Medical Reports in Subsequent Asylum Applications
Does Dutch law comply with international law?

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1. Introduction

Asylum seekers who have been victims of persecution, ill treatment or torture may show signs of physical or mental trauma. In these circumstances, a medical report that establishes the link between those harmful past events and physical and mental problems can be submitted in support of a claim for international protection. Even though these medical reports can be vital evidence in an asylum procedure, Dutch immigration authorities and Dutch courts do not always take them into account if they are first brought forward in a subsequent procedure. This is due to

a) the fact that the Immigration and Naturalisation Service (IND) has the possibility to dismiss subsequent asylum applications if they lack *new facts or changed circumstances,* a phrase which is interpreted restrictively*;* and

b) the strict interpretation of the 'ne bis in idem' principle by the national courts, which does not allow them to review the substance of a decision on a subsequent asylum application if they find that no new facts or changed circumstances have been submitted.

This can be very difficult for asylum seekers who did not submit the medical report in the initial asylum procedure, for example because they were unable to undergo a medical examination before the application deadline or because they were unable to talk about the events because of trauma or shame. The Dutch practice can be problematic in light of the principle of *non-refoulement*, the prohibition of returning a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

This expert advice addresses the question whether Dutch law regarding subsequent asylum procedures and in particular the fact that medical reports are not considered new facts in subsequent asylum procedures is in compliance with international law. It will do so by examining the case law of the European Court of Human Rights (ECtHR) and the views of the Committee against torture ComAT) and the Human Rights Committee (HRC). The focus will be on the role of medical reports as evidence in asylum cases (section 4)and requirements with regard to time limits and the scope and intensity of judicial review (section 5). First however section 2 will outline the current Dutch law and practice with regard to medical reports, subsequent asylum procedures and judicial review. Section 3 will introduce the relevant international framework, consisting of the European Convention on Human Rights (ECHR), the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) and their monitoring bodies.

2. Medical reports and subsequent asylum applications: the Dutch legal framework

2.1 The role of medical reports in Dutch asylum law

In Dutch law and policy the approach towards medical reports which establish a causal relationship between signs of physical or mental trauma and the applicant's claims of past torture or ill-treatment in his or her country of origin has been ambiguous. On the one hand the IND takes medical reports into account when examining an asylum claim. On the other hand the Secretary of State and the IND have stressed that no certain conclusions can be drawn as to the origin of scars or medical problems.[1]

Recently the highest administrative court, the Council of State[2] has recognised the importance of medical reports as evidence in asylum procedures.[3] It considers that if the medical report gives a strong indication that the claimed ill-treatment in the country of origin caused the applicant's injuries, the state may be required to further investigate the link between the signs of physical or mental trauma and the claim of ill-treatment in order to dispel any doubts on the risk of ill-treatment upon return. Whether the medical report warrants such further investigation must be examined in the light of the substantiated or credible personal situation of the applicant and country of origin information. The fact that other parts of the asylum account have not been deemed credible, does not take away the duty to investigate, particularly if:

- significant signs of physical or mental trauma are visible on the applicant's body;
- the signs of physical or mental trauma are consistent with his or her claim that the authorities of the relevant countries have ill-treated him or her;
- the claim is supported by reliable country of origin information; and
- the information shows that the authorities of that country of origin may examine the applicant after his or her return and may immediately become aware of the scars or injuries.[4]

Furthermore, it is relevant whether the asylum applicant has submitted other evidence in support of the risk of *refoulement*.[5] The IND has to state reasons for its finding that a medical report does not change its credibility assessment, and therefore does not warrant a further investigation, in its decision. The

[1] See eg K Zwaan, 'Medisch steunbewijs in de asielprocedure: de processie van Echternach?', *Asiel & Migrantenrecht* (2013), pp 527-533. See also TK 2014-2015, 34088, nr 6, pp 36-37.
[2] Afdeling bestuursrechtspraak van de Raad van State, www.raadvanstate.nl.
[3] ABRvS 19 February 2014, nr 201208171/1/V1, ECLI:NL:RVS:2014:600, ABRvS 25 August 2014, nr 201309411/1/V1, ECLI:NL:RVS:2014:3271.
[4] In several cases the Council of State accepted that the IND did not further investigate the link between signs of physical or mental trauma and past ill-treatment because the IND could reasonably deem the asylum account not credible and the parts of the account on which the medical report supported were not substantiated by other evidence. See ABRvS 20 April 2015, nr 201404461/1/V2, ECLI:NL:RVS:2015:1348 and ABRvS 30 January 2014, nr 201407043/1/V1, ECLI:NL:RVS:2015:303.
[5] ABRvS 19 February 2014, nr 201208171/1/V1, ECLI:NL:RVS:2014:600, para 5.1.

Council of State in its judgment extensively referred to the ECtHR's case law which will be discussed in section 4.2.1.

This case law is applicable only to medical reports submitted in an *initial asylum procedure*. Another legal framework applies to medical reports which are presented in a *subsequent asylum procedure*. This framework will be discussed in section 2.3. First we will discuss how the Dutch asylum procedure deals with medical reports in practice.

2.2 Medical reports in the Dutch asylum procedure

In the Netherlands all asylum applicants are (voluntarily) subjected to a medical examination before the start of the first asylum procedure[6] in order to ensure that they are fit to be interviewed.[7] If necessary the interview will be postponed or the manner in which the interview is to be conducted by the IND will be adjusted to the needs of the asylum applicant.[8] This medical assessment does not include an examination of the link between signs of physical or mental trauma and claims of torture or ill-treatment in the country of origin. However if scars are found on the applicant's body, this is mentioned in the report.

Currently in the Netherlands there is only one recognised[9] institution that writes medical reports, which is the Netherlands Institute for Human Rights and Medical Assessment (iMMO).[10] IMMO is a non-profit organisation where doctors write reports on a voluntary basis.[11] IMMO only accepts requests for a medical report if the IND has already expressed its intention to reject or already has rejected the asylum application.[12] At this point in time, reports are requested by the applicant or his or her legal representative. The costs for the medical examination and the writing of the report have to be paid by the applicant. If they are reimbursed[13], it is either by the Central Agency for Reception of Asylum Seekers (COA)[14] or by the IND.[15]

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[6] In a subsequent application the IND is not obliged to offer such an examination.
[7] Art 3:109(6) Aliens Decree (Vreemdelingenbesluit).
[8] Section C1/2.2 Aliens Circular (Vreemdelingencirculaire),in conformity with Art 3.109 (6) 2000 Aliens Decree.
[9] Section C14/3.5.2 Aliens Circular.
[10] Instituut voor Mensenrechten en Medisch Onderzoek, available at www.stichtingimmo.nl accessed 11 March 2015).
[11] www.stichtingimmo.nl/onderzoek-en-advies-2/beoordeling-van-de-aanvraag-immo-onderzoek/ and www.stichtingimmo.nl/rapporteurs-2/inleiding/.
[12] Nederlands Instituut voor forensische psychiatrie en psychologie, Medische steunbewijzen in asielprocedures (september 2014), http://www.stichtingimmo.nl/wp-content/uploads/2014/12/Onderzoeksrapport-NIFP.pdf accessed 10 June 2015, p 24.
[13] iMMO, Toelichting Inspanningsverklaring kostenvergoeding, http://www.stichtingimmo.nl/wp-content/uploads/2014/06/Toelichting-Inspanningsverklaring.pdf, p 2
[14] Central Agency for the Reception of Asylum Seekers. See Art 17 (2), Regulation on benefits asylum seekers and other categories of aliens (Regeling opvang asielzoekers).
[15] This can only happen in certaininstances, see iMMO, Toelichting Inspanningsverklaring kostenvergoeding http://www.stichtingimmo.nl/wp-content/uploads/2014/06/Toelichting-Inspanningsverklaring.pdf.
Regional Court The Hague, 11 March 2014, AWB 14/3855 and Asylum Information Database, Country Report: Netherlands, http://www.asylumineurope.org/reports/country/netherlands accessed 10 June 2015, p 33 (hereafter AIDA).

In practice many asylum applicants have difficulties requesting, let alone submitting an iMMO report a in the initial asylum procedure. It takes time to gather all (medical) information in support of a request for an iMMO report. Most asylum applications in the Netherlands are processed in the General Asylum procedure (AA-procedure) which is carried out within eight days.[16] The appeal procedure takes around four weeks (one week for lodging the appeal, three weeks for deciding on the appeal).[17] If further investigation if needed, the IND can refer an asylum application to the extended asylum procedure (VA-procedure), which has a time limit of six months for making a decision. Because iMMO has limited capacity to do medical examinations[18], the writing of a single report takes several months.[19] Additionally, the fact that the applicant has requested or intends to request an iMMO report often does not lead to a referral of the case to the VA-procedure. The reason for that is that the IND is uncertain whether iMMO will accept the request for a report.[20] Sometimes the IND finds an iMMO report irrelevant because it deems the asylum account not credible. As a result many iMMO reports are submitted during a subsequent asylum application. Then the legal framework regarding subsequent asylum applications applies.

2.3 Legal framework in subsequent asylum procedures

Article 4:6 of the General Administrative Law Act (hereafter: Awb) provides that decision making authorities are only required to consider the substance of a subsequent application if it contains 'new facts or changed circumstances'. The Council of State has interpreted the term 'new facts or changed circumstances' restrictively in its case law. This strict interpretation is implemented in Dutch asylum policy rules; the Aliens Circular (Vreemdelingencirculaire 2000).

Facts or circumstances are considered as 'new' if they are dated from after the previous (first) decision of the IND.'[21] According to section C1/3.8 of the Aliens Circular the point of departure is that asylum applicants are expected to 'submit all information and documents known to them in the initial asylum procedure'. Also traumatic experiences should be mentioned during the initial asylum procedure.[22] Facts or circumstances which date from before the decision on the initial asylum application are only considered to be new, if it is unreasonable to decide otherwise'[23] or if they could only be obtained after the previous decision.[24] The IND is restrictive in its consideration of whether a known fact or circumstance could not have been brought forward at the initial application.

[16] Art 3.114 Aliens Decree.
[17] Art 69 Aliens Act (Vreemdelingenwet).
[18] A Böcker, C Grütters, M Laemers, A Terlouw, K Zwaan, 'Evaluatie van de herziene asielprocedure: eindrapport' (Onderzoekscentrum voor Staat en Recht, 2014), p 95 (hereafter: Evaluatie 2014)
[19] Ibid, p 95
[20] Evaluatie 2014, p 122.
[21] Section C1/3.8 Aliens Circular and ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3.
[22] AIDA, p 29.
[23] Ibid.
[24] Section C1/3.8 Aliens Circular, ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3

The IND only needs to assess new facts or changed circumstances *relevant* to the asylum claim, in other words when these 'can alter the previous decision.'[25] If the applicant submits facts or circumstances in the context of his subsequent asylum procedure which date from before the decision on the first asylum application, the applicant must make plausible that he could not have submitted these facts and circumstances earlier. If the IND has rejected the earlier asylum application because the applicant's statements are deemed not credible the facts and circumstances submitted in the context of the subsequent asylum application must make the statements credible in order to be considered 'new facts or changed circumstances'.[26]

The IND will not reject a subsequent asylum application on the basis of Article 4:6 Awb if there are special facts and circumstances relating to the individual case. This is called the 'Bahaddar exception' which refers to the judgment of the ECtHR in the case *Bahaddar v the Netherlands*.[27] In this judgment the ECtHR ruled that applicants who claim that Article 3 ECHR[28] will be violated upon their return to their country of origin, need to comply with the national procedural rules (see also section 5.1.1.). This is only different if there are special facts and circumstances which relate to the individual case. According to the Council of State such facts and circumstances are present if the applicant submitted information which would clearly (onmiskenbaar) lead to the conclusion that the Secretary of State would violate the prohibition of *refoulement* if he would expel the applicant.[29]

If the IND finds that the applicant has not presented 'new facts or changed circumstances' with the subsequent application and the 'Bahaddar exception' does not apply[30], it has the competence to refuse the application by merely referring to its earlier decision.[31] The IND can also decide to take a decision on the substance of the application even though 'new facts or changed circumstances' are lacking.

Are medical reports considered 'new facts or circumstances?

The Council of State has applied its strict interpretation of new facts or circumstances to medical reports issued by iMMO.[32] The Council of State holds that a medical report has been written on request of the applicant and requires the applicant to provide 'a legally justified reason why such a [medical] report could not have been, and consequently should have been, requested in the initial procedure'. The fact that the applicant requested the medical report because of the negative outcome of the administrative and appeal procedures is not considered to be a legally justified reason.[33] The same applies to applications rejected in the eight day AA-procedure, unless the applicant has indicated during this

[25] ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3.
[26] Aliens Circular, section C1/3.8.
[27] ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.
[28] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (hereafter: ECHR).
[29] ABRvS 30 June 2014, nr 201301155/1/V2, ECLI:NL:RVS:2014:2483.
[30] Article 4:6 Awb.
[31] Ibid.
[32] ABRvS 11 December 2013, nr 201206788/1/V2, ECLI:NL:RVS:2013:2431.
[33] For example ABRvS 11 December 2013, nr 201206788/1/V2, ABRvS 29 August 2014, nr 201400245/1/V1, ABRvS 22 April 2015, nr 201406384/1/V6 (concerning medical advice).

procedure that he or she requested a medical report or has proven that he or she was not able to be subjected to a medical examination during this procedure.[34]

2.4 Judicial Review in subsequent asylum procedures

In subsequent asylum procedures judicial review by the Dutch courts in the first instance and on appeal is limited *ex officio* to the question of whether new facts or changed circumstances have been presented by the applicant in his or her subsequent application. According to the Council of State the 'ne bis in idem' principle prevents the courts from analysing the content of a subsequent application if there are no new facts or changed circumstances. [35] The result is that, even if the IND has decided not to apply Article 4:6 Awb in spite of a lack of new facts or circumstances and to take a decision on the substance of the subsequent asylum application, the court will not review this decision. If the IND assessed a medical report in the context of a decision on a subsequent asylum application even though this report could not be regarded a 'new fact' this assessment will not be reviewed by the courts. The court can only make an exception to this 'ne bis in idem' rule if the 'Bahaddar exception' applies (see section 2.3).[36] The Dutch courts have only applied the 'Bahaddar exception' in a few cases.[37] At least one regional court applied the 'Bahaddar exception'. It also referred to the ECtHR's judgment in *RC v Sweden* and considered that the burden of proof had shifted to the IND because the medical report concluded that the applicant's scars largely fitted into his asylum account. The IND had not taken the medical report into account in its decision on the subsequent application.[38]

2.5 Conclusion

It should be concluded that the IND and the Dutch courts attach important weight to medical reports in first asylum procedures. Contrastingly, in subsequent applications medical reports are not considered 'new facts or changed circumstances' according to the case law of the Council of State, which is also reflected in the Aliens Circular. The consequences of this are twofold. Firstly, the IND may ignore the medical report in a subsequent asylum procedure. However, it is not required to do so. Secondly, the court will limit its decision to the judgment of whether the medical report constitutes a new fact. If the IND does assess the substance of the application in light of a medical report, the court will not review this assessment. This is only different if the 'Bahaddar exception' applies, namely where the applicant submitted information which would clearly lead to the conclusion that the Secretary of State would violate the prohibition of *refoulement* if he or she would expel the applicant. In practice this exception has only been applied several times.

In the next section we will introduce the ECHR, CAT and ICCPR. After that we will address the international legal framework with regard to medical reports, time limits and the scope and intensity of judicial review and test whether Dutch law and practice complies with this framework.

[34] ABRvS 4 December 2013, nr 201211051/1/V2, ECLI:NL:RVS:2013:2348, para 2.5.
[35] ABRvS 6 March 2008, nr 200706839/V1, para 2.1.2.
[36] ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.
[37] Eg ABRvS 30 June 2014, nr 201301155/1/V2, ECLI:NL:RVS:2014:2483 and ABRvS 11 April 2014, nr 201310204/1/V2, ECLI:NL:RVS:2014:1381.
[38] Rb Amsterdam 29 August 2014, AWB 14/17928.

3. The International legal framework

In this section we will briefly introduce the three international treaties which are relevant to the topic of this expert opinion and are ratified by the Netherlands: the ECHR, the CAT and the ICCPR. We will discuss the relevant provisions of these treaties and the role of their supervising bodies: the European Court of Human Rights, The Committee against Torture and the Human Rights Committee.

3.1 The European Convention on Human Rights

The Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereafter: ECHR) in 1950. The European Court of Human Rights (hereafter ECtHR) was established by Article 19 ECHR and is the sole interpreter of the ECHR. Its judgments are binding (Article 46 ECHR). It mainly deals with individual complaints against state parties. It does not issue Concluding Observations or other statements on how well state parties comply with the ECtHR in general.

Article 3 lays down the prohibition of torture. There is no specific provision on *refoulement* in the ECHR. In *Soering v United Kingdom* the ECtHR first established that expelling a person is contrary to Article 3 where substantial grounds can be shown for believing that an individual faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.[39]

3.2 The UN Convention against Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: CAT) was adopted by the General Assembly of the United Nations. It entered into force in 1987. The Committee against Torture (hereafter ComAT) monitors compliance with the CAT. The ComAT decides on complaints of individuals seeking protection against a state which, in their view, breaches the Convention. The ComAT also provides General Comments in which it gives guidance to states parties on the implementation of the Convention. Furthermore it issues Concluding Observations about the compliance with the Convention in the state parties in general. These concluding observations review reports submitted by state parties. They provide a generalised commentary on the state's compliance with the CAT and where necessary offers recommendations. With regard to the Netherlands two sets of Concluding Observations and Recommendations have been issued in the last ten years: one in 2007[40] and one in 2013.[41]

[39] ECtHR 7 July 1989, *Soering v the United Kingdom*, Appl no 14038/88, paras 90-91.
[40] ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 3 August 2007, CAT/C/NET/CO/4, para 8.
[41] ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 31 May 2013 CAT/C/NLD/5-6, para 12.

Article 3 CAT contains an absolute prohibition of torture and explicitly includes the principle of *non-refoulement*. The views, General Comments and Concluding Observations can be relevant to the question how Article 3 should be interpreted and whether Dutch law and practice is in accordance with this provision.

3.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (hereafter ICCPR) was also adopted by the General Assembly of the United Nations and entered into force in 1976. The Human Rights Committee (hereafter: HRC), was established by Article 28 of the ICCPR and monitors the implementation of the ICCPR. In addition to examining individual complaints against state parties, the HRC publishes General Comments. It also issues Concluding Observations to address concerns and makes recommendations about how particular states are implementing the ICCPR.

The ICCPR covers a wide range of (human) rights, including the prohibition of torture in Article 7 ICCPR. There is no specific article on *refoulement*. However the HRC has held that Article 7 ICCPR includes a prohibition of *refoulement*.[42] The body of case law regarding the prohibition of torture and more specifically the principle of *non-refoulement* is limited.

[42] HRC 18 November 1993, *Kindler v Canada*, no 470/1991, para 13.2.

4. The role of medical reports as evidence in asylum cases

When it comes to medical evidence in asylum cases, we can distinguish between:

1. medical reports which establish that psychological problems (such as Post Traumatic Stress Disorder, henceforth PTSD) may have caused inconsistencies in the asylum account
2. medical reports which establish a link between mental or physical trauma and past torture or ill-treatment.

This section addresses the view of the ECtHR, ComAT and HRC with regard to both categories of medical reports. The amount of relevant case law varies between these bodies; we have for example not found any views of the HRC with regard to the first category of medical reports. The ComAT issued most important case law with regard to first category of medical reports, the ECtHR with regard to the second category.

4.1 Medical reports supporting psychological problems affecting the ability to make coherent and consistent statements

4.1.1 The Committee against Torture

The ComAT's views in individual cases show the importance of medical reports, relating to psychological disorders which may interfere with the asylum applicant's ability to make timely, coherent and consistent statements. The ComAT has held in several cases that 'complete accuracy is seldom expected from victims of torture'[43] particularly where a medical report shows that the applicant suffers from Post-Traumatic Stress Disorder (PTSD). In other cases however the consideration that 'complete accuracy is seldom expected from victims of torture' is notably absent and the ComAT did not accept that (major) inconsistencies could be explained by psychological problems.[44]

In some cases, the ComAT showed considerable leniency towards inaccuracies, even where they were of a material nature.[45] In *Haydin v Sweden* for example a number of inaccuracies and inconsistencies were detected in relation to the applicant's presentation of how authorities in Turkey discovered his political activities. Despite their material nature, the ComAT held that the inconsistencies did not raise significant doubts as to the core element and general accuracy of the claims. The ComAT disregarded these inconsistencies and attributed them to the author suffering from PTSD.[46]

[43] ComAT 12 February 1996, *Pauline Muzonzo Paku Kisoki v Sweden*, no 41/1996, para 9.3.
[44] Eg ComAT 29 November 2004, *SUA v Sweden*, no 233/2002, paras 6.4 and 6.5. See also R Bruin and M Reneman, *'Supervising bodies and medical reports'* in: E Bloemen, R Bruin & M Reneman, *Care Full. Medico-legal reports and the Istanbul Protocol in asylum procedures (*Utrecht/Amsterdam , Pharos/Amnesty International/Dutch Council for Refugees , 2006), para 1.2.
[45] ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, para 6.7, ComAT 17 December 2004, *Falcon Rios v Canada*, no 133/99.
[46] ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, para 6.6.

When the applicant has not been diagnosed with PTSD, evidence of other psychological disturbances may also be used to explain inconsistencies or late statements. In *VL v Switzerland* the ComAT accepted that humiliation and shame stopped the applicant disclosing details of rape. In *A v The Netherlands* a fabrication as to the applicant's national identity was excused and held to be attributable to fear of rejection of the application. This indicates that while PTSD is treated as very compelling justification for inconsistencies, absence of such a diagnosis is not always fatal. Any psychological issues that the applicant faces may explain inconsistent accounts presented in domestic proceedings.

The fact that the applicant has not submitted any medical report which explains inconsistencies in his asylum account may even be held against him or her. In *X v Switzerland* the applicant did not provide 'medical evidence .. that he suffers from the consequences of torture, either physically or mentally'. The ComAT concluded that 'the inconsistencies in the author's story cannot be explained by the effects of a post-traumatic stress disorder, as in the case of many torture victims'. [47]

4.1.2 The European Court of Human Rights

The ECtHR also acknowledged that complete accuracy as to dates and events cannot be expected in all circumstances from a person seeking asylum.[48] Furthermore it has disregarded important inconsistencies and contradictions in several recent cases where claims of past torture had been supported by a medical report.[49] However, there are also examples of cases where the ECtHR does not seem to accept that major inconsistencies can be explained by the fact that a person is a victim of torture or ill-treatment.[50] The ECtHR is very reluctant to accept medical reports as an explanation for late statements, in particular if the applicant only mentions that he has been tortured or ill-treated years after the first asylum application.[51]

4.2 Medical reports establishing a link between mental or physical trauma and past torture or ill-treatment

4.2.1 The European Court of Human Rights

In procedures before the ECtHR medical reports which establish a link between mental or physical trauma and past torture or ill-treatment can be crucial.[52] According to the ECtHR such a report may shift the burden of proof from the applicant to the state, even if there are inconsistencies in the applicant's

[47] In ComAT 9 May 1997, *X v Switzerland*, no 38/1995, the lack of evidence showing that the applicant suffered from PTSD precluded the ComAT from finding that inconsistencies in the applicant's story were reasonable.
[48] ECtHR 17 January 2006, *Bello v Sweden*, Appl no 32213/04.
[49] ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 54 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 55.
[50] ECtHR 17 January 2006, *Bello v Sweden*, Appl no 32213/04.
[51] ECtHR 20 March 1991, Cruz Varas and others v Sweden, Appl no 15576/89, ECtHR 16 March 2004, *Nasimi v Sweden*, Appl no 38865/02, ECtHR 10 November 2005, Paramsothy v the Netherlands, Appl no 14492/03. See also D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 264-265.
[52] Eg ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 59 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 53.

story. The state normally cannot reject an asylum claim by dismissing the applicant's account of past events as implausible or lacking credibility, where the medical report substantiating these events has not been rebutted by the state.[53]

In *RC v Sweden* the ECtHR held that the state authorities have a duty to direct that an expert opinion is obtained as to the probable cause of the applicant's scars, if the applicant submitted a medical certificate, which makes out a *prima facie* case as to the origin of scars on the body of the applicant (namely torture or ill-treatment). In this case, the applicant had submitted a medical certificate, which according to the ECtHR 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'.[54]

Not only expert medical reports but also reports which are not written by an expert specialising in the assessment of torture[55] or a report which only describes serious wounding or scars[56] may lead to a shift of the burden of proof from the applicant to the state. In these cases, the state has to show an alternative cause for the medical issues that have been established, for example by obtaining an expert opinion.[57] If fails to do so, the past torture has been established and the applicant has made a *prima facie* case. In *RC v Sweden* the medical certificate was not written by an expert specialising in the assessment of torture injuries.[58] In *RJ v France* the applicant submitted a medical report in support of his claim that he had been tortured by the Sri Lankan authorities.[59] This medical report described in a precise manner fourteen burn wounds, which dated back several weeks and, which caused significant pain necessitating local treatment and the use of oral drugs. The ECtHR considered that this report, even though it did not address the cause of the wounds found on the applicant, established a presumption of past ill-treatment. The Government could not rebut this presumption by only referring to the lacunas in the applicant's asylum claim. This implies that the Government should have asked an expert to conduct a medical examination of the applicant in which the link between the wounds and the applicant's account of past ill-treatment were assessed.[60]

Only if the applicant's account is extremely unlikely, a medical report containing serious indications of past torture does not lead to a shift of the burden of proof, even though the state has not rebutted the report's conclusions. This was the case in *I v Sweden*, where the applicant had not substantiated his claim that he was tortured as a result of his work as a journalist in Chechnya. The ECtHR considered that the applicant must put the state in the position to dispel any doubts about a future risk.

> 'However, this may be impossible, when there is no proof of the asylum seeker's identity and when the statement provided to substantiate the asylum request gives reason to question his or her credibility …

[53] ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, para 42.
[54] ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 53.
[55] ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 53.
[56] ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, para 41.
[57] ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 50.
[58] Ibid.
[59] ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, paras 41-43.
[60] This paragraph is based on G Beck, N Mole and M Reneman, *The application of the EU Charter of Fundamental Rights to asylum procedural law* (ECRE/Dutch Council for Refugees, 2014), available at http://www.ecre.org/component/downloads/downloads/937.html, p 119-120.

> Where an asylum seeker .. invokes that he or she has previously been subjected to ill-treatment, whether undisputed or supported by evidence, it may nevertheless be expected that he or she indicates that there are substantial and concrete grounds for believing that upon return to the home country he or she would be exposed to a risk of such treatment again, for example because of the asylum seeker's political activities, membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities, a pending arrest order, or other concrete difficulties with the authorities concerned.'[61]

The ECtHR has also attached important weight to medical evidence *documenting* scars because the fact that an applicant has scars on his body may lead to a *future* risk of torture upon return, irrespective of whether they are the result of *past* torture. In *I v Sweden* the ECtHR reasoned that if the applicant would have to undergo a body search after returning to Russia, his Chechen origin in combination with the scars could raise suspicion about his involvement in the Chechen war. Even though it was not established that he had been tortured by the Chechen authorities, the scar (a large cross burned on the applicant's back) was sufficient to cause a risk of *refoulement* . As a result the ECtHR found that the applicant's deportation would breach Article 3 ECHR.[62]

4.2.2 The Committee against Torture

The ComAT states in its General Comment No 1 that 'all pertinent information may be introduced by either party to bear on the question whether there is a risk of *refoulement*. According to the ComAT the following information is pertinent:

> (b) 'Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
> (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?'

The case law also shows that medical reports evidencing physical and/or psychological proof of torture are of paramount importance in claims under Article 3 of the Convention.[63] A medical report attesting to a causal link between scars and past torture is likely to lead to a finding that an applicant's story alleging past torture is credible. In *Said Amini v Denmark* the ComAT found it probable, based on the medical evidence, that the applicant was detained and tortured as claimed. This added weight to an eventual finding that he was at personal risk of torture if returned to Iran.[64]

Without medical evidence relating to allegations of assault, the credibility of an applicant's story may even be undermined. In *RSM v Canada the lack* of any medical evidence was stressed as a decisive reason in the eventual conclusion that the claim under Article 3 was not sufficiently substantiated to be

[61] ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09, para 62.
[62] ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09, paras 59-69.
[63] ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, para 6.6.
[64] ComAT 30 November 2010, *Said Amini v Denmark*, no 339/2008, para 9.8.

accepted.[65] Similarly, in *MS v Switzerland* the ComAT highlighted the lack of medical evidence as a particular reason why his allegations of past torture were held to be insufficiently substantiated.[66] Even in circumstances where the medical reports fail to specify the exact details of when and where the torture took place, they are likely to still provide sufficient grounds for believing the torture occurred i.e. that the grounds 'go beyond mere theory or suspicion'.[67]

The ComAT has stressed the importance of medical evidence in the 2007 and 2013 Concluding Observations regarding the Netherlands.[68] The 2013 observations regarding the Netherlands contain an unequivocal articulation of the value of medical evidence. These observations express concern at the apparent lack of importance placed on such evidence by not fully integrating medical review into the asylum procedures. It considered that the fact that Netherlands does not use 'the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) as a means for establishing link between the asserted ill treatment in the asylum application and the findings of actual physical examination is not in conformity with the requirements set out in the Istanbul Protocol'. It recommended the Netherlands to 'apply the Istanbul Protocol in the asylum procedures and to provide training thereon to concerned professionals to facilitate monitoring, documenting and investigating torture and ill-treatment, focusing on both physical and psychological traces, with a view to providing redress to the victims.' [69]

Where medical reports are vague, less weight is likely to be attributed to them. In *ZK v Sweden* inconclusive reports were approached with caution. While the eventual decision was based on the lack of risk for future torture (rather than the vagueness of the medical reports), the absence of clear evidence proving past torture weakened the overall claim.[70] It must also be noted that the value attributed to dental certificates (showing physical damage to teeth) is limited unless further evidence explaining the cause of the damage is also presented.[71]

While medical reports are highly influential in proving past torture, allegations of past torture must be substantiated in some way. Highly compelling, medical evidence alone is not sufficient to establish credibility and further evidence attesting to circumstances of the torture (such as arrest and detention for example) are often necessary.[72] If little other corroborating evidence is presented, the causal link between psychological problems, their alleged origin and their relevance for the purposes of Article 3 may be called into question. In *RK v Sweden* the ComAT considered that the applicant had only provided general information and no specific detailed information on incidents of torture or ill-treatment. It observed that medical reports were lacking in detail and referred to 'repeated incidents of violence' in connection with demonstrations and the fact that the applicant was subjected to 'threats, assault, and abuse …'. It recognised that the results of the forensic report 'may possibly support his

[65] ComAT 24 May 2013, *RSM v Canada*, no 392/2009, para 7.4.
[66] ComAT 13th November 2001, *MS v Switzerland*, no 156/2000, para 6.7.
[67] ComAT 8 July 2011, *Tony Chahin v Sweden*, no 310/2007, para 9.5.
[68] Apart from these observations, there are noticeably few comments on the handling of medical evidence in observations regarding other countries.
[69] ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 31 May 2013 CAT/C/NLD/5-6, para 12.
[70] ComAT 16 May 2008, *ZK v Sweden*, no 301/2006, para 8.4.
[71] ComAT 14 May 2012, *MDT v Switzerland*, no 382/2009, para 7.6.
[72] ComAT 21 May 2013, *DY v Sweden*, no 463/2011, para 9.8.

report of assault and torture' and that, the psychiatric report confirmed that he suffers from PTSD. It questioned however whether the applicant would still be at risk of being subjected to torture upon return, now that several years had passed since the alleged events.[73]

The ComAT makes it clear that the fact that a person was tortured in the past torture does not automatically mean that there is a present danger of torture, particularly when torture occurred several years in the past. [74] The ComAT frequently states that the principle inquiry is whether the complainant currently runs a risk of torture if he is deported to his home country.

4.2.3 The Human Rights Committee

There is very little commentary relating to medical evidence in the case law of the HRC apart from a case in which the HRC found an Article 7 breach because an expulsion decision was taken 'without [the authorities] conducting proper investigation of the allegations of torture and ignoring credible reports of a widespread use of torture against detainees there as well as unjustified refusal to carry out medical examination prior to his extradition'.[75] The applicant in this case had alleged that his body still bore the signs of torture, which could have been confirmed or falsified by a medical examination. Only after the applicant had already been extradited to Kyrgyzstan, but while his case was still pending at the HRC, had the state party requested Kyrgyzstan to conduct a medical investigation.[76] This showed that the state party was aware of the relevance of such an examination to determining the risk of torture upon return, but acted only after they anticipated the scrutiny of the HRC. This may have been a contributing factor to the consideration of the HRC that the refusal to carry out the medical examination was unjustified.

4.3 Conclusion

Notably the ComAT has accepted that psychological problems resulting from torture or ill-treatment may affect the applicant's ability to tell a consistent and coherent asylum account.[77] It therefore acknowledges the importance of medical reports which establish such psychological problems. The ECtHR has been lenient in its assessment of the credibility of the asylum account in several recent cases in which claims of past torture were supported by a medical report. However it has been more strict in other, older cases and in cases in which medical reports were used to explain late statements about past torture and ill-treatment.[78]

The ECtHR and ComAT have acknowledged that medical reports which establish a link between mental or physical trauma and past torture or ill-treatment have important weight in the asylum

[73] ComAT 19 May 2008, *RK v Sweden*, no 309/2006, para 8.5.
[74] Eg ComAT 14 November 2013, *YGH et al v Australia*, no 434/2010, para 8.5.
[75] HRC 17 March 2014, *Valetov v Kazakhstan*, no 2104/2011, para 14.7.
[76] HRC 17 March 2014, *Valetov v Kazakhstan*, no 2104/2011, para 14.4.
[77] ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, para 6.7.
[78] ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 54 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 55.

procedure.[79] The fact that the applicant has been the victim of torture or ill-treatment in the past may point at a future risk of such treatment upon return. The ECtHR held that if a medical report makes out a *prima facie* case as to the origin of scars on the body of the applicant (torture or ill-treatment) it is up to the state to dispel any doubts as to the future risk of *refoulement*.[80] The state cannot ignore such medical report and deem an asylum account not credible.[81] The ComAT and the HRC suggest that the state must document and investigate mental or physical trauma which is allegedly caused by past torture or ill-treatment in the country of origin.[82] Only if there are serious reasons to doubt the credibility of the applicant's account or if a long period has passed since the events in the country of origin, a medical report which substantiates past torture or ill-treatment may not have decisive weight and trigger a duty to investigate for the state.[83]

The next section will examine whether the fact that a medical report has been submitted during a subsequent asylum procedure may be reason to ignore this report during the administrative phase and/or in the context of the judicial review.

[79] ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 53, ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 59 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 53, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, ComAT 30 November 2010, *Said Amini v Denmark*, no 339/2008.
[80] ECtHR 9 March 2010, *RC v. Sweden*, Appl no 41827/07, para 53.
[81] ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, paras 41-43.
[82] HRC 17 March 2014, *Valetov v Kazakhstan*, no 2104/2011, para 14.7.
[83] ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09, para 62, ComAT 14 November 2013, *YGH et al v Australia*, no 434/2010, para 8.5.

5. Medical evidence in subsequent procedures

The case law and views of the ECtHR, ComAT and HRC regarding medical evidence discussed in the previous section, mainly concerned medical evidence that was brought forward in the initial asylum procedure. This expert opinion examines whether the fact that Dutch law allows the IND and even requires the courts to disregard a medical report submitted in a subsequent asylum procedure if it does not constitute a' new fact or changed circumstance', is in conformity with international law.

For this purpose, it is necessary to examine to what extent states are allowed to disregard such reports in subsequent asylum procedures (during the administrative phase and/ or appeal) because of procedural rules that require applicants to submit the evidence during (an early stage of) the initial procedure. In this section we first examine whether the ECtHR, ComAT and HRC set requirements with regard to time limits and late submission of evidence. Furthermore we assess the requirements regarding the scope and intensity of judicial review.

The requirements with regards to asylum procedures can be deduced from the explicit comments the ECtHR, ComAT and HRC make on the domestic procedure, but also from the way these bodies assess evidence themselves. For example, when a supervising body takes on a very active role in gathering evidence, it can be assumed the state party is expected to do the same, since otherwise it would *always* be better for an individual to appeal to the supervising body. This would endanger the subsidiary role of these bodies. [84] Therefore, this section will examine both the comments on the domestic procedure and the way the supervising bodies themselves assess the risk of *refoulement*.

5.1 Time limits and late submission of evidence

This section explores the case law and views of the supervising bodies on time limits and the late submission of evidence. It looks into the requirements set by the supervising bodies and addresses the question whether they take into account late evidence themselves. It should be noted that the prohibitions of *refoulement* under Articles 3 ECHR, 3 CAT and 7 ICCPR is absolute.[85] It may follow that national authorities cannot ignore evidence which makes it plausible that there is a the risk of *refoulement* because it was submitted in a late stage of the procedure.

5.1.1 The European Court of Human Rights

The ECtHR has not ruled in cases where a medical report was ignore because it was submitted late in the asylum procedure or in a subsequent asylum procedure. However it may be derived from the case law that the national authorities may not ignore crucial evidence only because it was submitted late. According to the ECtHR applicants who claim that their expulsion will violate Article 3 ECHR should normally comply with national procedural rules, including time limits.[86] However, the ECtHR recognised in *Bahaddar v the Netherlands* that that 'in applications for recognition of refugee status it may be

[84] T. Spijkerboer, 'Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', *International Journal of Refugee Law* (2009), pp 48-74.
[85] ComAT 5 December 2005, *Dadar v Canada*, no 258/2004, para 8.8.
[86] ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94, para 45.

difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if (…) such evidence must be obtained from the country from which he or she claims to have fled.' Therefore 'time limits should not be so short, or applied so inflexibly, as to deny an applicant .. a realistic opportunity to prove his or her claim'.[87] In *Jabari v Turkey*[88] the inflexibility of the time limit for lodging an asylum claim (five days) led to a violation of Article 13 ECHR. The ECtHR ruled that the automatic and mechanical application of this short time limit and the fact that the domestic court did not review the substance of the applicant's claim of a risk of *refoulement* deprived the applicant of an effective remedy.

In *IK v Austria*[89] the ECtHR found a violation of Article 13 ECHR because the asylum case of the applicant's mother was not taken into account in a subsequent asylum procedure. The applicant's first application was rejected because his asylum account would be contradictory and unconvincing. His mother's application was initially rejected as well, but she was granted refugee status on appeal. The Asylum Court considered that her story was credible and convincing and that she faced a considerable risk of persecution. The applicant's asylum claim was based on the same asylum account as his mother's. After his mother had been granted refugee status the applicant filed a subsequent application. This request was rejected because his asylum motives had already been dealt with in the first proceedings, and the case was therefore *res judicata*. Because the court failed to address the reason for the discrepancy between the outcome in the applicant's case and in the case of his mother, the ECtHR was not persuaded that the applicant's grievance was thoroughly examined by the domestic authorities. The ECtHR evaluated the risk itself and concluded that deportation would be in breach of Article 3 ECHR.

The ECtHR itself takes into account evidence which has been submitted late in the asylum procedure, or even only before the ECtHR.[90] In *Salah Sheekh v. the Netherlands,* the ECtHR considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time.[91] The ECtHR has indicated that the submission of evidence at a late stage of the procedure may undermine the credibility of this evidence.[92] However, the ECtHR does not exclude evidence or statements from its assessment only because they have been submitted long after the first asylum application.[93] In *Hilal v. the United Kingdom* the applicant mentioned that he was tortured in his second interview, which took place more than a month after the initial interview.[94] Furthermore, he waited almost two years to submit significant evidence, such as the death certificate of his brother, medical reports and a police summons. The ECtHR found no reasons to reject these documents as forged or fabricated, referring to an expert opinion submitted by the applicant which

[87] Ibid, para 45.
[88] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98.
[89] ECtHR 28 March 2013, *IK v Austria*, Appl no 2964/12.
[90] D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 276-279.
[91] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 136. See also ECtHR 17 July 2008, *NA v the United Kingdom*, Appl no 25904/07, para 112 and ECtHR 10 February 2011, *Dzhaksybergenov v Ukraine*, Appl no 12343/10, para 36.
[92] ECtHR 2 September 2008, *AA v Sweden*, Appl no 8594/04, paras 66-68. ECtHR 4 December 2008, *Y v Russia*, Appl no 20113/07.
[93] D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 278.
[94] ECtHR 6 March 2001, *Hilal v the United Kingdom*, Appl no 45276/99.

concluded that the documents were genuine. On the basis of these documents and the applicant's statements the ECtHR concluded that there was a real risk of *refoulement*.[95]

5.1.2 The Committee against Torture

We have not found an individual case in which the ComAT ruled whether national authorities were allowed to ignore evidence because it was submitted late. However in both the 2007 and 2013 observations of The Netherlands, the ComAT expressed disapproval of the restrictions regarding presentation of new evidence. The 2013 recommendations echo those from 2007, urging the Netherlands to allow asylum-seekers to submit new evidence if it was unavailable at the time of the first submission.[96]

In the individual complaint procedure, the ComAT itself generally does not take into account evidence that has not been presented at any stage in the domestic procedure. [97] Failure to do so will usually result in the complaint being inadmissible because national remedies were not exhausted. The ratio behind that rule is that states 'should have an opportunity to evaluate the new evidence' before the ComAT decides on it. [98] The fact that the applicant expects that national courts will not take the evidence into consideration or that it will not lead to a different decision by the domestic courts, does not matter in this regard.[99]

Submitting evidence at a late stage of the domestic procedures is however quite different from not submitting it in the domestic procedure at all. The ComAT seems to be rather understanding of asylum seekers not bringing forward all evidence at the first opportunity they get. In *Khan v Canada,* some of the claims and corroborating evidence were submitted *after* the refugee claim had been refused and deportation procedures had been initiated. The ComAT stated 'that this behaviour is not uncommon for victims of torture'. The ComAT went on to stress that it is nevertheless the ComAT's task to 'ensure that [the applicant's] security is not endangered'.[100] It concluded that the state party has an obligation to refrain from forcibly returning the applicant to his home country.[101] In *RK v Sweden* the ComAT took into account a medical report and a psychiatric report even though they had been submitted to it around a year after the complaint had been lodged before it. The ComAT did not attach decisive weight to the medical report because it was lacking in detail. While the psychiatric report confirmed that the applicant suffered from PTSD, the ComAT noted that the future risk of torture was not sufficiently substantiated.[102]

[95] Ibid. Baldinger also refers to ECtHR 5 July 2006, *Said v the Netherlands*, Appl no 2345/02 and ECtHR 8 November 2005, *Bader and Kanbor v Sweden,* Appl no 13284/04. D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 277.
[96] ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 31 May 2013 CAT/C/NLD/5-6, para 11(c).
[97] ComAT 26 May 2011, *FM-M v Switzerland*, no 399/2009, para 6.4.
[98] ComAT 2 May 1995, no 24/1995, *AE v Switzerland*, para 4.
[99] ComAT 26 May 2011, *FM-M v Switzerland*, no 399/2009, paras 6.4-6.5.
[100] ComAT 18 November 1994, *Khan v Canada*, no 15/1994, para 12.3.
[101] Ibid, para 13.
[102] ComAT 19 May 2008, *RK v Sweden*, no 309/2006, para 8.5.

5.1.3 The Human Rights Committee

The Concluding Observations of the HRC show that it requires states to ensure that asylum applicants whose applications are deemed inadmissible because they have, for example, missed the deadline for submitting their applications, are not deported to countries where there are substantial grounds for believing that they would be in danger.[103] This is also reflected in case law. In *Jonny Rubin Byahuranga v Denmark*,[104] the state was criticised for dismissing statements merely on account of late submission. The applicant had stated he was an outspoken critic of the Ugandan government, of which evidence was available online, and provided sources about widespread torture of political opponents in Uganda. According to the HRC, Denmark did not provide any substantive arguments, referring to an earlier risk assessment.[105] The HRC concluded that expulsion would be a violation of Article 7 ICCPR.

Not only are states not allowed to dismiss evidence merely because of late submission, states should also ensure applicants have enough time to prepare an asylum application[106] as well as a right to access adequate information in order to answer arguments and evidence utilised in their case.[107] The HRC has in particular urged the Netherlands to ensure a thorough and adequate assessment by allowing an adequate period of time for the presentation of evidence.[108]

5.2 Requirements as to the scope and intensity of judicial review

This section explores which requirements are set by the ECtHR, ComAT and HRC with regard to the scope and intensity of judicial review. In the part on the ECHR we only address the requirements under Article 13 ECHR, because Article 6 ECHR does not apply to asylum procedures.[109]

5.2.1 The European Court of Human Rights

Under Article 13 ECHR everyone whose rights have been violated has a right to an effective remedy. The ECtHR often evaluates whether or not a national procedure meets the standards set by the ECHR. States

[103] ComAT, *Concluding observations of the Committee against Torture concerning Portugal*, 5 July 2003, CCPR/CO/78/PRT, para 12.
[104] HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003.
[105] The fact that the applicant was convicted for drug-related crimes, may have heavily influenced the State's decision in this case and may have led to less a thorough investigation into the author's claims of the risk of torture.
[106] ComAT, *Concluding observations of the Committee against Torture concerning France,* 31 July 2008, CCPR/C/FRA/CO/4, para 20.
[107] ComAT, *Concluding observations of the Committee against Torture concerning Sweden*, 7 May 2009, CCPR/C/SWE/CO/6, para 17.
[108] *Concluding observations of the Committee against Torture concerning the Netherlands*, 25 August 2009, CCPR/C/NLD/CO/4, para 9.
[109] ECtHR 5 October 2010*, Maaouia v France*, Appl no 39652/98. The case law with regard to Art 6 ECHR can play a role in the interpretation of the right to and effective remedy and fair trial laid down in Art 47 of the Charter of Fundamental Rights of the European Union. For the requirements under Article 6 ECHR we refer to our expert opinion 'Medical Reports in Subsequent Asylum Applications Does Dutch law comply with EU law?' of July 2015, available at www.migrationlawclinic.org, para 6.3.

are afforded a margin of discretion in the way they arrange their national procedure.[110] However, Article 13 ECHR does require 'close and rigorous scrutiny' of a claim of a violation of Article 3 ECHR.[111] This requirement follows from the importance which the ECtHR attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises. The requirement of a close and rigorous scrutiny applies to the assessment by the ECtHR itself[112] as well as to the assessment by a national independent authority (including national courts)[113].

The requirement of rigorous scrutiny means that the national court must be able to examine the substance of the claim of a violation of Article 3 ECHR upon return.[114] It does not require the national courts have do a full and factual review of the state administration's decision to expel. The ECtHR has ruled in several cases that the UK system lived up to the standards of Article 13 ECHR, even though the courts could only quash a decision on the basis of "illegality, irrationality or procedural impropriety". [115] The irrationality test meant that a decision would be quashed if no reasonable Secretary of State could have made such a decision. This seems to be quite a marginal review, but it nevertheless met the ECtHR's aforementioned standards, possibly because UK courts had stressed that "the most anxious scrutiny" should be applied. If, on the other hand, a domestic court limits itself solely to formal legality without any regard for the substance of the applicant's claim, the national procedure does not live up to ECtHR's standards.[116]

In *M.S.S v Belgium and Greece* the ECtHR concluded that the Belgian extremely urgent procedure did not comply with the requirement of rigorous scrutiny for several reasons. First of all, as was also recognised by the Belgian Government, this procedure reduced the rights of the defence and the examination of the case to a minimum. The examination of the complaints under Article 3 by the Aliens Appeal Board could, according to the ECtHR, not be considered 'thorough'. One of the factors which led to this conclusion was that the Aliens Appeals Board did not always take into account new material submitted by the applicant. Other factors included the high burden of proof for suspension of the expulsion and the limitations on the rights of the defence.[117] In the case of *Abdulkhakov* the ECtHR had doubts that the risk of *refoulement* had been subject to rigorous scrutiny. It considered that it was 'struck by the summary reasoning adduced by the domestic courts and their refusal to assess materials originating from reliable sources'.[118]

In its own assessment of a claim under Article 3 ECHR the ECtHR sometimes refers to its subsidiary role and stresses that 'as a general principle, the national authorities are best placed to assess

[110] ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, Appl nos 13163/87; 13164/87; 13165/87; 13447/87and 13448/87, para 122;
[111] ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09 par 387, ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98, para 48.
[112] ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, no 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 108; ECtHR 28 February 2008, *Saadi v Italy*, Appl no 37201/06, para 128.
[113] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98.
[114] ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09 para 387.
[115] ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, Appl nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, paras 123 - 126; ECtHR 6 March 2001, *Hilal v the United Kingdom*, Appl no 45276/99, para 78.
[116] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98.
[117] ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, paras 389-390.
[118] ECtHR 2 October 2012, *Abdulkhakov v Russia*, Appl no 14743/11 , para 148.

not just the facts, but more particularly, the credibility of witnesses since it is they who have had the opportunity to see, hear and assess the demeanour of the individual concerned.'[119] In some cases the ECtHR relied on the credibility assessment made by the state party's authorities. On the other hand the ECtHR has made an independent assessment of the credibility of the applicant's asylum account in several cases.[120] Baldinger has extensively examined the ECtHR's case law and discovered three triggers for an independent assessment of the credibility by the ECtHR. One of these factors is 'insufficient national proceedings, for example, evidence was overlooked or not taken seriously'.[121] Another factor is '[n]ew facts, circumstances and developments, including evidence thereof, or new information which casts doubt on the information relied on by the government'.[122] The fact that relevant evidence is not taken into account in the asylum procedure or new evidence is presented in a later stage of the proceedings is a reason for the ECtHR to perform an independent rigorous scrutiny.

5.2.2 The Committee against Torture

A repeated general concern of the ComAT is the lack of opportunity for independent review. The ComAT has been stressing the importance of effective, independent and impartial review in many concluding observations.[123] In its most recent concluding observations the ComAT has continued to point this out.[124] In its Concluding Observations regarding Canada it has elaborated on the intensity of judicial review: 'The State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture'[125]. Furthermore it has expressed concern about appeal procedures in the Netherlands being limited to marginal review.[126] Considering the lack of specific comments about subsequent procedures, the general opinion of the ComAT that a complete judicial review of the merits should be available, most likely extends to subsequent procedures.

This concern is also reflected in the case law. In *Ke Chun Rong v Australia* the ComAT considered that 'the review on the merits of the complainants' claims regarding the risk of torture that he faced, was conducted predominantly based on the content of his initial application for a Protection visa, which

[119] ECtHR 9 March 2009, *RC v Sweden*, Appl no 41827/07, para 52.
[120] ECtHR 27 July 2005, *N v Finland*, Appl no 38885/02, ECtHR 5 July 2006, *Said v the Netherlands*, Appl no 2345/02, ECtHR 9 March 2009, *RC v Sweden*, Appl no 41827/07, ECtHR 15 January 2015, *AA v France*, Appl no 18039/11 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13.
[121] D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 248.
[122] Ibid.
[123] Eg ComAT, *Concluding observations of the Committee against Torture concerning Australia*, 21 November 2000, A/56/44, para 52; ComAT, *Concluding observations of the Committee against Torture concerning Hungary,* 6 February 2007, CAT/C/HUN/CO/4, para 10; ComAT, *Concluding observations of the Committee against Torture concerning Japan*, 3 August 2007, CAT/C/JPN/CO/1, para 14.
[124] ComAT, *Concluding observations of the Committee against Torture concerning Poland,* 23 December 2013, CAT/C/POL/5-6, para 12, ComAT, *Concluding observations of the Committee against Torture concerning Portugal,* 23 December 2013, CAT/C/PRT/5-6, para 9.
[125] ComAT, *Concluding observations of the Committee against Torture concerning Canada*, 7 July 2005, CAT/C/CR/34/CAN, para 5.
[126] ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 3 August 2007, CAT/C/NET/CO/4, para 7; ComAT, *Concluding observations of the Committee against Torture concerning the Netherlands,* 31 May 2013, CAT/C/NLD/5-6, para 11.

he filed shortly after arriving in the country, without knowledge or understanding of the system'. It further observed 'that the complainant was not interviewed in person neither by the Immigration Department, which rejected his initial application, nor by the Refugee Review Tribunal and therefore he did not have the opportunity to clarify any inconsistencies in his initial statement'. The ComAT concluded that the deportation would constitute a violation of Article 3 because Australia had failed to duly verify the complainant's allegations and evidence through proceedings, thus failing to meet the state party's procedural obligation to provide for effective, independent and impartial review.[127] This shows the ComAT attributes much weight to a proper assessment of the risk of torture upon return by the national authorities, in particular to the applicant's right to be heard.

In its case law, the ComAT usually determines itself whether or not there are substantial grounds for believing that the applicant would be in danger of being subjected to torture if he is expelled. In assessing this risk, the ComAT frequently describes their own role in the procedure as follows:

> 'While under the terms of its general comment the Committee is free to assess the facts on the basis of the full set of circumstances in every case, it recalls that it is not a judicial or appellate body, and that it must give considerable weight to findings of fact that are made by organs of the State party concerned.'[128]

The ComAT uses this or similar phrases to the one mentioned above in the overwhelming majority of cases.[129] However, in some cases it has mainly stressed the importance of the findings of fact by domestic authorities. An example is *MO v Denmark*. In this case the Danish authorities fully considered the relevant evidence in the case, which seems to have been the reason for the ComAT's emphasis on Denmark's findings.[130] In another case the ComAT even went as far as to say that '[the] Committee is not in a position to challenge their [the national authorities'] findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account.' In this case the fact that '[the] relevant evidence … has been considered by the Dutch authorities' again seems to have been decisive in choosing this approach.[131] In one case the ComAT stated the applicant had 'not put forward a persuasive argument that would allow the Committee to call into question the state party's conclusions'.[132] That seemed to be sufficient to make the state's findings of facts the ComAT's own.

In some cases ComAT did not comment on the findings of the national authorities and instead just stated that it was free to assess the facts itself. In the case *MPS v Australia*[133] the ComAT stated 'that it is not bound by findings of fact that are made by organs of the State party and instead has the

[127] ComAT 5 November 2012, *Ke Chun Rong v Australia*, no 416/2010, para 7.5.
[128] ComAT 3 July 2011, *TD v Switzerland*, no 375/2009, para 7.7.
[129] See for example ComAT 3 June 2010, *AM v France*, no 302/2006, para 13.5; ComAT 10 December 2009, *Minani v Canada*, no 331/2007, para 7.8, ComAT 15 November 2011, *EL v Switzerland*, no 351/2008, para 9.6, ComAT 21 May 2012, *EL v Canada*, no 370/2009, para 8.4, ComAT 23 May 2012, *MAMA et al v Sweden*, no 391/2009, para 9.4.
[130] ComAT 12 November 2003, *MO v Denmark*, no 209/2002, para 6.5.
[131] ComAT 14 May 2004, *SG v The Netherlands*, no 135/1999, para 6.6.
[132] ComAT 14 May 2012, *MDT v Switzerland*, no 382/2009, para 7.4. See also ComAT 3 June 2010, *AM v France*, no 302/2006, para 13.5.
[133] ComAT 30 April 2002, no 138/1999, *MPS v Australia*, para 7.3.

power ... of free assessment of the facts based upon the full set of circumstances in every case', without mention of the weight given to findings of fact made by domestic authorities.
One aspect that influences whether or not the ComAT accepts the state's assessment of the facts and circumstances is whether the applicant has argued they were wrong. Another explanation for the difference in the role the ComAT takes in assessing a complaint, is whether or not the ComAT comes to the same conclusion regarding the facts and circumstances. When a completely independent assessment would have led to the exact same findings of facts, they may as well give great weight to the findings made by the state party. If the ComAT is of a very different opinion, it will stress that they are not bound by the state's findings of facts. However, in the vast majority of cases, some form of the phrasing 'free assessment of the facts on the basis of the full set of circumstances' is used. This suggests that the ComAT will consider all evidence presented to the state party, even if it was not taken into account on the basis of domestic procedural law.

A last possible explanation is that the ComAT has taken a more reserved stand in recent years, whereas it took on a more active role in its early years. This would be due to pressure from member states not to become an appellate, quasi-judicial or administrative body.[134]

The Human Rights Committee

The HRC stresses the importance of due process[135] and procedural safeguards.[136] More specifically, it often mentions the need for an independent appeals body to ensure the availability of an effective remedy.[137] The HRC has also raised concerns regarding short time limits for submissions of appeals.[138] However, no comments have been made on what scope the appeal is required to have, nor is there any mention of subsequent asylum procedures.

The importance of procedural safeguards is also stressed in the case law. In *Alzery v Sweden* the HRC notes that 'reference should be made to the procedural safeguards considered necessary in refugee status determination in general'.[139] It also emphasises that judicial review of statements made by the applicant must be thorough.[140]

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[134] R Bruin and M Reneman, *'Supervising bodies and medical reports'* in: E Bloemen, R Bruin & M Reneman, *Care Full. Medico-legal reports and the Istanbul Protocol in asylum procedures (*Utrecht/Amsterdam , Pharos/Amnesty International/Dutch Council for Refugees , 2006), para 1.2.
[135] See eg *Concluding observations of the Committee against Torture concerning Hungary*, 25 October 2010, CCPR/C/HUN/CO/5 para 15.
[136] See eg *Concluding observations of the Committee against Torture concerning Latvia*, 11 April 2014 CCPR/C/LVA/CO/3 para 14.
[137] See eg *Concluding observations of the Committee against Torture concerning Japan,* 20 August 2014 CCPR/C/JPN/CO/6, para 19, *Concluding observations of the Committee against Torture concerning Japan,* 18 December 2008, CCPR/C/JPN/CO/5, para 25, *Concluding observations of the Committee against Torture concerning Ireland*, 19 August 2014, CCPR/C/IRL/CO/4, para 19.
[138] *Concluding observations of the Committee against Torture concerning Latvia,* 6 November 2003, CCPR/CO/79/LVA, para 9.
[139] HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005, para 4.22.
[140] HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003, para 11.3

When it comes to its own role, the HRC repeatedly recalls that 'it is generally for the judicial authorities of the state parties to the Covenant to assess the facts in such cases'[141] and that the HRC itself plays a limited role in such assessments.[142] Particularly, if an applicant has had ample opportunity to present his or her arguments and he or she fails to do so, the HRC will not consider itself competent to re-evaluate facts and evidence considered by national courts.[143] Only when the evaluation is clearly arbitrary or amounts to a denial of justice, will the HRC take it upon itself to scrutinise the evidence.[144]

5.3 Conclusion

Time limits and late submission of evidence

The ECtHR, ComAT and HRC have not directly addressed the question whether the administrative authorities and/or the national courts are allowed to ignore a medical report submitted in a subsequent asylum procedure, only because it should have been submitted earlier. However it may be derived from their case law and views in other documents that this may be problematic in the light of the absolute prohibition of *refoulement* and the right to an effective remedy.

The ECtHR has recognised that asylum applicants need to comply with national procedural rules. However it also considered that time limits for submitting evidence should be flexible.[145] The automatic and mechanical application of time limits may never lead to a violation of the principle of *refoulement*.[146] An example is the judgment in *IK v Austria* where the res judicata principle could not justify the fact that the Austrian authorities ignored an important new fact in a subsequent asylum procedure, namely the fact that the applicant's mother had been granted a refugee status.[147] Also the ComAt and the HRC indicated that the rules regarding submitting new evidence should not be too strict and may not lead to a violation of the principle of *refoulement*.

The supervising bodies themselves take into account evidence which was presented late in the national proceedings or sometimes even during the complaint proceedings. The only fact that it was submitted late (and could have presented earlier), is no reason to exclude the new evidence from the assessment.

It follows from the previous section that medical reports which establish a causal relationship between mental or physical trauma and past torture or ill-treatment should be considered important evidence in an asylum procedure. This also applies (at least as the ComAt is concerned) to medical reports which establish that an applicant has psychological problems which may interfere with his or her ability to make consistent and coherent statements. The fact that the IND and the courts can ignore medical reports just because they could have been submitted earlier may therefore violate the principle of *refoulement* and/or the right to an effective remedy. It is unlikely that the application of the 'Bahaddar exception' by the IND and courts can prevent that such a violation takes place considering the

[141] HRC 17 October 2014, *Khakdar v Russian Federation*, no 2126/2011, para 11.4, and HRC 31 October 2011, *AA v Canada*, no 1819/2008, para 7.8.
[142] HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10.5.
[143] HRC 18 November 1993, *Kindler v Canada,* no 470/1991, para 6.6.
[144] HRC 26 March 2014, *X v Denmark*, no 2007/2010, para 9.3.
[145] ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.
[146] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98.
[147] ECtHR 28 March 2013, *IK v Austria*, Appl no 2964/12.

high standard of proof (the evidence must clearly lead to the conclusion that the expulsion would violate the prohibition of *refoulement*) and its limited application in practice.

Judicial review

The supervising bodies have not addressed in their case law whether national courts may refuse to review parts of an asylum decision (i.e. the part where the IND assesses whether new evidence leads to the conclusion that there is a risk of *refoulement*) on the basis of the 'ne bis in idem principle'. However it follows from the ECtHR's case law that national courts should apply a rigorous scrutiny of the risk of r*efoulement*. Also the ComAt and the HRC deem an independent review of the merits of an asylum decision very important.

Furthermore the ECtHR and ComAT do not hesitate to assess the credibility of the applicant's asylum account and assess evidence if necessary. For the ECtHR the fact that the national authorities did not take into account important evidence or the fact that new evidence was presented to the Court may even be reason to depart from the national authorities' findings as to the credibility of the applicant's asylum account.[148]

If no new facts and circumstances have been submitted (and medical reports are usually not considered to be such new facts or circumstances) judicial review performed by the Dutch courts does not extend to the IND's assessment of the newly presented medical report. Therefore it may be questioned whether the judicial review by the Dutch courts in subsequent asylum complies with the requirement of a rigorous scrutiny. Again it should be noted that it is unlikely that the 'Bahaddar exception' by the IND and courts can prevent that the right to an effective remedy is violated, considering the high standard of proof and its limited application in practice.

[148] D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 248.

6. Conclusion

In the Netherlands asylum applicants may, on their own initiative, submit a medical report in support of their claim of past torture or ill-treatment. These reports are written by the Netherlands Institute for Human Rights and Medical Assessment (iMMO). They establish a link between mental or physical trauma and past torture or ill-treatment and/or establish psychological problems affecting the ability to make coherent and consistent statements.

The Dutch IND and courts generally attach important weight to medical reports which establish a link between mental or physical trauma and past torture or ill-treatment. However if a medical report is submitted in a subsequent asylum procedure, this may be completely different. This due to the fact that in a subsequent asylum procedure the IND has the possibility to dismiss the asylum application if no *new facts or changed circumstances* have been presented. Medical reports are usually not considered to constitute such new fact or circumstance. According to the Dutch Council of State a medical report has been written on request of the applicant and requires the applicant to provide 'a legally justified reason why such a [medical] report could not have been, and consequently should have been, requested in the initial procedure'. The fact that the applicant requested the medical report because of the negative outcome of the administrative and appeal procedures or that the asylum application has been rejected in eight days, is not considered to be a legally justified reason.[149]

The IND may decide to reassess a subsequent asylum application even though a medical report does not constitute a new fact or changed circumstance. If it (again) rejects the application, the strict interpretation of the 'ne bis in idem' principle by the national courts, does not allow them to review the substance of the asylum decision if they find that no new facts or changed circumstances have been submitted. As a result the IND's assessment of the question whether the medical report leads to the conclusion that expulsion would lead to a violation of the prohibition of *refoulement*, is not subjected to independent review. This expert opinion addressed the question whether Dutch law regarding subsequent asylum procedures and in particular the fact that medical reports are not considered new facts in subsequent asylum procedures is in compliance with international law.

First of all this expert opinion argued that both the ECtHR and ComAT have acknowledged that medical reports which establish a link between mental or physical trauma and past torture or ill-treatment have important weight in the asylum procedure.[150] The fact that the applicant has been the victim of torture or ill-treatment in the past may point at a future risk of such treatment upon return. The ECtHR held that if a medical report makes out a *prima facie* case as to the origin of scars on the body of the applicant (torture or ill-treatment) it is up to the state to dispel any doubts as to the future risk of *refoulement*.[151] The state cannot ignore such medical report and deem an asylum account not credible.[152] The ComAT and the HRC suggest that the state must document and investigate mental or

[149] For example ABRvS 11 December 2013, nr 201206788/1/V2, ABRvS 29 August 2014, nr 201400245/1/V1, ABRvS 22 April 2015, nr 201406384/1/V6 (concerning medical advice).
[150] ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 53, ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 59 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 53, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, ComAT 30 November 2010, *Said Amini v Denmark*, no 339/2008.
[151] ECtHR 9 March 2010, *RC v. Sweden*, Appl no 41827/07, para 53.
[152] ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, paras 41-43.

physical trauma which is allegedly caused by past torture or ill-treatment in the country of origin.[153] Only if there are serious reasons to doubt the credibility of the applicant's account or if a long period has passed since the events in the country of origin, a medical report which substantiates past torture or ill-treatment may not have decisive weight and trigger a duty to investigate for the state.[154]

The ComAT has also accepted that psychological problems resulting from torture or ill-treatment may affect the applicant's ability to tell a consistent and coherent asylum account.[155] It therefore acknowledges the importance of medical reports which establish such psychological problems. The ECtHR has been lenient in its assessment of the credibility of the asylum account in several recent cases in which claims of past torture were supported by a medical report. However it has been stricter in other cases, in particular where medical reports were used to explain late statements about past torture and ill-treatment.[156]

The ECtHR, ComAT and HRC have not directly addressed the question whether the administrative authorities and/or the national courts are allowed to ignore a medical report submitted in a subsequent asylum procedure, only because it should have been submitted earlier in the proceedings. However it may be derived from their case law and views in other documents that this may be problematic in the light of the absolute prohibition of *refoulement* and the right to an effective remedy.

The ECtHR has recognised that asylum applicants need to comply with national procedural rules. However it also considered that time limits for submitting evidence should be flexible.[157] The automatic and mechanical application of time limits may never lead to a violation of the principle of *refoulement*.[158] An example is the judgment in *IK v Austria* where the res judicata principle could not justify the fact that the Austrian authorities ignored an important new fact in a subsequent asylum procedure, namely the fact that the applicant's mother had been granted a refugee status.[159] Also the ComAt and the HRC indicated that the rules regarding submitting new evidence should not be too strict and may not lead to a violation of the principle of *refoulement*. The supervising bodies themselves take into account evidence which was presented late in the national proceedings or sometimes even during the complaint proceedings. The only fact that it was submitted late (and could have presented earlier), is no reason to exclude the new evidence from the assessment. The fact that the IND and the courts can ignore a medical report which makes out a *prima facie* case of past torture or ill-treatment, just because they could have been submitted earlier, may therefore violate the principle of *refoulement* and/or the right to an effective remedy. It is unlikely that the application of the 'Bahaddar exception' by the IND and courts can prevent that such a violation takes place considering the high standard of proof (the evidence must clearly lead to the conclusion that the expulsion would violate the prohibition of *refoulement*) and its limited application in practice.

[153] HRC 17 March 2014, *Valetov v Kazakhstan*, no 2104/2011, para 14.7.
[154] ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09, para 62, ComAT 14 November 2013, *YGH et al v Australia*, no 434/2010, para 8.5.
[155] ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/1997, para 6.7.
[156] ECtHR 15 January 2015, *AA v France*, Appl no 18039/11, para 54 and ECtHR 15 January 2015, *AF v France*, Appl no 80086/13, para 55.
[157] ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.
[158] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98.
[159] ECtHR 28 March 2013, *IK v Austria*, Appl no 2964/12.

The supervising bodies have not addressed in their case law whether national courts may refuse to review parts of an asylum decision (i.e. the part where the IND assesses whether new evidence leads to the conclusion that there is a risk of *refoulement*) on the basis of the 'ne bis in idem principle'. However it follows from the ECtHR's case law that national courts should apply a rigorous scrutiny of the risk of r*efoulement*. Also the ComAt and the HRC deem an independent review of the merits of an asylum decision very important. Furthermore the ECtHR and ComAT do not hesitate to assess the credibility of the applicant's asylum account and assess evidence if necessary. For the ECtHR the fact that the national authorities did not take into account important evidence or the fact that new evidence was presented to the Court may even be reason to depart from the national authorities' findings as to the credibility of the applicant's asylum account.[160]

If a medical report (irrespective of whether it makes out a *prima facie* case of past torture or ill-treatment) is not considered to be a new fact or circumstance, judicial review performed by the Dutch courts does not extend to the IND's assessment of the medical report. Therefore it may be questioned whether the judicial review by the Dutch courts in subsequent asylum complies with the requirement of a rigorous scrutiny. It is unlikely that the 'Bahaddar exception' by the IND and courts can prevent that the right to an effective remedy is violated, considering the high standard of proof and its limited application in practice.

[160] D Baldinger, *Rigorous Scrutiny versus Marginal Review* (Nijmegen, Wolf Legal Publishers, 2013), p 248.