



**Implementation of the Aliens Act 2000:
UNHCR's Observations and Recommendations**

I. Introduction

The fundamental changes introduced by the *Aliens Act 2000*, which came into force on 1 April 2001, were the Netherlands Government's response to high numbers of asylum applications and the related expenditure required to ensure asylum-seekers' needs are adequately met and their claims fairly adjudicated. UNHCR commented at the time of its adoption, although not all of its concerns were taken into account.

In line with its supervisory responsibility, UNHCR has since monitored the implementation of the law. This note points out the areas of concern and provides recommendations with regard to:

- 1) the accelerated procedure as it is legally defined and implemented;
- 2) the burden of proof imposed on asylum-seekers;
- 3) the understanding of new facts leading to limitations in the scope of judicial review and in subsequent applications;
- 4) further limitations in the context of judicial review.

II. Areas of concern

1. The accelerated procedure

An increasing number of cases are determined and subsequently rejected in the accelerated asylum procedure. During the last three months of 2002, more than 60% of all asylum applications were rejected in the accelerated procedure,¹ according to figures provided by the Ministry of Justice. The former Minister for Immigration and Integration has further indicated that the aim is to examine 80% of the asylum requests in the accelerated procedure.²

The only criterion for dealing with cases in the accelerated procedure, is whether they can be rejected within 48 processing hours without time-consuming investigations (including

¹ TK 2002-2003, 19 637, no. 731.

² TK 95-5623, 5 September 2002 and TK 2002-2003, 28 600 VI, No. 5.

manifestly unfounded cases and cases where a claim can be lodged with a third country).³ This criterion has been interpreted very broadly in practice to include cases which go far beyond manifestly unfounded cases or cases which could be considered inadmissible on formal grounds, i.e. that another country is responsible for determining the claim. Such a broad interpretation was also endorsed by the second appeal instance, the Administrative Jurisdiction Division of the Council of State (hereafter Council of State)⁴, although it specified that the criterion should be whether rejection on the basis of a careful assessment is possible within 48 processing hours.⁵

UNHCR's observations:

UNHCR is concerned that accelerated procedures in the Netherlands have become the rule and that the stated aim is to have an even higher share of claims examined in an accelerated procedure. From UNHCR's perspective, channeling claims into the accelerated procedure should not be statistics-driven but rather be determined on the merits of the claim.

UNHCR accepts and supports measures that could lead to more efficient and rapid determination of asylum claims, in so far they take into account basic procedural safeguards. Conclusion No. 30 of the Executive Committee (EXCOM) of UNHCR focuses specifically on manifestly unfounded or abusive claims, and makes provision for claims considered to be so obviously without foundation as not to merit full examination at every level of the procedure.⁶ As noted during the Global Consultations on International Protection amongst others:

if the types of application which may be categorized as clearly abusive or manifestly unfounded can be clearly defined and delimited and if appropriate safeguards are in place, the approach can be a useful case management tool within the asylum procedure to expedite decision making in countries dealing with a significant caseload.⁷

Clearly defined categories of manifestly unfounded or clearly abusive applications could, for instance, be expedited through prioritization in first instance procedures. The basic safeguards as in regular procedures should, however, apply, including a full personal interview. For specific categories of asylum-seekers, appropriate rebuttable presumptions may be used against the asylum-seeker, for example, in cases where the individual originates from a country where generally there is no persecution, or where the claim is considered abusive because the asylum-seeker insists on the validity of documents. The asylum-seeker must, however, be accorded an effective opportunity to rebut any such presumptions. Where claims prove to be more complex, or where there is indication that the asylum-

³ Aliens Circular C3/12.1.1.

⁴ Council of State decision No. 200103264/1 of 7 August 2001, JV2001/259.

⁵ Council of State decision of 27 August 2001, NAV 2001/317.

⁶ Conclusion No. 30 (XXXIV) of 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.

⁷ EC/GC/01/12 of 31 May 2001.

seeker may be in need of international protection, such cases should be referred to the regular procedure.

Further, UNHCR recommends that issues of a formal nature be handled distinctly from issues of a substantive nature, which require examination on the merits of the claim.

1.1 Claims by vulnerable asylum-seekers as well as manifestly well-founded claims

In practice, traumatized persons, as well as unaccompanied and separated children have been channeled into the accelerated procedure. While recognizing that asylum-seekers may not be able to raise the reasons for their flight for psychological reasons (e.g. trauma), the Council of State has nonetheless insisted that they should at least express their inability to do so during the interview on the motives for their flight.⁸

UNHCR's observations:

Generally vulnerable and traumatized asylum-seekers, including unaccompanied and separated children, require time to establish trust and confidence in the person(s) responsible for determining their claim, before they can explain the reasons for their flight or the cause of their trauma. Persons raising gender-related claims and survivors of torture or severe trauma in particular require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community. Particularly for survivors of sexual violence or other forms of trauma, subsequent interviews may be needed in order to establish trust and to obtain all the relevant information.⁹

UNHCR is concerned that the 48-hour framework of the accelerated procedure does not permit the time required to establish the necessary confidence and trust. Claims by traumatized and other vulnerable cases, including unaccompanied and separated children, should always be channeled into the regular procedure and be prioritized within that procedure. Manifestly well-founded cases, that is cases where the international protection need is evident, deserve early assurances of safety and stability, and should therefore also be prioritized within the regular procedure.

1.2 Suspensive effect and protection from expulsion

An appeal against a decision taken in an accelerated procedure does not have automatic suspensive effect, although it may be requested. In practice, however, different rulings have

⁸ Council of State decisions No. 200202610/1 of 28 June 2002, JV 2002/294 and No. 200202452/1 of 16 July 2002, JV 2002/304.

⁹ See UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of refugees, HCR/GIP/02/01 of 7 May 2002.

made it extremely difficult to obtain such suspensive effect and therefore protection against expulsion.

The Council of State has decided that the authorities' power to expel an alien is a consequence by law of a negative asylum decision, and there is therefore no need to issue a separate expulsion order.¹⁰ However, the Council has repeatedly found that since no date for expulsion was set (as no expulsion order had been issued), the expulsion did not appear to be imminent. Suspensive effect was therefore not granted.¹¹

UNHCR's observations:

The aforementioned rulings make it extremely difficult to argue for the grant of suspensive effect. This is further complicated by the fact that material support is terminated immediately following a negative first instance decision in accelerated procedures, thereby in effect undermining the ability of the asylum-seeker to submit an appeal and to request suspensive effect.

Given the potential serious consequences of an erroneous first instance decision, it is UNHCR's view that withholding expulsion until at least one proper review of the decision has been taken is a fundamental protection guarantee. Suspensive effect should therefore in principle be granted in asylum cases.

Exceptionally, in cases that can be considered manifestly unfounded or clearly abusive as outlined above, automatic suspensive effect could be lifted. However, in such cases, there should be an effective means to request suspensive effect, based on a review of the facts of the asylum case. Further, material support should not be terminated until the deadline for requesting review of the case has passed, or until a decision on suspensive effect has been taken. Where it is granted, material assistance should continue to be provided until a final decision has been taken.

2. Burden of proof

The jurisprudence of the Council of State places the burden of proof primarily on the asylum-seeker. The facts and circumstances that form the basis of the asylum claim, have to be made plausible by the asylum-seeker, *inter alia* by submitting relevant documents. Further, he or she has to raise his/her reasons for flight in the substantive interview with an officer of the Immigration and Naturalization Service (Immigratie- en Naturalisatiedienst - IND); the authorities are not called upon to elicit these reasons through questions.¹²

UNHCR's observations:

As outlined in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, the burden of proof lies with the asylum-seeker and is discharged by providing a

¹⁰ Council of State decision No. 200101994/1 of 29 May 2001, JV 2001/166.

¹¹ Council of State decision No. 200104991/2 of 9 November 2001, JV 2002/14.

¹² Council of State decision No. 200105344/1 of 28 December 2001, JV 2002/73.

truthful account of relevant facts and by “assist[ing] the examiner to the full in establishing the facts of the case”.¹³ The Handbook also states the following: “...the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.”¹⁴ The examiner therefore has a responsibility to ensure that the applicant is put in a position to present his or her case adequately and to ascertain and evaluate any available evidence provided by the asylum-seeker.

Given the particular circumstances in which asylum-seekers find themselves, it is often difficult for them to provide evidence in relation to key facts of their personal history. Their credibility therefore often plays a crucial role. A claim should be considered credible where the applicant has presented a claim that is coherent and plausible and therefore capable of being believed. Inability to remember dates or minor details or inconsistencies, which are not material to the refugee status determination, should not be used as decisive factors in determining credibility. Once the examiner is satisfied with the applicant’s general credibility, the latter should be given the benefit of the doubt as regards those statements for which evidentiary proof is lacking.¹⁵

It should further be kept in mind that many asylum-seekers have valid reasons for absence of, or reliance on fraudulent, documents. This may be because they were forced to leave their countries without documents, or instructed by the smugglers to hand them over or to destroy them.¹⁶ Such an occurrence should not be a ground for considering an asylum claim manifestly unfounded or abusive.¹⁷ As noted also during the Global Consultations process, “...asylum-seekers ha[ve] a responsibility to cooperate with the authorities. Lack of documentation, however, d[oes] not in itself render a claim abusive. The issue of lack of cooperation and lack of documentation should ideally be handled as separate issues.”¹⁸

3. The understanding of new facts leading to limitations in the scope of judicial review and in subsequent applications

The concerns caused by the legal definition and the implementation of the accelerated procedure and the burden of proof, as outlined in Sections 1 and 2 above, are exacerbated by the considerable restrictions which asylum applicants face in submitting new facts in an appeal procedure or in the case of subsequent applications.

Pursuant to Article 83 of the *Aliens Act 2000*, in assessing an appeal, the District Court takes into account, facts and circumstances that have arisen subsequent to the first instance

¹³ Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, 1979, HCR/1P/4/Eng/REV2, re-edited January 1992, para. 205(a)(i). See also Note on Burden and Standard of Proof in Refugee Claims, UNHCR Position Paper (16 December 1998).

¹⁴ *Ibid*, para. 196.

¹⁵ Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, UNHCR Geneva, April 2001, p. 3. See UNHCR’s Note on Burden and Standard of Proof in Refugee Claims issued in December 1998 for an overview of UNHCR’s position generally.

¹⁶ The drafters of the 1951 Convention, in recognition of this, provided in Article 31 for exemption from punishment for illegal entry or stay.

¹⁷ See also UNHCR’s comments on the Dutch Bill on undocumented asylum-seekers, 5 October 1998.

¹⁸ A/AC.96/961, p. 20, para. 27.

decision, unless this violates the principle of due process or unless the completion of the case will be delayed disproportionately.

Article 4:6 of the *General Administrative Law Act* gives the Minister the authority to reject a subsequent application by referring to the previous negative decision, if the applicant states no new facts and circumstances.

Based on case law by the Council of State¹⁹, the *Aliens Circular* subsequently defined such new facts and circumstances as those that were not known or could not reasonably have been known when the first instance decision was taken.²⁰

The Council of State has, however, interpreted the term “new” in a very restrictive manner. Documents that existed during the course of the accelerated procedure but were obtained by the applicant after issuance of a decision on his or her claim, possibly because they had not yet arrived from the country of origin, are not considered as new facts. The Council of State generally has taken the view that the applicant could, and thus should, have submitted such documents in time. While the applicant may in principle rebut such a presumption by proving that it was not possible to obtain such information earlier, in practice this can hardly be proven. The same approach has been taken with respect to claims of sexual violence and torture, which, for reasons of shame, trauma or otherwise, were not raised prior to issuance of a decision.²¹

The District Courts follow the jurisprudence of the Council of State and therefore do not take into consideration evidence, documents or further statements that the asylum-seeker obtained after a negative decision in first instance, arguing they are not new facts or circumstances.

The same restrictive approach has been taken by the Council of State with respect to new facts or circumstances in the case of subsequent applications, even if such information could demonstrably lead to the conclusion that the asylum-seeker may after all be found to be a refugee. The asylum-seeker is considered to have exhausted the procedure and is required to leave the Netherlands. The Council of State has, moreover, ruled that deviations from the procedure outlined in the Law²² are imperative only where special facts or circumstances concerning the individual case arise.²³ The Council of State has only considered this rule to be applicable in one recent case, where Article 3 of the European Human Rights Convention was a concern, although it did not define “special facts or circumstances”.²⁴

¹⁹ Council of State decision No. 200104321/1 of 16 October 2001, JV 2002/6.

²⁰ Aliens Circular C5/20.5.

²¹ Council of State decisions No. 200103175/1 of 3 August 2001, JV 2001/258, No. 200202610/1 of 28 June 2002, JV 2002/294, No. 200202452/1 of 16 July 2002, JV 2002/304 and Nos. 200203409/1 and 200203388/1 of 8 August 2002, JV 2002/471.

²² Such as Article 4:6 of the *General Administrative Law Act*.

²³ Council of State decision No. 200200237/1 of 5 March 2002, JV 2002/125.

²⁴ Council of State decision No. 200300506/1 of 24 April 2003, JV 2003/280.

The provision giving the Minister the authority to refuse reconsideration of a subsequent application on this basis is a discretionary one.²⁵ However, the jurisprudence of the Council of State suggests that the District Courts must restrict themselves to the question of whether new facts or circumstances have arisen (*nova*). The District Courts are therefore not qualified to assess the Minister's finding that the earlier decision was not manifestly incorrect in the light of new information.²⁶ The scope of review by the Council of State does not affect the Minister's choice as to whether or not to apply the discretionary provision. Nevertheless, following this jurisprudence, the Minister has, through an amendment of the Aliens Circular, limited his possibility to review cases to situations where there are new facts. It is no longer possible to review manifestly incorrect decisions if there are no new elements.²⁷

UNHCR's observations:

In UNHCR's view, this narrow interpretation of new facts and circumstances is of particular concern in cases of survivors of gender-related violence, torture as well as other vulnerable cases that are dealt within the time-limited framework of an accelerated procedure, as outlined above.

Particularly in cases where the sole reason that the documents/information could not be submitted in time was the strict 48-hour time limit for a first instance decision, no cases should be rejected solely on the basis that the relevant information was not raised or documents submitted earlier. This applies both for appeals and when considering subsequent applications. Further, in case of a real risk of *refoulement*, this should always be considered as "special circumstances", requiring proper consideration of the case.

4. Further limitations in the context of judicial review

The Council of State has further restricted the scope of review by District Courts, by generally limiting any review of the findings and assessment of the facts by the Minister of Justice²⁸ to an assessment of whether the Minister could reasonably have come to his decision. Even where a different conclusion could be argued, in so far as the point of view of the Minister is reasonable, the Courts must accept the Minister's decision. While District Courts are competent to issue decisions on eligibility, they must proceed on the basis of facts as found and assessed by the Minister in so far as his assessment is considered reasonable.

UNHCR's observations:

²⁵ Article 4:6 of the *General Administrative Law Act*.

²⁶ Council of State decisions No. 200104321/1 of 26 July 2001, JV 2002/6, No. 200105774/1 of 11 January 2002, JV 2002/128 and No. 200200351/1 of 5 March 2002, JV 2002/124.

²⁷ Aliens Circular, C5/20.5.

²⁸ Council of State decisions No. 200202455/1 of 3 July 2002, JV 2002/296, No. 200202328/1 of 9 July 2002, JV 2002/275, No. 200204308/1 of 13 September 2002, JV 2002/387 and No. 200206297/1 of 27 January 2003, JV 2003/103.

In UNHCR's view, asylum-seekers should have the possibility for at least one appeal with full examination of both facts and points of law. The far-reaching limitations with regard to the review of the facts and their assessment by the Minister, particularly when considered in conjunction with the concerns raised in earlier sections, do not operate in favour of the asylum-seeker and raise serious questions regarding the effectiveness of the available remedies.

III. Conclusion

In the spirit of cooperation and constructive engagement with the authorities, UNHCR would like to recommend that:

- only 'manifestly unfounded' or 'clearly abusive' cases, as defined by UNHCR's Executive Committee in its Conclusion No. 30, be channeled into the accelerated procedure;
- manifestly well-founded cases be prioritized in the regular procedure to ensure a quick and efficient examination of their claim;
- vulnerable cases, including cases suspected of trauma, and cases where sexual or gender-specific violence or torture may be of concern, as well as claims by unaccompanied or separated children be channeled into and prioritized within the regular procedure;
- appeals against negative decisions in the first instance generally be granted automatic suspensive effect; exceptions to this automaticity to apply only to manifestly unfounded or clearly abusive cases, as outlined above;
- the interpretation of "new facts and circumstances" be more flexible in such a way that asylum-seekers, particularly vulnerable cases such as traumatized asylum-seekers and unaccompanied and separated children, be offered a real possibility to demonstrate that they are in need of international protection;
- measures be taken to ensure a full review of questions of both facts and law in the case of appeals in asylum cases.

UNHCR is pleased to provide further information should this be required and to engage in constructive dialogue on the way forward.

UNHCR
July 2003