

RAPPORT DES PAYS-BAS

Rapporteur

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SUMMARY**CASE I**

Under Dutch law and policy on aliens, an alien who marries a Dutch national and who seeks to settle with that person in the Netherlands is not *ipso jure* entitled to a residence permit. He must fulfil certain conditions, the most important of which are the following : (a) he must not pose a threat to public policy (i.e. must not have been convicted for a serious crime by a final judgment of a court) or national security ; (b) the Dutch partner must in principle have independent and established means of support ; (c) the marriage in question must be valid and must have been contracted in accordance with Dutch law or the law governing the marriage in question according to rules of private international law ; it must not be a marriage of convenience, and in the case of a polygamous marriage only one of the partners qualifies for admission ; and (d) the spouses must set up a joint household.

In the first instance it is the Minister of Justice who decides whether an alien meets these requirements. If the Minister dismisses an application for admission, the alien may apply to him for administrative review of the dismissal. If the Minister dismisses the application for review, the alien may as a rule appeal to the Judicial Division of the Council of State. If proposed amendments to the present Aliens Act become law, appeals will be heard by the Administrative Division of the District Court at The Hague. No appeal will lie from the District Court's judgment ; the only legal remedy will be "cassation in the interests of the law" by the Supreme Court on the demand of the Procurator-General, which will have no effect on the position of the alien concerned.

Expulsion is generally suspended pending a review or appeal procedure. However, in certain circumstances the Minister of Justice may refuse to grant suspensive effect to the application. No appeal can be made to the Judicial Division of the Council of State against such a refusal, or against an expulsion order. However, an alien may institute interlocutory injunction proceedings before the President of the District Court at The Hague by way of a tort action against the State.

When reviewing a challenged decision, the following factors are examined by the Judicial Division of the Council of State: (a) inconsistency with a generally binding rule ; (b) abuse of power ; (c) unreasonableness ; and (d) incompatibility with one or more principles of sound administration, more in particular the requirements that the decision is based on sound reasoning, has been diligently prepared and does not violate the equality principle. Pursuant to Articles 93 and 94 of the Dutch Constitution, generally binding rules include self-executing provisions of treaties and of decisions of international organisations. Article 8 of the European Convention on Human Rights, which contains the right to respect for family life, is of particular importance for aliens who apply for (extension of) a residence permit to remain united or to reunite with their family, or to found a family.

CASE II

The Aliens Act bases its definition of the term "refugee" on the definition contained in Article 1 (A) of the Convention relating to the Status of Refugees, while in practice the grounds for refusing to admit an alien as a refugee are also mainly based on Articles 1 (F) and 33, paragraph 2, of the same Convention. In addition, the doctrine of the "country of first asylum" is applied by the authorities and in case law as a ground for refusing to admit a refugee to the Netherlands.

In general an alien is permitted to await the decision on his application for admission in the Netherlands, unless he poses a threat to public policy, public order or national security, or there is a danger that the opportunity of return to the country of origin or of admission to a third country will be lost. Similarly, an alien who has the option of returning to a country of first asylum under certain guarantees, or concerning whom no reasonable doubt can exist that he is not a refugee, as a rule must leave the Netherlands after dismissal of his application at first instance.

With respect to the authority competent to decide on an application at first instance and in review, the possibility of appeal to the Judicial Division of the Council of State and the possibility of instituting interlocutory injunction proceedings against expulsion, what has been said in relation to Case I also holds good here. The same applies to the grounds on which review by the Judicial Division of the Council of State of the refusal to admit the asylum seeker is based, special weight being attached, as far as the applicable international law is concerned, to Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment.

Under the proposed amendments to the Aliens Act, appeals by asylum seekers against the refusal of admission will also be heard by the Administrative Division of the District Court at The Hague, with as the only further remedy "cassation in the interests of the law". Another proposed amendment will introduce the possibility of dismissing an application for admission on the grounds that it is inadmissible or manifestly ill-founded.

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I.- INTRODUCTION : A BRIEF SKETCH OF DUTCH LAW AND POLICY ON ALIENS

A brief sketch of the relevant components of Dutch law and policy on aliens follows in order to enable the reader to place the discussion of the two cases in context.

N.B. Far-reaching amendments to the Aliens Act are currently under preparation. It is planned that the bill in question will enter into force on 1 January 1994, but at present (Le. November 1993) it is hard to predict whether this deadline will be reached. This report is based on the Aliens Act in its present form. Marked differences between the text of the amended and that of the present act will be indicated where relevant.

I.1. A general outline of the provisions governing admission and residence

On the subject of residence rights for aliens, the Aliens Act distinguishes between short-term stays, for which no residence permit is required, and long-term stays.

Under the provisions of Section 8 of the Aliens Act, aliens are entitled *ipso jure* to stay in the Netherlands for a short period (not to exceed six months) providing they

- (a) comply with entry formalities (e.g. possess a valid travel document and, if necessary, a visa) ;
- (b) possess sufficient resources to defray the costs of their residence in the Netherlands and the costs of travel to a place outside the Netherlands ; and
- (c) do not constitute a threat to public order, public policy or national security. Under Article 8 of the Benelux Convention on the free movement of persons, short-stay rights in the Netherlands extend also to Belgium and Luxembourg, while aliens entitled to stay in the two latter countries qualify for short stays in the Netherlands.

Aliens seeking to stay for a longer period must obtain a residence permit (whether temporary or permanent), unless they can derive residence rights directly from an international agreement by which the Netherlands is bound. Thus, for instance, citizens of the European Union who fulfil certain conditions derive a right to reside in the Member-States directly from the relevant provisions governing the free movement of persons⁽¹⁾. An alien in possession of a permanent residence permit ("*vestigingsvergunning*") is entitled to stay for an indefinite period of time pursuant to Section 10 of the Aliens Act. Such permits will be issued on request if the applicant meets certain conditions. The main requirement is that the applicant must have resided legally in the Netherlands - as his principal place of residence - for a five-year period. Aliens who have been admitted as refugees are also permitted to reside in the Netherlands for an indefinite period under the provisions of Section 10. Other categories qualifying - under certain conditions - for a permanent residence permit include aliens who have been admitted to the Netherlands in their capacity as relatives of :

(1) EC Court of Justice, judgment of 8 April 1976, Case 48/75, Royer, [1976] ECR 497 ; Judicial Division of the Council of State (hereafter Council of State), judgment of 26 October 1988, RV1988, 29. The same may apply to Turkish nationals under the provisions of the Association Agreement between the EC and Turkey ; EC Court of Justice, judgment of 20 September 1990, Sevince, Jur. 1990, p. 1-3461 ; Council of State, judgment of 9 April 1991, RV 1991, 31. To citizens of the European Union a special document, valid for a five-year period, is issued as evidence of authorization to stay in the Netherlands. Members of the Diplomatic Corps are entitled *ipso jure* to reside in the Netherlands by virtue of their accreditation, as long as they have not been declared *persona non grata*.

- (a) Dutch nationals ;
- (b) aliens in possession of a permanent residence permit ; or (c) aliens admitted as refugees.⁽¹⁾

In all other cases residence permits have a limited validity, usually of one year.

The Aliens Act does not specify the grounds on which aliens may be admitted. Section 11, subsection 5, merely states that "the issue of a residence permit, or its renewal, may be refused for considerations relating to the public interest". This leaves the authorities considerable discretion. Over the years this crystallised into the policy laid down in the 1982 Aliens Circular, which bars aliens from admission unless :

- (a) they derive a right of entry from an international agreement ;⁽²⁾

- (b) their presence will serve essential Dutch interests ;⁽³⁾

or

- (c) admission is called for in the light of compelling humanitarian reasons.⁽⁴⁾

The latter ground, "compelling humanitarian reasons", has in fact become a collective category of grounds for admission, including *inter alia* (a) refugee status⁽⁵⁾ ; (b) medical treatment purposes ; (c) joining a spouse or partner ; (d) family reunification or extended family reunification, adoption and fostering ; (e) continued residence after termination of a relationship from which residence rights had been derived ; (f) admission of second-generation aliens and of former Dutch nationals ; (g) study ; and (h) situations in which failure to admit an alien would be disproportionately severe in view of the situation in the country of origin .

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The proposed amendments to the Aliens Act provide for the issue of a provisional residence permit⁽⁶⁾. Such permits could be issued to aliens who are in the Netherlands and who submit an application for admission, if the Minister of Justice believes that expulsion to the country of origin would entail exceptional hardship for the alien in question given the general situation in that country⁽⁷⁾. A provisional residence permit would be issued for a maximum one-year period, with the possibility of further one-year extensions. After three consecutive years of domicile in the Netherlands on the basis of a provisional residence permit, an alien would be entitled

(1)Section 10, subsection 2, Aliens Act in conjunction with Article 47 of the Aliens Decree.

(2) In addition to the law of the European Union, Benelux law, the Convention relating to the Status of Refugees and diplomatic agreements, such rights could for instance be derived from human rights conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (e.g. Article 3 concerning the prohibition of torture and inhuman or degrading treatment or punishment, and Article 8 concerning the right to respect for family life) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

(3) For instance economic or cultural interests.

(4) Aliens Circular 1982, A4, § 5.1.1.

(5) The prohibition of refoulement derives directly from Article 33 of the 1951 Convention relating to the Status of Refugees, but does not in itself confer a residence right.

(6) Section 11, subsection 2, in conjunction with Section 9a of the Bill amending the Aliens Act.

(7) Section 12b, subsection 1, of the Bill amending the Aliens Act.

to apply for - and would be granted - a "standard" residence permit⁽¹⁾. A provisional residence permit could be withdrawn if the grounds militating against the holder's expulsion ceased to exist⁽²⁾.

1.2. Admission to join a spouse

As stated above, admission to join a spouse comes under the admission ground "compelling humanitarian reasons" as laid down in the 1982 Aliens Circular. Chapter B 19 contains provisions which specifically relate to this category. Of special importance are here Article 8 of the European Convention on Human Rights (hereafter referred to as ECHR), under which the Contracting Parties are obliged to respect private and family life, and Article 12 of the ECHR, which concerns the right to marry and found a family. The relevant provisions in the 1982 Aliens Circular can be summarised as follows :

- (a) Admission can be granted both on the basis of a marriage which already existed when both partners were domiciled in a foreign country (classified as "*gezinshereniging*", i.e. family reunification) and on the basis of marriage to a partner resident in the Netherlands ("*gezinsvorming*", i.e. founding a family).
- (b) A marriage must be valid and have been contracted on the basis of Dutch law or the law governing the marriage in question according to rules of private international law. Its validity must be borne out by authenticated official documents.
- (c) Even if a polygamous marriage is valid according to the law of the country in which it was contracted, only one of the spouses may be admitted in the context of family reunion or to found a family. No other spouse can be considered for admission on this ground, not even if the "first" spouse has left the Netherlands in the meantime. This does not of course rule out admission on other grounds. The same applies in cases where the person resident in the Netherlands whom a spouse or prospective spouse seeks to join, is living with a partner in a long-term non-marital relationship.
- (d) The spouses must set up a joint household and actually cohabit.
- (e) The person whom an alien wishes to join must have independent and established means of support. If this person is a Dutch national, has been admitted as a refugee or holds a permanent residence permit, then the regulations on this point are relaxed in certain respects⁽³⁾
- (f) The person whom an alien wishes to join must have suitable accommodation for a spouse and any children who might be admitted. Lack of suitable accommodation will not be invoked against a Dutch national or an alien admitted as a refugee.

(1) Section 13a of the Bill amending the Aliens Act.

(2) Section 12a, subsection 4, of the Bill amending the Aliens Act.

(3) 1982 Aliens Circular, B 19, § 2.4.1.1.

(g) Admission can be refused on the grounds that an alien might pose a threat to public order, public policy or national security, being a more narrow specification of the general ground for refusal to issue or renew a residence permit laid down in Section 11, subsection 5 of the Aliens Act, namely "for considerations relating to the public interest". The 1982 Aliens Circular gives a more detailed definition of this general clause, with slightly different criteria being applied in cases where an alien seeks to join a Dutch national, an alien admitted as a refugee or the holder of a permanent residence permit⁽¹⁾.

The requirement that a marriage must be valid is not of great weight in cases where the partner resident in the Netherlands is a Dutch national or "favoured" citizen of the European Union⁽²⁾, holds a permanent residence permit or has been admitted as a refugee. In such cases, admission may also be granted to aliens intending to cohabit with their partners on an unmarried basis, provided they have a steady relationship, evident, *inter alia*, in the fact that they share a household. The partner living in the Netherlands must, however, be prepared to maintain the foreign partner and must be financially capable of doing so. The relaxation of the income requirement which applies to cases where a Dutch national or an alien admitted to the Netherlands as a refugee is being joined by a spouse or prospective spouse does not apply here. In addition, the partner must have suitable accommodation, a requirement not imposed in cases where aliens are seeking to join Dutch nationals or aliens admitted as refugees to whom they are married or whom they intend to marry.

A residence permit can be refused if it is evident that the marriage is one of convenience. This could emerge from statements by the parties concerned, from reliable statements by third parties or from repeated evidence that the parties concerned do not actually have a joint household⁽³⁾. In the case of relationships other than marriage, admission is refused if there are grounds to suspect that the relationship has been initiated with a view to furnishing the partner with residence rights in the Netherlands for some other purpose. Such grounds may be found, for example, in the fact that there was no close relationship between the parties concerned before arrival in the Netherlands, or because the relationship commenced at a time when the partner did not have short-term or long-term residence rights.

The European Commission of Human Rights and the European Court of Human Rights in Strasbourg accord the concept of "family life" in Article 8 of the ECHR an autonomous meaning, independent of the legal systems of individual Contracting Parties. According to that case law, in order to be applicable, Article 8 does not require a marriage to be valid ; a marriage can be recognised on the grounds that a marriage ceremony has taken place and that the partners assume that they are married and live as a married couple⁽⁴⁾. Neither does Article 8 require that parties cohabit ; even where circumstances have brought about short or long intermissions in cohabitation, "family life" can be said to exist, providing that such contacts as do exist are sufficiently close and frequent⁽⁵⁾. Finally, Article 8 does not distinguish between monogamous and polygamous marriages ; "family life" may exist with each of the wives and the children born of each marriage, depending on the relationships which are maintained and the degree of care, both material and otherwise, which can be shown to exist.⁽⁶⁾

(1) 1982 Aliens Circular, B 19, § 2.2.4 and § 2.4.1.3.

(2) I.e. a citizen of one of the Member-States to whom the rules concerning free movement of persons apply.

(3) Aliens Circular 1982, B 19, § 2.1.1.

(4) European Court of Human Rights, judgment of 28 May 1985, Abdulaziz, Cabales and Balkandali, Series A.94 (1985), p. 32. The married state must be genuine, but a non-marital relationship also establishes "family life".

(5) This can be deduced by analogy from the European Court of Human Rights judgment of 21 June 1988, Berrehab, Series A.138 (1988), p. 14, concerning the relationship between father and child after divorce. See Council of State, judgment of 24 October 1988, RV 1988, 17.

(6) Implicit : European Commission on Human Rights, decision on admissibility of Application 2991/66, Kahn v. United Kingdom, Yearbook X (1967), p.478 ; Council of state, judgment of 25 May 1992, RO 2.90.4061.

13. Admission as a refugee

Section 15, subsection 1, of the Aliens Act reads as follows :

"Aliens coming from a country in which they have a well-founded fear of being persecuted because of their religious or political persuasion, or their nationality, or because they belong to a certain race or a certain social group, may be admitted as refugees by Our Minister fi.e. the Minister of Justice]."

No express distinction is made between "recognition" and "admission" as a refugee. However, established Dutch case law takes the position that the decision concerning recognition as a refugee and the decision concerning admission as a refugee are two distinct decisions, with the former necessarily preceding the latter.⁽¹⁾

When establishing whether an alien should be recognised as a refugee, the definition of "refugee" laid down in Article 1 (A) of the 1951 Convention relating to the Status of Refugees (hereafter referred to as Refugee Convention) is taken as the starting point. Although that provision and Section 15 of the Aliens Act are not completely identical, in case law it is assumed that since the Netherlands became bound by the 1967 Protocol to the Refugee Convention, both definitions refer to the same category of persons. It is unclear, however, whether the grounds for exclusion laid down in Article 1 (D)-(F) of the Refugee Convention must be considered as inherent to Section 15 of the Aliens Act. In general, decisions and judgments concerning refugee status are based on the Refugee Convention rather than on Section 15 of the Aliens Act. In any case, if the grounds for exclusion have not already been taken into account in establishing refugee status, they will play an important role in the decision on whether or not to admit the alien as a refugee.

Since the Refugee Convention does not lay down any obligations as regards admission - leaving aside the ban on *refoulement* contained in Article 33 - Section 15 of the Aliens Act is used as a basis for admission decisions. It leaves the Dutch authorities considerable discretion in that respect, merely stating that aliens of this category "may be admitted". This freedom is however expressly curtailed by subsection two of Section 15, which implements the ban on *refoulement* referred to above, and reads as follows :

"Entry can only be refused for weighty considerations relating to the public interest if such refusal would compel the alien to proceed forthwith to a country as referred to in subsection one."

Such "weighty considerations" might include the grounds for exclusion laid down in Article 1 (F) of the Refugee Convention and the exception which Article 33, paragraph 2, of the same Convention permits even to the prohibition of *refoulement*.

The phrasing of Section 15, subsection 2, of the Aliens Act and Article 33, paragraph 1, of the Refugee Convention leaves room for application of the concept of "country of first asylum": there are no grounds for admission if the refugee can return to a third country in which he has spent some time after his flight and which offered, and is likely to offer, protection against *refoulement*.⁽²⁾

The Refugee Convention is not the only international instrument to restrict the discretion on the part of the Dutch authorities as regards admission decisions. One of the main other examples is the prohibition of torture and inhuman or degrading treatment or punishment laid down in Article 3 of the ECHR.

(1) Council of State, judgment of 12 July 1978, 27. In an isolated case the Council of State set aside the question of recognition, having already concluded that the asylum seeker concerned could be refused admission as a refugee on the grounds that the Netherlands could not be regarded as the first country of asylum ; judgment of 29 september 1983, RV 1983, 4, Howener, under the case law as it stands this judgment must be regarded as less correct.

(2) Aliens Circular 1982, B 7, § 1.2.

A request for admission as a refugee can also lead to the conferral of residence rights in a form other than refugee status. For a long time Convention refugee status (as defined under Article 1(A) of the Refugee Convention) - the so-called "A-status" - coexisted with a "B-status" accorded to asylum seekers who could not be considered refugees in terms of Article 1(A), but who could not reasonably be expected to return to their country of origin for compelling political reasons⁽¹⁾. In a judgment of 29 February 1988, however, the Council of State held that anyone awarded the status of "asylee" ("B-status") must be deemed to have been admitted on the basis of Section 15 of the Aliens Act⁽²⁾. With this judgment the Council of State effectively put an end to the "B-status", which, therefore, is disregarded in the present paper. In practice yet another option exists, which is sometimes referred to as "C-status". It leads for the asylum seeker to a residence permit for compelling humanitarian reasons, not because of the political situation in his country of origin, but because general conditions there are deemed to be such that he could not reasonably be expected to return⁽³⁾.

The proposed amendments to the Aliens Act introduce the possibility of rejecting an application for admission as a refugee on the grounds that the application is inadmissible or manifestly ill-founded. An application is deemed to be inadmissible if :

(a) another State, party to the Refugee Convention, is responsible for dealing with the application pursuant to a provision of a treaty or of a decision of an international organisation that is binding upon both the State in question and the Netherlands, unless the application is based on relevant facts which could not be taken into account by the authorities in that State in their decision on the application ;⁽⁴⁾

(b) the alien has submitted an earlier asylum request in the Netherlands on the same grounds, which was denied by a final decision ;

(c) the alien has already applied for admission to the Netherlands under another name ;

(d) the alien did not make himself available to the competent authorities by staying in a place designated by or on behalf of them in connection with the investigation of his case ;

(e) the alien has already been admitted under the terms of Sections 9, 9a or 10 ;

or

(f) the alien does not possess a travel document as required for entry into the Netherlands, unless he has immediately approached a border control or immigration officer, informing him of the municipality where he entered the Netherlands and claiming to have a well-founded fear of being persecuted within the meaning of Section 15 of the Aliens Act.⁽⁵⁾

(1) Council of State, judgment of 24 February 1988, RV 1988, 4.

(2) RV 1988, 3.

(3) Council of State, judgment of 17 August 1987, RV 1988, 6.

(4) This clause is inserted mainly in view of the entry into force of the 1990 Schengen Agreement and, at a later date, the 1990 Dublin Convention, both of which lay down regulations determining the State responsible for examining asylum applications.

(5) Section 15b of the Bill amending the Aliens Act.

An application is deemed to be manifestly ill-founded if :

(a) it is based on circumstances which, either in themselves or in connection with other facts, cannot reasonably be held in any way to constitute legal grounds for admission ;

(b) in addition to being a national of his country of origin, the alien is a national of a third country, and facts and circumstances show that he could obtain sufficient protection in that country ;

(c) it has emerged that a country in which the alien stayed earlier will admit him until such time as he has found lasting protection elsewhere ;

(d) in order to support his application the alien has submitted false or forged documents or papers and, on being questioned on the subject, has wilfully persisted in maintaining their authenticity ;

or

(e) in order to support his application the alien has knowingly submitted travel or identity papers or documents which do not relate to him.⁽¹⁾

It is as yet too early to say whether these amendments will also bring about changes in the case law referred to above, to the effect that decisions on refugee status should always precede decisions on admission.

1.4. Legal protection

An alien can submit an application for admission to the Netherlands to the head of local police or, if in another country, to a Dutch diplomatic or consular representative⁽²⁾. The decision on his application will be taken by or on the instructions of the Minister of Justice⁽³⁾ and will be communicated to the alien in writing, preferably in person. If his request is turned down, reasons must be given for the decision⁽⁴⁾. The alien is first given the opportunity of explaining his request in person to the local police ; asylum seekers are questioned by an interviewing officer of the Justice Department. Legal representation is not assured at this stage, nor is a formal role laid down for the UNHCR Representative in the case of asylum seekers.

If his application for admission is dismissed, or the dismissal is implicit in the fact that six months has elapsed since the application has been submitted without a decision having been taken, the alien may apply for review of that decision to the Minister of Justice. Such applications for administrative review must be submitted within one month, or as soon as can reasonably be expected⁽⁵⁾. The review amounts to a full reconsideration of the case, on the basis of the facts and circumstances known at the time. The Minister of Justice is obliged, if the application for review concerns admission as a refugee, to consult the Advisory Committee on Matters concerning Aliens (and he may do so where review concerns a residence permit), which will invite the alien for

(1) Section 15c of the Bill amending the Aliens Act.

(2) Article 52 of the Aliens Decree. After arrival in the Netherlands, an asylum seeker must turn to a designated reception centre where his claim to asylum can be investigated.

(3) Articles 19 and 20 of the Aliens Regulations. The regulations refer throughout to the Minister of Justice. For many years now, however, aliens policy has been part of the portfolio of the Deputy Minister of Justice. Any further references to "Minister", therefore, should actually be understood to mean "Deputy Minister".

(4) Article 53 of the Aliens Decree.

(5) Sections 29-30 of the Aliens Act.

a hearing and, if the alien is an asylum seeker, will also give the UNHCR Representative the opportunity of communicating his views on the matter⁽¹⁾.

An alien may appeal to the Council of State against the dismissal (or implicit dismissal) of his application for administrative review. The Aliens Act rules out the possibility of appeal in cases where a decision to dismiss an application for review is in accordance with the recommendation of the Advisory Committee on Matters concerning Aliens and the alien had been domiciled in the Netherlands for less than one year prior to the date of the decision on review⁽²⁾. In the past, however, the Council of State has refused to apply that restriction in the case of asylum seekers on the ground that it conflicted with Article 16 of the Refugee Convention, which was held to be "binding on all persons" (i.e. self-executing) within the meaning of - what is now - Article 94 of the Constitution⁽³⁾.

The Council of State judges the appeal "ex tunc", that is to say according to the facts and circumstances as they stood at the moment at which the challenged decision was taken. If the appeal is lodged by an asylum seeker, the Council of State will give the UNHCR Representative the opportunity of communicating his views on the matter. The Council of State can dismiss the appeal or quash the challenged decision on one of the grounds provided by Section 8, subsection 1, of the Administrative Jurisdiction Act. In the latter case, the Minister must take a new decision taking into account the Council of State's judgment⁽⁴⁾. If the appeal concerns a decision taken after 1 July 1992, the Council of State may - in appropriate cases - substitute its own decision for that of the Minister⁽⁵⁾.

No appeal may be made to the Council of State against an expulsion order, not even if the order is issued at the appeal stage (in cases in which the appeal has not been granted suspensive effect). Since there is thus no special judicial procedure providing a provisional remedy against (the order on) expulsion, the civil courts take the position that they have jurisdiction - under Section 2 of the Judiciary (Organisation) Act - in summary proceedings to hear actions against (orders on) expulsion as tort actions.

Under the proposed amendments to the Aliens Act, appeal will no longer lie with the Council of State, but with the Administrative Division of the District Court at The Hague, which for that purpose may also hold sessions in Amsterdam, Haarlem, Den Bosch and Zwolle⁽⁶⁾. The same Court will hear appeals against expulsion. The Court's judgments on cases concerning aliens are not open to further appeal ; the only possibility left is that of "cassation in the interests of the law" by the Supreme Court on the demand of the Procurator-General⁽⁷⁾. This form of cassation only serves the uniform application of the law but constitutes no remedy for the alien concerned.

(1) Section 31, subsection 2, of the Aliens Act, and Article 16 of the Aliens Decree.

(2) Section 34, subsection 1 (b), of the Aliens Act.

(3) Judgment of 10 April 1979, RV 1979, 3. Article 16, paragraph 2, of the Refugee Convention provides that: "A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts".

(4) Section 99, subsection 1, of the Council of State Act.

(5) Section 99, subsection 3, of the Council of State Act. 35 10

(6) Section 33a of the Bill amending the Aliens Act.

(7) Section 33g of the Bill amending the Aliens Act.

According to the proposed amendments, no administrative review by the Minister of Justice can be applied for, if the application for admission has been dismissed on the ground that it is inadmissible or manifestly ill-founded⁽¹⁾. The alien may, however, lodge an appeal with the District Court⁽²⁾.

The Advisory Committee on Matters concerning Aliens will continue to act as the advisory body in the administrative review procedure. It must be consulted by the Minister of Justice if at the time of the dismissal of his application the applicant had been admitted to and domiciled in the Netherlands for five consecutive years, if he has demonstrated to a certain extent that he has a well-founded fear of being persecuted, or if he has been declared an undesirable alien while at the time of that decision he had been admitted to, and had been domiciled in the Netherlands for five consecutive years ; in other cases the Minister may consult the Committee⁽³⁾.

1.5. Expulsion ; relationship between Article 33 of the Refugee Convention and Article 3 of the ECHR

When an application for admission is dismissed at first instance, as a rule the Minister of Justice or the head of local police, as the case may be, also issues an expulsion order. If the asylum seeker objects on the ground that expulsion will lead to refoulement, expulsion can only take place on the special instruction of the Minister of Justice⁽⁴⁾. An alien is usually allowed a period of time within which to apply for administrative review of the negative decision. Immediate expulsion will only take place if it is considered in the interests of public order, public policy or national security⁽⁵⁾. If administrative review is applied for, the Minister of Justice decides whether that application has suspensive effect. If the expulsion is not suspended, the final moment of departure is set at fourteen days, giving the alien time to institute interlocutory injunction proceedings with the President of the District Court at The Hague against the expulsion order.

Section 32 of the Bill amending the Aliens Act indicates in which cases the application for administrative review has suspensive effect with respect to the expulsion of the alien. These are the following ones :

- (a) in cases where an alien has applied for admission as a refugee, unless there can be no reasonable doubt that there is no danger of persecution ; and
- (b) in other cases, if there are good grounds to suppose that the application for administrative review has a reasonable chance of success.

(1) Section 29 of the Bill amending the Aliens Act.

(2) Section 33a of the Bill amending the Aliens Act.

(3) Section 31, subsection 2, of the Bill amending the Aliens Act.

(4) Section 22 of the Aliens Act.

(5) Section 24 of the Aliens Act.

According to Strasbourg case law a Contracting Party violates Article 3 of the ECHR (prohibition of torture or inhuman or degrading treatment or punishment) if it expels or deports a person to a country where he runs a serious risk of being exposed to treatment of this kind in a third country⁽¹⁾. Since this Convention provision is directly applicable (self-executing), Dutch courts are obliged to review a challenged decision for its conformity with Article 3⁽²⁾. This review does not have to coincide completely with the review of the challenged decision for its conformity with the prohibition of refoulement of Article 33 of the Refugee Convention, since there are cases in which inhuman or degrading treatment or punishment might conceivably be held not to constitute persecution within the meaning of Article 1(A) of the Refugee Convention, for instance if it is found that the alien was not persecuted on one of the grounds set out in Article 1 (A) or that the treatment complained of or to be feared is not a matter of State responsibility.

The Council of State initially took the view that the treatment to which an asylum seeker could be exposed as a result of compelled return to his country of origin (or to the country of previous residence) is an issue which does not arise until expulsion becomes a real prospect, and therefore should not be raised in an appeal against the dismissal of an application for admission⁽³⁾. The Council of State has, however, changed its views on this point⁽⁴⁾. It recently quashed a number of decisions whereby asylum seekers had been refused residence permits despite having been given temporary leave to remain in the Netherlands on the ground that, given the general situation in their country of origin, expulsion could lead to a violation of Article 3 of the ECHR. According to the Council of State, the distinction on which these decisions had been based, namely between a real risk that Article 3 would be violated and the possibility that expellees might be exposed to treatment which contravened the provisions of that article, evinced poor reasoning, since it was not convincingly demonstrated why the existence of the possibility of such treatment did not constitute compelling humanitarian reasons for admission⁽⁵⁾.

II. CASE 1: RESIDENCE AND WORKING PERMITS FOR ALIENS WHO ARE NOT CITIZENS OF THE EUROPEAN UNION

II.1. Introductory remarks

Unlike what would appear to be the case in France judging from the description of the case, in The Netherlands an alien who marries a Dutch national does not qualify *ipso jure* for a residence permit. Residence permits are moreover not issued for a ten-year period. It is usual for the validity of a residence permit issued to an alien joining a spouse to be set at one year. In practice no use is made, in cases where aliens apply for admission for the purposes of family reunion or of founding a family, of the possibility of issuing a permanent residence permit on the strength of the residence status of the spouse living in the Netherlands.

The first requirement here, too, is that the alien must not pose a threat to public policy or national security. In the case of marriage to a Dutch national, the requirement concerning public policy is relaxed to the extent that admission will only be refused if the alien in question has been convicted of a serious crime for which he has been given a long-term prison sentence or other custodial sentence, and the judgment has become

(1) European Court of Human Rights, judgment of 7 July 1989, Soering, Series A.161 (1989), p.35 ; idem, judgment of 20 March 1991, Cruz Varas, Series A.201 (1991), p.28.

(2) Articles 93-94 of the Constitution.

(3) Judgment of 19 January 1987, R02.84.0795/96.

(4) Already implicit: judgment of 19 July 1990, RV 1990, 3 ; judgment of 14 February 1991, R02.90.0934.

(5) Inter alia judgment of 4 September 1992, RV 1992, 11.

final, or if he has received a prison sentence following several convictions, or has received a number of custodial sentences⁽¹⁾.

The Dutch partner is required to have sufficient independent and established means of support⁽²⁾ although there are exceptions to this requirement (for example in the case of unemployed persons 57.5 or more years of age, lone-parent families with a child under the age of 6, and persons with a 100% invalidity assessment), and it is sometimes relaxed (e.g., unemployment benefit is under certain circumstances classified as sufficient and independent means of support)⁽³⁾.

Further requirements, as listed in the introduction under 1.2, are that (a) the marriage must be valid and have been contracted on the basis of Dutch law or the law governing the marriage in question according to rules of private international law; (b) the marriage must not appear to be a marriage of convenience; and (c) in the case of a polygamous marriage which is valid according to the law of the country in which it was contracted, no other spouse - or partner - and/or children of that union have been admitted to the Netherlands in the context of family reunification (whether or not these individuals are still in the Netherlands)⁽⁴⁾. Finally, the spouses must set up a joint household and actually cohabit, if they are not already doing so⁽⁵⁾. Under the provisions of article 47 of the Aliens Decree, spouses of a Dutch national resident in the Netherlands only qualify for residence for an indefinite period if they actually form part of the family unit. In other words, family reunion or founding a family must actually have taken place⁽⁶⁾.

For the record it should be noted that admission does not present a problem in cases where an alien acquires Dutch nationality through marriage to a Dutch national. Formerly, foreign women could opt for Dutch nationality on marriage to a Dutch national⁽⁷⁾. However, since the entry into force of the present Nationality Act on 1 January 1985 that is no longer the case. Now foreigners, irrespective of their sex, can only qualify for naturalisation after having been domiciled in the Netherlands for a five-year period, or after having been married to a Dutch national for three years⁽⁸⁾.

(1) Aliens Circular 1982, B 19, 2.4.1.3. If admission has been applied for by a "favoured" citizen of the European Union, the requirement is more stringent - such applicants cannot be refused unless they pose a "current threat". That does not however apply here.

(2) "Sufficient means of support" is understood to mean a net income at least equivalent to the subsistence minimum within the meaning of the National Assistance Act: Aliens Circular 1982, B 19, § 2.2.2.

(3) Aliens Circular 1982, B 19, § 2.4.1.1.

(4) Aliens Circular 1982, B 19, § 2.1.1. The Council of State has held that the policy on polygamous marriages does not constitute discrimination, since it has an objective and reasonable purpose, i.e. the economic welfare of the Netherlands ; judgment of 3 July 1990, RV 1990, 25.

(5) *Ibid.*

(6) The Council of State held that this policy component might be considered to be related to the public interest within the meaning of Section 11, subsection 5 of the Aliens Act and that, consequently, its non-fulfilment might lead to dismissal of the application ; judgment of 1 September 1983, NJCM Bulletin 1983, p. 486.

(7) Section 8 of the former Nationality and Residence Act.

(8) Section 8 of the present Nationality Act.

II.2. Question 1

An alien may apply to the Minister of Justice for administrative review of the decision refusing him a residence permit for the purpose of joining a spouse or of employment⁽¹⁾. In a case such as the one in question, the Minister of Justice is not obliged to consult the Advisory Committee on Matters concerning Aliens, although he may do so⁽²⁾. If the application for review is dismissed by the Minister of Justice, or must be deemed to have been dismissed on the ground that no decision has been taken within three months of the submission of such an application, the alien can lodge an appeal with the Council of State.

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* *

If the amendments to the present Aliens Act become law, appeals will no longer be dealt with by the Council of State, but by the Administrative Division of the District Court at The Hague, with the only further remedy being "cassation in the interest of the law" by the Supreme Court on the demand of the Procurator-General .

II.3 Question 2

At none of these stages is the alien required to be represented by a lawyer. Aliens who elect to be so represented, and who have insufficient means, are entitled to receive full legal aid⁽³⁾.

No costs are entailed in the submission of an application for admission or an application for administrative review of a decision refusing admission⁽⁴⁾. A sum of NLG 170 is payable in the case of an appeal to the Council of State. If an alien is entitled to free legal aid, he may be wholly or partly exempted from paying this sum⁽⁵⁾. No other legal costs will be incurred by an alien submitting an appeal, except for possible lawyer's bills. If a challenged decision is quashed, the State is ordered to compensate an alien for court fees if he has paid them. However, an alien whose appeal is dismissed is not ordered to compensate the State. The Council of State does not rule on compensation of possible other legal costs.

(1) Employment permits are subject to a separate procedure, being the responsibility, not of the Minister of Justice, but - under the provisions of the Foreign Workers (Employment) Act - of the Minister for Social Affairs and Employment. If an alien does not possess a residence permit he may, pending the outcome of the admission procedure, be issued a employment permit with a maximum validity of six months. Such permits may be extended on the proviso that the alien in question is entitled to remain in the Netherlands pending a final decision on admission. However, employment permits are only issued if there are no Dutch nationals, aliens with a residence permit or citizens of the European Union available for the work to which the requested permit relates (Section 8 of the Foreign Workers (Employment) Act). If an alien is admitted to join a spouse, an employment permit will be issued on application without that application being investigated under Section 8, subsection 1, of the above Act.

(2) Section 31 of the Aliens Act.

(3) For details, see the Legal Aid Act.

(4) Until now, no use has been made of the option provided for in Section 16, subsection 2, of the Aliens Act, to levy a charge on aliens for the issue of a residence permit or permanent residence permit.

(5) Section 73, subsection 2, of the Council of State Act.

An alien may call upon the services of an interpreter. An interpreter may be designated by the Council of State and, in that case, will receive a fee from public funds⁽¹⁾. An interpreter provided by an alien of his own accord may or may not be accepted, but will not be paid a fee from public funds.

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* *

The proposed amendments to the Aliens Act provide for the possibility of charging aliens a fee of between, NLG 50 and NLG 1,000 for filing an application for admission. The Minister of Justice will determine the cases in which a fee is payable, and will adopt regulations governing the payment⁽²⁾. A court fee of NLG 200 will be payable in the case of an appeal to the District Court at The Hague⁽³⁾. Where an appeal concerns a decision refusing an alien admission as a refugee, the court fee will be NLG 50⁽⁴⁾. The possibility of total or partial exemption from the obligation to pay the court fee will cease to exist. The District Court will have the power to order a party to pay costs reasonably incurred by another party in connection with an appeal to the Court. However, just as in the case of any other natural person, an alien can only be ordered to pay costs in cases where clearly unreasonable use has been made of procedural law⁽⁵⁾.

II.4. Question 3

Except in the case of citizens of the European Union, aliens do not have a legal right to remain in the Netherlands while awaiting the decision in the first instance on their application for admission. They are, however, generally permitted to do so, providing they do not pose a threat to public order, public policy or national security, or that further sojourn in the Netherlands does not prejudice the possibility of return to the country of origin or a third country⁽⁶⁾. The system established by the Aliens Act implies that an alien whose application for admission is dismissed, as a rule is also notified that he must leave the Netherlands. Although Section 22 of the Aliens Act merely provides that an alien *may* be expelled, the assumption is that expulsion will be postponed only for special reasons. Thus, Section 25 provides that an alien shall not be expelled if such a course of action is regarded as unreasonable in view of his state of health or that of any of the members of his family. Cases may also arise in which there are practical barriers to immediate expulsion, for instance because an alien does not have the requisite travel documents, or because no country is prepared to accept him. Aliens are required to report to the relevant authorities on a weekly basis, pending the decision on their application⁽⁷⁾.

Aliens who have applied to the Minister of Justice for administrative review of a negative decision concerning admission or (extension of) a residence permit may remain in the Netherlands pending the Minister's decision. This does not apply in cases where an application for a residence permit was submitted at a point when the alien was not entitled to reside in the Netherlands (for instance not during the period of short stay or not at

(1) Sections 82 and 88 of the Council of State Act.

(2) Section 16, subsection 2, of the Bill amending the Aliens Act.

(3) Section 8:41 of the draft General Administrative Law Act.

(4) Section 33f of the Bill amending the Aliens Act.

(5) Section 8:75, subsection 1, of the draft General Administrative Law Act. For the services of an interpreter in proceedings before the District Court, see Sections 8:35, 8:36 and 8:60 of the draft General Administrative Law Act.

(6) 1982 Aliens Circular, A 6, § 4.2.2.2. The latter may apply, for instance, if an alien's passport or visa has only limited validity.

(7) Article 70, paragraph 1 (b), of the Aliens Decree.

a time when the alien possessed an authorization for temporary stay or a residence permit issued at an earlier stage) or was submitted less than a month before expiry of the period of lawful stay⁽¹⁾. In the latter cases the Minister of Justice may refuse to grant suspensive effect to the application for review. The existing legislation allows him a certain amount of latitude on this point. The 1982 Aliens Circular indicates that suspensive effect is usually withheld where an application for review was not submitted on time, or was submitted by an alien who entered the Netherlands illegally or whose stay has become illegal due to the expiry of the permitted period of short stay. The same applies where aliens pose a serious threat to public order, public policy or national security. In general, however, suspensive effect will not be withheld when it may be assumed that the application for review has a reasonable chance of success⁽²⁾.

An alien who has lodged an appeal with the Council of State against the dismissal of an application for administrative review is entitled to remain in the Netherlands pending the appeal. However, the Minister of Justice can refuse to grant suspensive effect to the appeal, if his dismissal of the application for administrative review accords with the recommendation of the Advisory Committee on Matters concerning Aliens or in cases in which, if the judgment on the appeal were to be awaited, expulsion would become impossible within the foreseeable future⁽³⁾. Here, too, the general rule is that suspensive effect will be granted to an appeal when it may be assumed that the appeal has a reasonable chance of success⁽⁴⁾.

If it is decided to expel an alien pending the review or appeal procedure, he cannot apply to the Chairman of the Judicial Division of the Council of State for suspension of the expulsion order ; Section 107 of the Council of State Act concerning suspension of challenged administrative decisions does not apply here⁽⁵⁾. The only remedy open to the alien is to apply to the President of the District Court at The Hague for an interlocutory injunction against the State in a tort action, based on the case law according to which the civil courts have jurisdiction to hear tort actions if the applicant does not have access to an equivalent remedy through other proceedings which offer him sufficient guarantees of fair trial⁽⁶⁾. Although the President will review the way in which rules and policy relating to the suspensive effect of applications for administrative review and of appeal have been applied by the Minister of Justice, he will primarily be guided in his decision by his estimation of the chances of success of the application for review or appeal⁽⁷⁾. The fact that the Minister has for a long time tolerated an alien's presence in the Netherlands, e.g. due to the delay in taking a decision on his application for admission, with the result that the alien has become integrated in society, may also constitute grounds for an order prohibiting expulsion⁽⁸⁾. If the President refuses to issue such an order, the alien can appeal to the Court of Appeal at The Hague, and from its decision he may lodge an appeal in cassation with the Supreme Court.

(1) Section 32 of the Aliens Act in conjunction with Article 79 of the Aliens Decree.

(2) 1982 Aliens Circular, A 6, § 4.3.3.

(3) Section 38 of the Aliens Act.

(4) 1982 Aliens Circular, A 6, § 4.4.2.

(5) Section 34, subsection 3, of the Aliens Act.

(6) See e.g. President of the District Court at The Hague, judgment of 21 September 1976, RV 1976, 45. Actions by aliens are also heard by Presidents of some other District Courts, but in doing so they formally act as deputies to the Hague President.

(7) See e.g. President of the District Court at Zwolle, judgment of 5 September 1983, KG 1983, 296.

(8) See e.g. President of the District Court at Alkmaar, judgment of 2 April 1982, RV 1982, 69.

The President of the District Court arrives at a decision within a matter of days. Appeals to the Court of Appeal and to the Supreme Court are, however, a much lengthier matter. While the authorities will suspend expulsion pending the President's judgment, they do not do so in the case of appeals against the President's decision refusing the injunction.

If the appeal to the Council of State is granted suspensive effect, either by decision of the Minister of Justice or by order of the President of the District Court, this does not mean that the appeal will be given priority. On average, a period of one and a half to two years will elapse before judgment is given. The Council of State reviews the challenged decision *ex tunc*, i.e. based on the situation at the time when it was taken⁽¹⁾. Consequently, due to the length of the proceedings the actual situation at the time when the Council of State passes judgment may differ substantially from that at the time when the Minister took his decision⁽²⁾.

The proposed amendments to the Aliens Act contain express rules governing the suspensive effect of applications for administrative review. Expulsion will be suspended in the case of asylum seekers, unless there can be no reasonable doubt that the applicant is in no danger of persecution, and in other cases where the application for review is deemed to have a reasonable chance of success⁽³⁾.

Both the appeal against the dismissal of an application for administrative review and the appeal against a refusal to suspend the expulsion will be heard by the Administrative Division of the District Court at The Hague. Section 33b of the Bill amending the Aliens Act provides that the Court, when hearing appeals in the latter category, will at the same time, where possible, review the decision refusing admission. Appeal to the Court will not automatically have suspensive effect.

II.5. Question 4

The alien concerned may base his application on Section 11, subsection 5, of the Aliens Act in conjunction with the policy rules laid down in the 1982 Aliens Circular concerning family reunion and founding a family. Dutch law contains no provisions which specifically guarantee respect for family life. Article 10, paragraph 1, of the Constitution lays down the right to respect for privacy, but "without prejudice to restrictions laid down by or pursuant to Act of Parliament". Section 11, subsection 5, of the Aliens Act, which permits refusal to issue or extend a residence permit for considerations relating to the public interest, constitutes such a restriction.

Pursuant to Articles 93 and 94 of the Constitution, an alien may also invoke Article 8 of the ECHR, which explicitly proclaims the right to respect for family life. Insofar as Dutch law or policy conflicts with the said Article, the courts must leave the former out of application. The concept of "family life" within the meaning of Article 8 is held by Strasbourg case law to be an autonomous concept⁽⁴⁾. It can have a wider significance than the Dutch term "gezin", which is used in Dutch aliens law and aliens policy. In principle, marriage establishes "family life", but subsequent events may have occurred as a result of which such family life either never materialized or ceased to exist at some later stage⁽⁵⁾. This might be the case, for instance, if marriage does not lead to cohabitation or if the spouses cease to cohabit.

(1) See e.g. Council of State, judgment of 23 December 1987, RV 1988, 1.

(2) See e.g. Council of State, judgment of 21 May 1991, RV 1991, 6.

(3) Section 32 of the Bill amending the Aliens Act.

(4) European Commission of Human Rights, report of 10 December 1977, Marckx, Series B.29 (1982), p. 44. Implicitly: European Court of Human Rights, judgment of 13 June 1979, Marckx, Series A.31 (1979), p. 14.

(5) European Court of Human Rights, judgment of 21 June 1988, Berrehab, Series A.138 (1988), p. 14; Council of State, judgment of 1 July 1991, R02.89.3162.

Even if, in the first case referred to in the questionnaire, at the time of the *décision* on the application for a *résidence* permit "family life" could be said to exist (the wife's Statement could indicate that this was not the case), according to established case law of the Council of State the refusal would not constitute *interférence* with the exercise of the right to respect for family life, because it would not have the effect of depriving the alien of a *résidence* permit which entitled him to establish and maintain family life in the Netherlands. That case law is based on the *considération* that Article 8 of the ECHR does not contain an obligation for the Contracting Parties to respect a couple's choice of country of matrimonial residence⁽¹⁾. The Council of State would subsequently examine whether the Netherlands was nevertheless bound by a positive obligation, *inhérent* in an effective respect of family life⁽²⁾, to permit *résidence* in the Netherlands⁽³⁾. It would base its judgment in this respect on a fair balance between the interests of the alien in being admitted and the public interest served by a refusal. In the light of the wife's statement to the effect that the marriage is one of convenience, this "fair balance" is most likely to swing in the favour of the public interest that is served by a restrictive admissions policy.

If the wife's statement concerning the character of the marriage was made after a *résidence* permit had been issued, this would constitute a ground for withdrawing the permit⁽⁴⁾. An appeal against such withdrawal on the basis of Article 8 of the ECHR would be unlikely to succeed, since it could be concluded from the statement that family life did not exist at the time the *décision* to withdraw the permit was taken.

II.6. Question 5

When reviewing a challenged *décision*, the Council of State may quash the *décision* on one or more of the following grounds : (a) inconsistency with a generally binding rule ; (b) abuse of power ; (c) unreasonableness ; and (d) incompatibility with a *général* principle of proper administration⁽⁵⁾.

If the Minister of Justice based his *décision* on the conclusion that the marriage concerned is invalid or is a marriage of convenience within the meaning of the 1982 Aliens Circular, the State Council's review will most probably focus on the principle that a *décision* must have been diligently prepared (in the case in question an investigation should have taken place into the legality or authenticity of the marriage) and on the principle that a *décision* must be based on sound reasoning. The same applies when a *décision* is reached on the conclusion that the partners are not cohabiting within the meaning of the 1982 Aliens Circular. The Council of State would, for instance, have to assess whether the Minister of Justice was justified in relying on the wife's statement, or a statement made by a third party, taking into account such *considérations* as whether the statement was internally consistent, was not made under any kind of outside pressure, and was not influenced by feelings of malice.

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(1) See for instance Council of State, judgment of 9 July 1991, R02.89.3088. See also European Court of Human Rights, judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali*, *Séries A.94* (1985), p. 34.

(2) On the concept of "positive obligation", see the *Abdulaziz* judgment, *ibid.*

(3) See e.g. Council of State, judgment of 9 July 1991, R02.89.3088.

(4) Section 12 of the Aliens Act.

(5) Section 8 of the Administrative Jurisdiction Act.

The Administrative Division of the District Court at The Hague, which will hear appeals under the amended Aliens Act, when quashing the challenged decision, will have to indicate in its judgment which written or unwritten rule of law or which general principle of law is held to have been contravened.⁽¹⁾

II.7. Question 6

If the Council of State quashes the challenged decision, the Minister of Justice must take another decision. If the decision has been quashed on one of the grounds (a) to (c) referred to in the answer to question 5, in most cases the new decision will be in the alien's favour. In the case of ground (d) it may well be possible that deficiencies in the diligence with which the decision has been prepared or in the arguments on which the decision has been based be rectified without any material change in the outcome, i.e. the decision itself may still constitute a dismissal. In such cases the alien may then appeal once again to the Council of State without first (as in the first instance) having to submit an application for administrative review. If the challenged decision dates from 1 July 1992 or afterwards, the Council of State may itself take the new and final decision. It will do so only, however, if its judgment leaves no room for discretion on the part of the Minister of Justice.

Under Section 104 of the Council of State Act, the Council of State can impose a penalty on the Minister of justice if, as long as and as often as the latter does not fully comply with its judgment. If the judgment does not specify a time-limit, the Council of State assumes that the new decision will be taken within three months.⁽³⁾

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After the entry into force of the amended Aliens Act, the situation will be as follows. If the District Court upholds the appeal, it will quash, either wholly or partly, the challenged decision. The Court can order the Minister of Justice to take a new decision, but it can also rule that its judgment replaces the challenged decision. It can also set a time-limit within which a new decision must be taken. The Court will be empowered to impose an penalty if and for as long as the Minister of Justice fails to act upon its judgment⁽⁴⁾.

III. CASE 11: DEPORTATION OF ASYLUM SEEKERS

III.1. Introductory remarks

Under current policy, all applications for admission as a refugee are received and dealt with⁽⁵⁾. As indicated in the introduction, the proposed amendments to the Aliens Act provide for the possibility of declaring an application for admission as a refugee inadmissible or manifestly ill-founded, thus terminating the investigation of the case, be it that appeal to the District Court remains open.

(1) Section 8:77 of the draft General Administrative Law Act ; the draft does not contain an exhaustive list of the grounds for quashing a decision.

(2) See e.g. judgment of 16 July 1986, A-2.1855 (1982): penalty of NLG 500 a day.

(3) Judgment of 8 March 1982, RV 1982, 67.

(4) Section 8:72 of the General Administrative Law Act.

(5) Aliens Circular 1982, B 7, § 1.4.

Asylum seekers are permitted to remain in the Netherlands while awaiting the decision on their application for admission as a refugee, unless they pose a threat to public order, public policy or national security, or there is a risk that the opportunity of return to the country of origin or of admission to a third country will be lost⁽¹⁾. The moment at which an application for admission as a refugee is submitted is not relevant in this respect. If an asylum seeker claims that expulsion would force him to go straight to a country in which he has well-founded fear of being persecuted, expulsion will only take place on the express instructions of the Minister of Justice⁽²⁾. The Netherlands is under the obligation to observe the prohibition of refoulement contained in Article 33 of the Refugee Convention.

III.2. Question 1

For information on the authorities competent to deal with applications for admission as a refugee, see the answer to question 1 under Case 1. With regard to the issue which judicial body has jurisdiction to review the legality of an order of expulsion, see the answer to question 3 under Case 1.

III.3. Question 2

With regard to legal representation, see the answer to question 2 under Case 1. If asylum seekers require legal aid or advice, they are informed of the possibility of being represented by counsel. They are also provided with the addresses of the UNHCR Representative in the Netherlands, the Refugee Health Care Centre, the Dutch Refugee Council and the Dutch office of Amnesty International.⁽³⁾

In order to assist aliens in submitting applications for admission as a refugee, reliable and if possible sworn interpreters are where necessary provided free of charge by the Justice Department⁽⁴⁾.

For information on costs and fees, see the answer to question 2 under Case I.

III.4. Question 3

As far as suspensive effect is concerned, the information given in answer to question 3 under Case I applies, the only difference being that asylum seekers are always permitted to remain in the Netherlands pending a decision at first instance on their application, if necessary in a designated location or in custody⁽⁵⁾. If an application is dismissed and an application for administrative review submitted, the asylum seeker may remain in the Netherlands pending the outcome of that application. This rule does not apply, however, if the asylum seeker did not travel directly to the Netherlands and stayed or could have stayed, before his arrival, in a country in which - assuming that he is a refugee - he enjoyed or could have enjoyed sufficient protection against deportation to his country of origin and, in the opinion of the Minister of Justice, stayed or could have stayed in that third country under circumstances which could not be considered abnormal by local standards. It should, however, be noted that even when the above applies, an asylum seeker will only be expelled from the Netherlands on the proviso that he is sufficiently assured of access to and reception in the third country concerned. Other cases in which suspensive effect is not granted are those in which there can be no reasonable

(1) Ibid, § 4.2.2.2.

(2) Section 22, subsection 2, of the Aliens Act.

(3) 1982 Aliens Circular, B 7, § 1.7.

(4) 1982 Aliens Circular, B 7, § 2.2.1.2.

(5) 1982 Aliens Circular, B 7, § 2.2.5.

doubt that the alien is not a refugee within the meaning of the Refugee Convention, and when the asylum seeker is only staying in the Netherlands on a temporary or provisional basis⁽¹⁾.

III.5. Question 4

Under present aliens law and aliens policy there is no such thing as a provisional residence permit. If an alien has no residence permit, the only possible residence status ensues from the fact that his expulsion is suspended. The proposed amendments to the Aliens Act introduce a provisional residence permit for aliens whose expulsion to their country of origin would, in the view of the Minister of Justice, entail exceptional hardship for them in connection with the general situation in the country in question⁽²⁾. The issue of such a permit, however, has the effect of irrevocably excluding an application for admission until such time as the alien has been informed that the provisional permit has been withdrawn. These permits are issued for a one-year period, and may be renewed twice. Once an alien has been domiciled for three years in the Netherlands on the basis of such a permit, he may apply for - and will be granted- a residence permit.⁽³⁾

An asylum seeker who is awaiting the outcome of his application for admission as a refugee may be issued a temporary work permit with a maximum validity of six months, if and for as long as he is entitled to remain in the Netherlands pending the outcome of the procedure⁽⁴⁾. However, such a permit will only be issued if the labour market cannot, or cannot be reasonably expected to, provide workers for the type of job to which the permit relates⁽⁵⁾. A work permit can only be issued after an application for admission has been submitted and after the relevant immigration authorities have established whether admission is in principle possible on the basis of existing law and policy⁽⁶⁾.

III.6. Question 5

The Council of State reviews refusals to admit aliens as refugees on the basis of the grounds for quashing a challenged decision listed in the answer to question 5 under Case 1. For this review of the decision on admission the preliminary determination by the Council of State of whether the alien concerned is a refugee within the meaning of Article 1 (A) of the Refugee Convention is of great relevance. Of crucial importance for this determination is the situation in the country of origin at the moment at which the alien left it and at the moment at which the Minister of Justice took his decision. Ultimately, of course, the decisive issue is whether the alien has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of

(1) 1982 Aliens Circular, B 7, § 5.1. This policy has been incorporated in the proposed amendments to the Aliens Act, partly in Section 1 5c concerning the dismissal of an application as manifestly ill-founded - in which case the asylum seeker cannot apply for administrative review - and partly in Section 32 concerning the suspensive effect of an application for administrative review.

(2) Section 12b of the Bill amending the Aliens Act.

(3) Section 13a of the Bill amending the Aliens Act.

(4) Section 7, subsection 4, of the Foreign Workers (Employment) Act.

(5) *Ibid.*, Section 8.

(6) *Ibid.*, Section 5, subsection 3 (b).

a particular social group or political opinion in his country of origin. If the Council of State is of the opinion that the alien can be considered a refugee, the next question to be decided is whether, for this reason, he should be admitted to the Netherlands. One of the factors which play a role here is the issue of whether a country of first asylum can be said to exist⁽¹⁾. The following four criteria must be met before this can be said to be the case :⁽²⁾

(a) It must be plausible that the alien has come to the Netherlands not directly, but after a stay in - rather than simple transit through - a third country⁽³⁾. If the alien has stayed only briefly in a third country, he is deemed - in the absence of evidence to the contrary - to have been in transit⁽⁴⁾. The intentions of the alien will also be taken into consideration in this respect⁽⁵⁾.

(b) It must be plausible that the alien enjoyed or could have enjoyed sufficient protection against *refoulement* in that third country⁽⁶⁾. Sufficient protection is in principle deemed to exist if the third country in question is party to the Refugee Convention, unless there are indications that it does not comply with its provisions⁽⁷⁾. Even if the third country is not a party to the Refugee Convention, from its record it may be sufficiently clear that it provides protection against *refoulement*.⁽⁸⁾

(c) The Minister of Justice must have had reasonable grounds for assuming that the alien stayed in that third country or could have stayed there under circumstances which could not be considered abnormal by local standards⁽⁹⁾.

(d) There must be reasonable guarantees that the alien will be granted entry and admission by the third country⁽¹⁰⁾. The burden of proof that this will not be the case rests on the alien.⁽¹¹⁾

Under Section 15c, subsection l(c), of the draft Bill amending the Aliens Act, the fact that there is evidence that a country of previous stay is willing to admit the alien until such time as he obtains lasting protection elsewhere, constitutes a ground for dismissing his application for admission as a refugee on the grounds that it is manifestly ill-founded.

(1) For the first time: Council of State, judgment of 17 August 1978, RV 1978,

(2) 1982 Aliens Circular B 7, § 1.2

(3) Council of State, judgment of 12 August 1988, RV 1988, 9.

(4) Council of State, judgment of 25 October 1985, RV 1985, 4.

(5) 1982 Aliens Circular, B 7, § 1.2. See President of the District Court in Haarlem, judgment of 11 November 1988, RV 1988, 10.

(6) The sole issue here is compliance with Article 33 of the Refugee Convention, not compliance with other articles of that Convention: Council of State, judgment of 3 May 1985, RV 1985, 3.

(7) Council of State, judgment of 14 January 1982, RV 1982, 5, concerning Sudan.

(8) Council of State, judgment of 10 January 1980, 1 ; Council of State, judgment of 25 October 1985, RV 1985, 4.

(9) Council of State, 17 August 1978, RV 1978, 29, concerning a Kurd who had fled from Iraq to Iran.

(10) Council of State, judgment of 12 August 1988, RV 1988, 9.

(11) Council of State, judgment of 14 January 1982, RV 1982, 5.

The fact that years may elapse between an alien entering the country and his submitting an application for asylum does not make his application inadmissible, but it will prove difficult for an alien in such a situation to convince the authorities that he has a well-founded fear of being persecuted in his country of origin, especially if he has been able to extend his passport in the meantime, has visited his country of origin or has in some way undermined the credibility of his claim.

This does not apply in cases where the situation in the country of origin has changed radically during the alien's stay in the Netherlands and shortly before his application for admission as a refugee, since this may create grounds for a well-founded fear of persecution ("*réfugié sur place*"). The Council of State is prepared to recognise fear of reprisals for political activities carried out in the Netherlands as a ground for conferring refugee status, providing that such activities follow on from similar activities in the country of origin⁽¹⁾ and that involvement in such activities has drawn the alien in question to the attention of the authorities of the country of origin⁽²⁾.

III.7. Question 6

Expulsion may not lead either directly or indirectly⁽³⁾ to refoulement, since this would contravene Article 33 of the Refugee Convention, which provision can be applied directly by the Dutch courts. The stance accordingly taken by Dutch courts is that an asylum seeker may be expelled only if there can be no reasonable doubt that the person concerned is objectively speaking not a refugee⁽⁴⁾, or no reasonable doubt that there is a country of first asylum⁽⁵⁾.

Nor is expulsion permitted to a country where there are serious grounds for assuming that an alien will be subjected to torture or inhuman or degrading treatment or punishment, in contravention of Article 3 of the ECHR, since this would amount to violation by the Netherlands of that treaty provision⁽⁶⁾. The fact that a country to which an alien is to be expelled is not a party to the ECHR does not constitute a compelling ground for an investigation into the potential risks for the expellee but it may indicate that such an investigation is required⁽⁷⁾. Expulsion of an alien who has no prospect of being admitted to another country may also constitute a violation of Article 3 of the ECHR.⁽⁸⁾

(1) Council of State, judgment of 26 July 1979, RV 1979, 10.

(2) Council of State, judgment of 2 August 1988, RV 1988, 5.

(3) See the answer to question 5 of the present Case where it relates to sufficient protection against refoulement offered by a third country.

(4) Supreme Court, judgment of 29 June 1990, RV 1990, 61.

(5) Supreme Court, judgment of 26 October 1990, RV 1990, 8.

(6) European Court of Human Rights, judgment of 7 July 1989, Soering, Series A. 161 (1989), p. 35 ; idem, judgment of 20 March 1991, Cruz Varas, Series A.201 (1991), p. 28.

(7) See e.g. President of the Hague District Court ('s-Hertogenbosch session), judgment of 19 December 1991, KG 1992, 46.

(8) Court of Appeal at The Hague, judgment of 29 October 1987, NJ 1988, 1009. The Benelux Court held the "shuttle-cock treatment" to which such measures can lead to contravene Benelux Decree M/P(67) 1: judgment of 15 April 1992, RvdW 1992, 114. The Supreme Court followed this view: judgment of 11 June 1993, RvdW 1993, 128.

Finally, the court may judge - on the basis not of the political situation in the country of origin but on the basis of the general conditions there or in a third country to which the alien would have to go in case of expulsion - that the likelihood of the procedure ultimately resulting in admission for compelling humanitarian reasons⁽¹⁾ is so great that the court orders an injunction on these grounds.⁽²⁾

III.8. Question 7

A refusal by an alien to provide certain information can constitute a ground for refusing admission, providing that it has been made sufficiently clear to the alien in question that the information required is considered necessary for the assessment of his application⁽³⁾. The head of local police can request - and if necessary order - an alien to provide certain information⁽⁴⁾.

If the information provided by an alien subsequently proves to be false, his residence permit may be withdrawn if, had the correct information been available at the time, the permit would not originally have been issued.⁽⁵⁾

The fact that an alien claims to have lost his identity papers may detract from his credibility with regard to his origin, travel route, et cetera. However, this does not in itself constitute a ground for refusing admission⁽⁶⁾. Aliens are however expected to cooperate with efforts to establish their identity⁽⁷⁾.

The proposed amendments to the Aliens Act will make it possible to dismiss as manifestly ill-founded an application submitted by an alien who provides as supporting evidence false or forged papers and who, despite being questioned on the matter, wilfully persists in maintaining their authenticity. The same applies to applications submitted by aliens who wilfully provide as supporting evidence travel or identity papers or other documents which do not relate to them⁽⁸⁾.

In virtue of the 1990 Schengen Agreement, carriers will be responsible for ensuring that the passengers they transport possess the right travel documents⁽⁹⁾.

(1) See supra, under 1.3, for information on what is styled "C-status".

(2) 1982 Aliens Circular, A 6, § 4.4.2 ; see e.g. President of the District Court at Zwolle, judgment of 5 September 1983, KG 1983, 296.

(3) Council of State, judgment of 6 July 1982, RV 1982, 17.

(4) Article 58 of the Aliens Decree.

(5) Council of State, judgment of 1 July 1991, RV 1991, 36.

(6) Council of State, judgment of 14 May 1990, R02.87.1760.

(7) Council of State, judgment of 14 May 1990, R02.87.2192.

(8) Section 15c, subsection 1 (d) and (e), of the Bill amending the Aliens Act.

(9) Section 6, subsection 2, of the Act approving the Agreement requires carriers to submit copies of aliens travel documents to border control officials, except in cases where travel is within the region.