chamaiev*, para. 336.

<sup>37</sup> *N. v Finland*, para. 152.

<sup>38</sup> See, Rules of Court, Article A1.

<sup>39</sup> In a confusing consideration, the Court apparently seeks to limit the gap between its own findings and those of the Finnish authorities. In para. 157 it states: 'The Court would note in this connection that the Finnish authorities and courts, while finding the applicant's account generally not credible, do not appear to have excluded the possibility that he might have been working for the DSP. Moreover, the Finnish authorities and courts did not have an opportunity to hear K.K.'s testimony with regard to the applicant's background in the DRC. It cannot be said therefore that the position of the Court contradicts in any respect the findings of the Finnish courts'. This is surprising, because the Court's finding that N.'s statements are credible does contradict the Finnish outcomes. More specifically, in para. 154 the Court states that the testimony of the other asylum seeker was available to the Finnish authorities when they considered N.'s application (para. 154), whilst it now holds that they did not have an opportunity to hear her testimony.

of the applicant in a similarly detailed manner, finds them incredible, and hence dismisses the application as inadmissible.<sup>40</sup>

In the *Salah Sheekh* judgment, the Court considered:

In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time (paragraph 136).

This consideration is in line with what the Court actually does in its decisions and judgments. It is true that the Court finds it relevant when the national authorities have engaged in extensive and thorough assessment of facts, and collection and evaluation of evidence (*Cruz Varas, Vilvarajah*). However, its main point is that it has to be ‘satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported’ by relevant sources (*Salah Sheekh*, paragraph 136). In this, the thoroughness of the national asylum procedure is one factor, but the crucial issue is not a procedural one, but the substance: was the assessment right?

## 5.2 Rigorous scrutiny under Article 13

Although the Court uses the term ‘rigorous scrutiny’ both for its own activity in Article 3 cases, and for what it demands from domestic courts in Article 3 cases, under Article 13 it has accepted the British judicial review system in asylum cases, which may well have applied a form of scrutiny that was less intense than the Court’s own before the passing of the Human Rights Act 1998.<sup>41</sup> As was explained in the 1991 *Vilvarajah* judgment, British judicial review used to occur solely on the basis of the *Wednesbury* principles, and consisted of an examination of the exercise of discretion by the authorities to determine whether they left out of consideration a factor that should have been taken into account, or took into account a factor that should have been ignored, or whether they came to a conclusion so unreasonable that no reasonable authority could have

<sup>40</sup> *Nasimi v. Sweden* (Decision), (2004), European Court of Human Rights.

<sup>41</sup> Domestic law in the United Kingdom has changed as a consequence of the 1998 Human Rights Act. However, the focus of this Article is not the compatibility of UK domestic law with the European Convention on Human Rights, but with the case law of the European Court of Human Rights. As a consequence, UK domestic law is only relevant in as far as, and in the way in which, it is perceived by the Court.

reached it.<sup>42</sup> This gives the impression that British judicial review in asylum cases was relatively removed and quite marginal. However, the Court then went on to cite a then leading asylum decision of the House of Lords as to the extent and effect of judicial review. The Lords considered that the *Wednesbury* principles ought to be applied in such a way as to subject the refusal of asylum 'to the more rigorous examination to ensure that it is in no way flawed' and had to be subjected to 'the most anxious scrutiny' and to 'rigorous examination' (paragraph 91). In later case law, the Court cited the United Kingdom Court of Appeal, which held that in asylum cases the domestic court must subject the refusal of asylum to rigorous examination 'and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion'. The Court of Appeal held that, notwithstanding that domestic law places asylum decisions in a discretionary area of judgment, no special deference had to be paid by the domestic courts to the authorities' conclusion on the facts. According to British case law, 'In circumstances such as these, what has been called the "discretionary area of judgment" – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... – is decidedly a narrow one'. Thus, the Court has consistently emphasised that the fact that judicial scrutiny in British asylum cases takes place against the background of the criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, does not deprive the procedure of its effectiveness.<sup>43</sup> The Court found it sufficient that British courts can 'effectively control the legality of executive discretion on substantive and procedural grounds', and that they can quash a decision 'where it was established that there was a serious risk of inhuman or degrading treatment'.

One may argue that, in these cases, the Court has accepted the British judicial review system in asylum cases because, against the background of legal standards formulated in terms of domestic law, in fact a 'most anxious scrutiny', a 'rigorous examination' is applied, which 'ensures' that the denial of asylum is 'in no way flawed'. In this understanding of the Court's case law, the marginal form is accepted because of the rigorous substance.<sup>44</sup> Another view, however, holds that a judicial review that applies a marginal test on important points (concretely: on the assessment of credibility) still constitutes a rigorous scrutiny in the sense of Strasbourg case law.<sup>45</sup> The body of case law on Article 13 in itself leaves some room for this view. In

<sup>42</sup> *Vilvarajah*, para. 90.

<sup>43</sup> *Bensaid v. United Kingdom*, para. 56; *Hilal v. United Kingdom*, para. 78. Modern case law post-1998 relies on proportionality rather than *Wednesbury*.

<sup>44</sup> *Essakkili*, n. 1 above, 46-51.

<sup>45</sup> Afdeling bestuursrechtspraak van de Raad van State 15 juni 2006, JV 2006/290. See, for the details of the Dutch marginal judicial scrutiny, *Essakkili*, *ibid.*, 13-41.

its *Hilal* decision, the Court found that a British court ‘would not form its own independent view of the facts which would then necessarily prevail over whatever view has been formed’ by the authorities. Also, the Court has never explicitly stated that it accepted application of the *Wednesbury* principles *because*, in actual practice, they are applied in a way which leaves the administration barely any discretionary freedom. Furthermore, the Court has not ruled that a judicial scrutiny which is less intense than the one in pre-1998 British judicial review cases would be in violation of Article 13; the Court has, in other words, never stated that the former British review system constitutes the bottom line of what is still acceptable.

### 5.3 The meaning of rigorous scrutiny

It is not easy to reconcile the Court’s clear position on its own rigorous scrutiny, and its ambiguous position on the rigorous scrutiny required from domestic courts in asylum cases. Clearly, the Court cannot require that domestic courts examine by themselves whether or not deportation is contrary to Article 3. This is what the Court does. Domestic courts in many, if not most European countries, work in a system that requires them to decide not whether the (intended) government act is legal, but whether the decision to take that act is legal. Concretely: the object of their scrutiny is not the deportation, but the decision to deport. This object of scrutiny in itself allows for either a full, or a marginal judicial scrutiny, as explained above (part 5.1). It would be contrary to the Court’s subsidiary role if it were to completely rewrite the national law of administrative procedure. It must limit itself to the way in which the procedure is applied.

A consequence of the procedural autonomy of States is that the Court will not object to the form of judicial review, concretely: to the criteria which are to be applied – even when, as in the British case, these criteria prescribe a marginal rationality test. The Court can only intervene if the way in which the national test is applied in practice leads to judicial scrutiny that gives fewer guarantees for conformity of deportations with Article 3 than the Court’s own examination. If one interprets the Court’s case law on Article 13 in such a way that domestic courts can apply a less intense scrutiny than the Court itself, this implies that the Court would apply a kind of scrutiny to asylum cases that has not been applied by domestic courts. This is incompatible with the subsidiary role of the Court, which requires that domestic courts apply a scrutiny that is at least as comprehensive and intense as the one applied by the Court.<sup>46</sup>

<sup>46</sup> This interpretation also fits with one aspect of the *Chahal* judgment, where the Court found that a remedy in which the central question is actually an incorrect one, this constitutes a violation of Article 13; *Chahal v. United Kingdom* (Judgment), (1996) European Court of Human Rights, Rep. 1996-V, para. 153.

Only such a systematic analysis of the term rigorous scrutiny can take away the ambiguity in the Court's case law on the meaning of Article 13 in asylum cases. The scrutiny by domestic Courts must dispel any doubts as to the unsoundness of the claim (compare *Saadi*), regardless of the formal criterion applied, be it full scrutiny or a marginal rationality test. The Court itself has not drawn this conclusion, and has recently side-stepped the issue.<sup>47</sup> It therefore remains to be seen whether the Court will overcome its hesitation to intervene in national procedural law on this point.

## 6. Suspensive effect

One of the core elements of an effective remedy is the possibility for the appeals authority to grant appropriate relief.<sup>48</sup> In asylum cases, the question has arisen whether the possibility to grant appropriate relief requires that deportation is suspended until the appeals authority has given a judgment - whether the appeal should have suspensive effect.

In its *Jabari* judgment, the Court ruled that:

[G]iven 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 (...) the possibility of suspending the implementation of the measure impugned.

In the *Čonka*<sup>49</sup> judgment, the Court repeated this passage from the *Jabari* judgment, stating 'that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible'. The judgment concerned the Belgian appeals procedure in asylum cases. The appeal which was at stake (appeal to the Belgian Council of State) in the *Čonka* case did not have suspensive effect. There were possibilities to request the Council of State for a stay of deportation (that is to decide that the appeal has suspensive effect), but that summary procedure had no suspensive effect. Thus, in effect, the Belgian authorities could deport an asylum seeker pending the request for suspensive effect. In practice, however, the Council of State called the authorities to enquire about the moment the deportation was scheduled, and made sure a decision about suspensive effect was taken before the expulsion. The Court found this

<sup>47</sup> *Mir Isfahani v. the Netherlands* (Decision), (2008), European Court of Human Rights (struck out of the list).

<sup>48</sup> *Kudła v. Poland* (Grand Chamber Judgment), (2000), European Court of Human Rights, Rep. 2000-XI, para. 157.

<sup>49</sup> *Čonka v. Belgium* (Judgment), (2002), European Court of Human Rights, Rep. 2002-I.

system to be in violation of Article 13 for two reasons.<sup>50</sup> First, this system brings with it the risk of error, more specifically:

[T]he risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.<sup>51</sup>

Second, the Court had a more general problem with the Belgian system:

[T]he requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention.<sup>52</sup>

It considered that the Belgian authorities were not required to defer deportation until the Council of State had had the opportunity to rule on the application for suspensive effect. Also, the onus for ensuring that a decision about suspensive effect was taken before deportation was on the Council of State, which, however, was not under any obligation to do so. And finally, the practice was based on internal circulars of the Council of State. ‘Ultimately, the alien has no guarantee that the *Conseil d’Etat* and the authorities will comply in every case with that practice, that the *Conseil d’Etat* will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace’. Therefore, ‘the implementation of the remedy (is) too uncertain to enable the requirements of Article 13 to be satisfied’.

In its *Gebremedhin*<sup>53</sup> judgment, building on *Čonka*, the Court referred to a resolution of the Committee of Ministers of the Council of Europe;<sup>54</sup> a

<sup>50</sup> This is an unacknowledged change in the Court’s case law. In *Soering v United Kingdom*, (para. 123), the Court ruled that the English courts’ lack of jurisdiction to grant interim injunctions in asylum cases did not detract from the effectiveness of the remedy ‘since there is no suggestion that in practice a fugitive would ever be surrendered before his application to the Divisional Court and any eventual appeal therefrom had been determined’. Cf. *Vilvarajah*, para. 125: ‘the practice is that an asylum seeker will not be removed from the United Kingdom until proceedings are complete’.

<sup>51</sup> *Čonka*, above n. 49, para. 82.

<sup>52</sup> *Ibid.*, para. 83.

<sup>53</sup> *Gebremedhin v France* (Judgment), (2007), European Court of Human Rights.

<sup>54</sup> Recommendation no. R (98) 13, of the Committee of Ministers, on the right of rejected asylum seekers ‘to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights’, adopted by the committee of ministers on 18 Sept. 1998. On 4 May 2005, at the 925th Meeting of the Ministers’ Deputies, the Committee of Ministers of the Council of Europe adopted twenty Guidelines on forced return.

resolution of the Parliamentary Assembly of the Council of Europe,<sup>55</sup> a recommendation of the Council of Europe Commissioner for Human Rights,<sup>56</sup> and a view of the UN Committee Against Torture.<sup>57</sup> They all hold that, in asylum cases, a legal remedy must have the possibility of suspensive effect. The case was about an Eritrean national, who had asked for admission to French territory in order to submit an asylum application. It was considered that the asylum application he wished to submit would have been manifestly unfounded, and on this basis he was refused entry. He filed an appeal, but this appeal did not have suspensive effect. He applied for suspensive effect, but the possibility existed for him to be deported while that request was pending. Although the request and the appeal were both dismissed, he was not deported immediately because the Eritrean authorities refused to issue a travel document. He was only admitted to French territory after the European Court of Human Rights had issued an interim measure.<sup>58</sup> Once on French territory, he could, and actually did, apply for asylum. He was recognised as a refugee several months later. The French government held that the possibility of suspensive effect did not have to be a formal legal one, as long as there was a possibility of suspensive effect in practice. The Court rejected this, and held that in asylum cases Article 13 requires a legal guarantee of the possibility of suspensive effect.<sup>59</sup> In its *Gebremedhin* judgment, the Court made it clear that its position in *Conka* was not a 'one-off' statement, and elaborated and entrenched its position. It summarised its position in a decision issued a few months later when it considered that the Court has held that, in cases concerning deportation, a remedy without automatic suspensive effect does not conform to the requirement of effectiveness of Article 13 of the Convention.<sup>60</sup>

<sup>55</sup> Recommendation 1236 (1994), 'on the right of asylum', adopted by the Assembly on 12 Apr. 1994; Recommendation 1327 (1997), 'on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe', adopted by the Assembly on 24 Apr. 1997; Resolution 1471 (2005), 'Accelerated asylum procedures in Council of Europe member states', adopted by the Assembly on 7 Oct. 2005.

<sup>56</sup> Recommendation of the Commissioner for Human Rights, 'concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders', (CommDH/Rec(2001)1) Strasbourg, 19 Sept. 2001.

<sup>57</sup> Committee Against Torture, Thirty-fifth session, 7-25 Nov. 2005, 'Conclusions and recommendations of the Committee against Torture: France', 3 Apr. 2006, document CAT/C/FRA/CO/3.

<sup>58</sup> See Rule 39 of the Rules of the Court.

<sup>59</sup> 'l'article 13 exige que l'intéressé ait accès à un recours de plein droit suspensif'. Cf. *Chamaiev*, para. 460: 'Toutefois, lorsque les autorités d'un Etat s'empressent de remettre un individu à un autre Etat le surlendemain du jour où la décision a été adoptée, il leur appartient d'agir avec d'autant plus de célérité et de diligence pour permettre à l'intéressé, d'une part, de faire soumettre à un examen indépendant et rigoureux son grief fondé sur les articles 2 et 3 et, d'autre part, de faire surseoir à l'exécution de la mesure litigieuse'. (emphasis added).

<sup>60</sup> 'La Cour a, en outre, estimé qu'en matière d'éloignement du territoire, un recours dépourvu d'effet suspensif automatique ne satisfaisait pas aux conditions d'effectivité de l'article 13 de la Convention'.



The Court's position in applications concerning Article 13 is consistent with its case law on the suspensive effect of an application to the European Court of Human Rights itself. In its first *Mamatkulov* judgment,<sup>61</sup> the Court considered that the effectiveness of the complaint procedure before the Court itself implies compliance with interim measures in order to ensure the effectiveness of the decision on the merits. This may be necessary in order to safeguard, and to avoid prejudice to, the rights as determined by the final judgment. For an effective examination of an application under Article 3 in the context of deportation to another country, it is necessary that the Court can give a binding interim measure. If such an interim measure is disregarded, that renders the right to an individual application nugatory. In the Grand Chamber judgment in the *Mamatkulov* case,<sup>62</sup> the Court likewise based the binding nature of its interim measures on the requirement that the right to lodge an application with the Court must be effective. An interim measure is only issued if there is 'imminent risk of irreparable damage'. In asylum cases, it is necessary in order to 'maintain the status quo', to 'ensure the continued existence of the matter that is the subject of the application'. In the two *Mamatkulov* judgments, the Court gives a more extensive rationale for the requirement that, in order to be effective, a remedy must have the possibility of suspensive effect.

In sum, the Court has held that Article 13 requires that legal remedies in asylum cases must have the possibility of suspensive effect. The procedure in which an application for suspensive effect is dealt with must have suspensive effect itself as a matter of law. It is not sufficient to have an established practice that deportation will only take place after a domestic court has decided whether or not to grant suspensive effect to an application. The Court requires, as a minimum, a legal guarantee that an asylum seeker will not be deported until a judge has decided on the application for suspensive effect.

The Court has not specified in which situations suspensive effect must be granted. In other words, it has not decided on a criterion to be applied. Although this is closely intertwined with domestic law (as is, by the way, the entire issue of suspensive effect of administrative appeals), this is a crucial issue. The Court has repeatedly given considerations that are relevant for this. In the *Čonka* judgment, the Court held that, if suspensive effect is refused mistakenly (in particular: if the national

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*Sultani v France* (Judgment), (2007), European Court of Human Rights, para. 50. *Comp. NA v United Kingdom* (Judgment), European Court of Human Rights, para. 90: 'where the applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect'.

<sup>61</sup> *Mamatkulov and Askarov v Turkey*, (First Section Judgment), (2003), European Court of Human Rights.

<sup>62</sup> *Mamatkulov and Askarov v Turkey*, (Grand Chamber Judgment), (2005), European Court of Human Rights.

appeals authority subsequently grants the appeal), the remedy would not be sufficiently effective for the purposes of Article 13. In both its *Mamatkulov* judgments, however, the Court held that, for a remedy in asylum cases to be effective, it must be able to prevent deportation where there is a real risk of inhuman treatment. This suggests that the criterion for granting or withholding is whether or not the appeal is well-founded. However, the nature of an interim procedure is that it is not about the substantive merits, but about the sustainability of a case. An interpretation of this passage that leads to conformity with *Čonka* would be that, for a remedy to *be able* to prevent deportation where there *is* a real risk of inhuman treatment, deportation *must* be suspended if there *may be* a real risk of inhuman treatment.

The criterion for granting suspensive effect must be such that it is excluded that, when the appeal itself is decided, it turns out to be well-founded. In substance, this means that suspensive effect must be granted to an appeal, unless it is beyond reasonable doubt that deportation is not contrary to Article 3.<sup>63</sup> The concurring opinion of judge Zupančič in *Saadi* points in the same direction, where he argues that the role of the applicant in Rule 39 situations (that is the procedure about suspensive effect before the Court) is to produce a shadow of a doubt, whereupon the burden of proof shifts to the country concerned.

## 7. Conclusion: subsidiarity and ‘arguability’

The foregoing analysis shows that the Court’s position on judicial review in asylum cases is to be constructed by piecing together its case law on Articles 13, 35, and 3 ECHR. Especially on the point of the intensity of judicial review, its position is not entirely clear, and possibly not entirely coherent.

A crucial building block of this analysis is the presumption that judicial review at the national level cannot provide a substantially lower level of protection against violations of the Convention than the Court’s supervision provides. The Court’s supervision must be subsidiary in nature. If it is not, the Convention system will break down under the burden of too many legitimate applications. One may find that this view does not sit easily with the margin of appreciation which the Court accords to States under Article 13. An emphasis on subsidiarity does narrow the margin of appreciation. However, it does not do away with it; it merely provides for a minimum, which is exactly what the Convention is supposed to do. As long as the

<sup>63</sup> Cf. the Dutch Supreme Court, which ruled that Article 33 of the 1951 Geneva Convention implied that an asylum applicant can only be removed pending an appeal if it is beyond reasonable doubt that he is not a refugee, Hoge Raad 13 May 1988, Rechtspraak Vreemdelingenrecht 1974-2003, 5, Rechtspraak Vreemdelingenrecht 1988, 13, Nederlandse Jurisprudentie 1988, 910. It dismissed the State’s contention that an asylum seeker could be removed pending an appeal unless it was at first sight plausible that he was a refugee, which it found to be too strict a criterion.

minimum requirements are met, States are free to have their own procedures, including any national idiosyncrasy they like. Subsidiarity is one of the tools used in order to provide a coherent analysis of the Court's case law. It is based on the Court's case law on Article 35 ECHR. The presumption that the Court's role is subsidiary in nature is essential to the argument that judicial review at the domestic level cannot consist of a scrutiny which is marginal in substance. It is not problematic if it is marginal in its wording, as long as it is 'full' in its substance.

Another crucial building block of this analysis is 'arguability'. The term 'arguability' refers to the criterion of an 'arguable claim' in the Court's case law on Article 13 (see above, part 2). This means that an application is defensible or sustainable; that the applicant has a *prima facie* case; that there is a case to answer. If a claim is arguable under Article 3 ECHR, this has important consequences. First, such a case cannot be dismissed on formal grounds; even if the applicant made procedural errors, such as submitting evidence out of time, the claim that deportation is contrary to Article 3 will have to be assessed substantively, and domestic courts will have to address the substance of such claims. Second, if a claim is arguable, the State in which the application was lodged cannot sit back and wait for the applicant to establish substantial grounds for believing that there is a real risk of treatment contrary to Article 3. Instead, it will have to actively investigate the case in order to 'dispel any doubts' about it. In other words: if a case is arguable, the burden of proof shifts to the responding State, which has to establish that deportation is not contrary to Article 3. For domestic courts, this means that arguable claims can only be dismissed if the State has satisfactorily met the burden of proof. Third, during appeals, applicants cannot be deported when they have an arguable claim, and the procedure about suspensive effect itself should suspend deportation as a matter of law.

Taken together, these two building blocks allow the Court's case law to be interpreted as a coherent whole. This construction would allow the Court to divert the increasing number of asylum cases back to where they should primarily be addressed: domestic authorities and domestic courts. At present, the trend in European countries is otherwise. States use increasing inventiveness to sidestep the substance of asylum claims, and domestic courts seek to do away with cases on formal grounds requiring little substantive scrutiny. Contrary to what one would expect, these institutions seek less power to deal with substance, instead of more. The consequence of this is that the scrutiny of asylum applications becomes less rigorous. Ironically, in this case it requires some activity (and some may be inclined to say activism) of a supranational court to empower domestic courts – or more precisely, to force domestic courts to use the powers they have in order to ensure conformity with Article 3 ECHR in asylum law.