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**Asylum and Shelter;
Recent Judgments by the Dutch Council of State**

REPORT BY

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1. Introduction

The Netherlands does not have a constitutional court. Cases are heard in final instance by one of four highest courts. Our Court – the Administrative Jurisdiction Division of the Council of State – not only is the highest administrative court with general jurisdiction, but also the highest court in alien cases. Recently the Council of State has given judgment in landmark cases on claims which are at the heart of the topic ‘migration’: asylum and shelter. I will first report the decision on asylum of April of this year, followed by the decision on shelter of November of last year.

2. Asylum

Article 2, second paragraph, of the Netherlands Constitution reads:

The admission and expulsion of aliens shall be regulated by Act of Parliament.

The Act of Parliament concerned is the Aliens Act 2000.

Article 3 of the European Convention on Human Rights provides:

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

The Netherlands Constitution does not have an equivalent clause, but under Article 94 of the Constitution the courts are under an obligation not to apply legal provisions in national laws (including Acts of Parliament) which violate self-executive treaty provisions and resolutions by international institutions.¹

Article 3 of the European Convention on Human Rights (ECHR) is a treaty provision which is self-executing and it is quite often relied on in asylum cases. This provision colours the interpretation of one of the grounds for granting asylum.² It is also relied on in expulsion procedures.³

The European Court of Human Rights holds in its settled case-law that States, as a matter of international law, have the right to control the entry, residence and removal of aliens.⁴ Moreover, it is settled case-law that neither the Convention nor its Protocols confer the right to political asylum.⁵ However, expulsion does give rise to an issue under Article 3 ECHR when substantial grounds are shown for believing that an asylum seeker, if deported, faces a real risk of being subjected to treatment contrary to Article 3 ECHR.⁶

In cases on Article 3 ECHR, the European Court of Human Rights applies a particularly thorough scrutiny.⁷ In one case, judges of the European Court of Human Rights even travelled

¹ The same holds true for public authorities.

² Section 29, first paragraph, opening and under b, second sentence, of the Aliens Act 2000.

³ Section 72, third paragraph, of the Aliens Act 2000.

⁴ See e.g. ECtHR (Grand Chamber), *Saadi v. Italy*, judgment of 28 February 2008, No. 37201/06, para. 124.

⁵ ECtHR, *Saadi v. Italy*, judgment of 28 February 2008, No. 37201/06, para. 124.

⁶ ECtHR, *Saadi v. Italy*, judgment of 28 February 2008, No. 37201/06, para. 125.

⁷ ECtHR, *Dumitrescu v. Roumenia*, judgment of 24 March 2015, No. 28440/07, para. 55.

all the way to Finland to assess the facts in an asylum case.⁸ Not only does the Convention require a thorough scrutiny under Article 3, but also – under Article 13 ECHR (on the right to an effective remedy) – a “full examination of both facts and points of law” by the national courts is required. The latter standard is also required under Article 46, third paragraph, of the EU Directive on common procedures for granting and withdrawing international protection.⁹ Pursuant to that provision, the review by the Court encompasses a full and *ex nunc* examination of both facts and points of law, including, if applicable, an examination of the need for international protection.

Credibility assessment is quite complicated, for instance because:

- The factual substance of every claim will be difficult to check;
- Judicial independence and impartiality can be put under pressure from anti-refugee/migrant or societal pressures;
- Many claimants will have vulnerabilities inherent to their situation, so the psychological and trauma dimensions affecting them must be considered.¹⁰

The scope and intensity of judicial review of credibility assessments by authorities in asylum procedures, is a topic which is much debated in our country.¹¹ The Council of State acknowledged certain discretion for decision-making authorities. This does not mean that there is no review at all, but that the court will not replace the authorities’ assessment with its own assessment.¹² Moreover, the court reviews whether or not the authorities have carried out their credibility assessments with due care and whether they had given sufficient reasons for their decisions.¹³

Judgment of 13 April 2016, No. 201507952/1/V2 (X (an Alien) v. Secretary of State for Security and Justice

In a recent judgment¹⁴ – following the entering into force of a law that implemented the EU Directive I just mentioned – the Council of State has strengthened the requirements that the courts should take into account when asylum assessments are reviewed. In a broad and thorough judgment, the Council of State explained how the courts¹⁵ assess the decision-making process leading to the conclusion that an asylum claim lacks credibility. The court assesses whether every legal requirement is satisfied, in particular with regard to the requirement of due care, the merits and the duty to give sufficient reasons.¹⁶

The court examines whether the Secretary of State was correct in his or her assessment of the elements which are relevant and material to his or her overall assessment of an asylum claim’s credibility. The court also examines – with the same rigorous scrutiny – allegations with regard to inconsistencies and vagueness. The same intensity of review is applied by the court to assessments of whether statements made by aliens during interviews contradict one another. There is no reason why the court would not be able to assess that. Finally, the court reviews whether or not assessments of credibility are in keeping with the general principles of administrative law.¹⁷

⁸ ECtHR, *N. v. Finland*, judgment of 26 July 2005, No. 38885/02.

⁹ Directive 2013/32/EU (recast).

¹⁰ See the Mackey and Barnes-report to the International Association of Refugee Law Judges (2013), p. 14. See <helsinki.hu/wp-content/uploads/Crede_Paper_March2013-rev1.pdf>.

¹¹ See e.g. D. Baldinger, *Rigorous Scrutiny versus Marginal Review*, Nijmegen: Wlp 2013.

¹² Administrative Jurisdiction Division of the Council of State, judgments of 27 January 2003, Case No. 200206297/1.

¹³ Administrative Jurisdiction Division of the Council of State, judgment of 4 May 2006, Case No. 200509551/1.

¹⁴ Soon to be submitted to the CODICES Database.

¹⁵ That is the administrative courts.

¹⁶ Para. 7.0.

¹⁷ Para. 7.1.

The Council of State has also paid attention to the fact that the European Court of Human Rights sometimes substitutes its own opinion for the opinions of national authorities on the basis of its own investigation and assessment.¹⁸ The position of the European Court is not comparable to that of a national court, according to the Council of State. The European Court arrives at an independent judgment as to if, given the latest state of affairs, there is a genuine risk that Article 3 ECHR will be breached. Unlike a Dutch court, it does not have the ability to quash a decision, nor to require a State to render a new decision.¹⁹

3. Shelter

In another recent judgment the Council of State has held that the Secretary of State for Security and Justice was allowed to impose conditions to the sheltering of persons without a valid residence permit.²⁰

A bed, a bath and bread

The Council ruled *inter alia* that the Secretary of State was allowed to impose conditions on persons without a valid residence permit obtaining basic housing. The District Court had ruled differently, referring to the European Social Charter, the ECHR and a decision in a Dutch case by the European Committee of Social Rights (ECSR).²¹

The Council of State found that the ruling of the ECSR is not legally binding. Such rulings may play a part in the interpretation or applicability of treaty provisions that can be relied on in court – like Article 8 ECHR – but it is for the European Court to decide if they do and to what extent.

Besides, the Council confirmed its standing case-law that it does not follow from Article 8 ECHR that the State is under a general obligation to provide for shelter for aliens who are of age, with or without a residence permit. It also recognised that respect for private life under Article 8 ECHR – which also includes a basic care for a person's physical and mental integrity – may in certain circumstances entail positive obligations, for instance to realise some form of housing.²² Indeed in this case some form of shelter had been provided for, as the alien stayed at a location restricting his liberty.

In short, the Council ruled that the Secretary of State was entitled to expect that the alien co-operated in his own departure in exchange for 'a bed, a bath and bread'. Setting such co-operation as a criterion for 'a bed, a bath and bread' was lawful.

The case was a particularly sensitive one, due to the different ways in which the coalition partners within the government had interpreted a statement made by the Committee of Ministers of the Council of Europe following the decision by the European Committee of Social Rights.²³ In the meantime complaints have been made to the European Court of Human Rights.²⁴

¹⁸ See e.g. ECtHR, *F.N. and Others v. Sweden*, judgment of 18 December 2012, No. 28774/09, paragraphs 70 to 80.

¹⁹ Para. 8.2.

²⁰ Administrative Jurisdiction Division of the Council of State, judgment of 26 November 2015, No. 201500577/1/V1, *CODICES* 2015-3-002.

²¹ ECSR, *CEC v. the Netherlands*, decision of 1 July 2014, No. 90/2013, <www.coe.int/socialcharter>

²² Reference was made to ECtHR, *V.M. v. Belgium*, judgment of 7 July 2015, No. 60125/11 and ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, judgment of 8 April 2014 No. 31045/10.

²³ The Central Appeals Tribunal, highest court in *inter alia* social security cases, took the same view as the Council of State in judgments delivered on the same day. Central Appeals Tribunal, judgments of 26 November 2015, Nos ECLI:NL:CRVB:2015:3803 and ECLI:NL:CRVB:2015:3834, <www.rechtspraak.nl>.

²⁴ PM.