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

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1. Introduction

Asylum seekers who have been victims of persecution or serious harm may show signs of physical or mental trauma. In these instances, a medical report¹ that establishes the link between those harmful past events and physical and mental trauma can be submitted in support of a claim for international protection. The importance of this causal link is substantiated by the Qualification Directive² (hereafter: QD). Article 4(4) of this Directive lays down that ‘the fact that an applicant has already been subject to persecution or serious harm ... is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm.’ In accordance with the principle of *non-refoulement*,³ applicants having a well-founded fear of persecution or running a real risk of suffering serious harm, qualify for international protection and cannot be returned their country of origin.

For a number of reasons, including procedural inadequacies, time restraints or trauma-related reluctance, some applicants for international protection do not submit medical reports to the authorities until after the completion of the initial (first) application process, including judicial review. Consequently, some applicants do not submit medical reports until a subsequent application.

In the Netherlands, it is recognised that medical reports can provide important evidence that an applicant has been ill-treated in the past. However medical reports submitted in subsequent asylum procedures are often not taken into account in the context of the administrative decision and/or judicial review of this decision. 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.

The central question of this expert advice is whether Dutch law concerning subsequent asylum procedures and in particular the fact that medical reports are not considered new facts in subsequent asylum procedures is in compliance with European Union (EU) law. Even though this expert advice focuses on medical reports in subsequent applications, the analysis is also relevant for other statements or evidence which have been submitted in such applications.

¹ For the purposes of this expert advice, a medical report is a medical or medico legal report or certificate, resulting from a medical examination by a qualified medical professional, demonstrating a causal link between persecution or serious harm and physical or mental trauma.

² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337.

³ Enshrined in eg Arts 18 and 19 of the *Charter of Fundamental Rights of the European Union* [2012] C326/02 and Art 21 QD.

In order to answer the central question, section 2 will first discuss the Dutch legal framework and practice with regard to medical reports and subsequent asylum procedures (administrative phase and judicial review). Section 3 will discuss the EU legal framework concerning medical reports, subsequent asylum procedures and judicial review. In section 4 we will specifically address the question of whether medical reports should be considered ‘new elements or findings’ in the meaning of Article 40(2) and (3) of the recast Procedures Directive⁴ (Directive 2013/32/EU, hereafter: RPD). This provision states that subsequent applications in which new elements or findings have arisen or are presented which add significantly to the likelihood of qualifying for international protection must be subjected to a full examination in accordance with Chapter II RPD. Section 5 assesses under which circumstances Member States may refrain from such full examination because it was the applicant’s fault that the new elements or findings have not been presented in the initial asylum procedure (Article 40(4) RPD). Finally, section 6 will address the question of the scope of judicial review in subsequent asylum procedures.

1.1 Recommendations for questions for preliminary ruling

Each section will end with conclusions and recommendations for questions for a preliminary ruling. According to Article 267 of the Treaty on the Functioning of the European Union (hereafter: TFEU),⁵ all national courts are permitted and national courts against whose decisions there is no judicial remedy are obligated to refer questions of EU law interpretation to the Court of Justice of the European Union (CJEU). This obligation applies unless the CJEU has ‘already dealt with the point of law in question’⁶ or ‘the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.’⁷ We will show in this expert advice that there is reasonable doubt as to the interpretation of several aspects of the RPD provisions regarding subsequent applications and medical reports.

1.2 Method of analysis undertaken and sources used

In order to identify the purpose and general scheme of the community law, the CJEU interprets the relevant provisions ‘on the basis of both the real intention of its author and the aim the latter seeks to achieve, in the light, in particular, of the versions in all languages’⁸ and ‘in light of the provision of Community law as a whole.’⁹ Consequently, this expert advice contains a linguistic, systematic and teleological analysis of the RPD for the purpose of assessing the Netherlands’ compliance with

⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180.

⁵ Treaty on the Functioning of the European Union [2008] OJ C115/47.

⁶ CJEU Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 14.

⁷ Ibid, para 16. See also K Lenaerts, and JA Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, *EUI Working Papers* (Academy of European Law, 2013), p 12 and M Derlén, *Multilingual Interpretation of European Union Law*, European Monographs, (Alphen aan den Rijn, Wolters Kluwer Law International, 2009), pp 73-77

⁸ CJEU Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, para 35. See also CJEU Case C-89/12 *Bark* [2013] ECR I-0000, para 36 and CJEC Case 29/69 *Stauder v Ulm* [1969] ECR 419, para 3.

⁹ CJEU Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 20.

the RPD. The CJEU has often not accepted a Member State relying on the clarity and unambiguousness of the EU law in its own language in isolation,¹⁰ suggesting that both discrepancies and consistency between language versions contribute to the uniform interpretation of relevant provisions.¹¹ A systematic analysis is necessary as EU law is intended to 'ensure *consistency* between its policies and activities'.¹² Consequently, provisions, especially those belonging to the same *system* of law, must be mutually consistent regarding principles, rules and concepts employed.¹³

As from 20 July 2015 the RPD should be implemented in the EU Member States (except Denmark, Ireland and the United Kingdom). For this reason this expert advice mainly focuses on the RPD and only refers to the Procedures Directive (Directive 2005/85/EC, hereafter: PD) if necessary for purposes of interpretation. Where both the RPD and the PD are concerned we refer to 'the Procedures Directives'. In addition to the two Procedures Directives, the Qualification Directives and the Charter of Fundamental Rights of the European Union¹⁴ (hereafter: the Charter), this expert advice relied on case law of the CJEU, the 2009 and 2011 drafts of the RPD and their detailed comments and explanatory memorandum and comparative and other reports from the European Commission and a number of Non-Government Organisations (NGOs) along with other academic works. The case law of the European Court of Human Rights (ECtHR) is relied on where relevant key principles are enunciated, because this case law inspires the CJEU in its interpretation of the provisions of the Charter.¹⁵

¹⁰ CJEU Case 372/88 *Milk Marketing Board of England and Wales v Cricket St Thomas Estate* [1990] ECR I-1345, paras 18-19.

¹¹ *Ibid*, para 19. See also CJEU Case 90/83 *Paterson v Weddel* [1984] ECR 1567, para 11, CJEU Case 228/87 *Pretura unificata di Torino v X* [1988] ECR 05099, para 14 and CJEU Case C-384/98, *D v W* [2000] ECR I-6795, para 17.

¹² Art 7 TFEU.

¹³ G Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' *German Law Journal* (2009), p 459.

¹⁴ *Charter of Fundamental Rights of the European Union* [2012] C326/02.

¹⁵ See Art 53(2) of the Charter.

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 applicants 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.¹⁶

Recently the highest administrative court, the Council of State¹⁷ has recognised the importance of medical reports as evidence in asylum procedures.¹⁸ 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.¹⁹

Furthermore, it is relevant whether the asylum applicant has submitted other evidence in support of the risk of *refoulement*.²⁰ The IND has to state reasons for its finding that a medical report does not

¹⁶ 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.

¹⁷ Afdeling bestuursrechtspraak van de Raad van State, www.raadvanstate.nl.

¹⁸ 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.

¹⁹ 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 reasonably did not deem the asylum account credible and the parts of the account that 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.

²⁰ ABRvS 19 February 2014, nr 201208171/1/V1, ECLI:NL:RVS:2014:600, para 5.1.

change its credibility assessment, and therefore does not warrant a further investigation, in its decision. The Council of State in its judgment extensively referred to the ECtHR's case law.

This case law is applicable only to medical reports submitted in a the *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 check before the start of the (first) asylum procedure²¹ in order to ensure that they are fit to be interviewed.²² 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.²³ This medical check 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 recognised²⁴ institution that writes medical reports, which is the Netherlands Institute for Human Rights and Medical Assessment (iMMO).²⁵ IMMO is a non-profit organisation where doctors write reports on a voluntary basis.²⁶ 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.²⁷ 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,²⁸ it is either by the Central Agency for Reception of Asylum Seekers (COA)²⁹ or by the IND.³⁰

²¹ In a subsequent application the IND is not obliged to offer such an examination.

²² Art 3:109(6) Aliens Decree (Vreemdelingenbesluit).

²³ Section C1/2.2 Aliens Circular (Vreemdelingencirculaire), in conformity with Art 3.109 (6) 2000 Aliens Decree.

²⁴ Section C14/3.5.2 Aliens Circular.

²⁵ Instituut voor Mensenrechten en Medisch Onderzoek, available at www.stichtingimmo.nl accessed 11 March 2015).

²⁶ www.stichtingimmo.nl/onderzoek-en-advies-2/beoordeling-van-de-aanvraag-immo-onderzoek/ and www.stichtingimmo.nl/rapporteurs-2/inleiding/.

²⁷ 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.

²⁸ iMMO, Toelichting Inspanningsverklaring kostenvergoeding, <http://www.stichtingimmo.nl/wp-content/uploads/2014/06/Toelichting-Inspanningsverklaring.pdf>, p 2

²⁹ 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).

³⁰ This can only happen in certain instances, 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 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.³¹ The appeal procedure takes around four weeks (one week for lodging the appeal, three weeks for deciding on the appeal).³² If further investigation is needed, the IND can refer an asylum application to the extended asylum procedure (VA-procedure), which extends the time limit within which a decision needs to be reached to six months. Because iMMO has limited capacity to do medical examinations,³³ the writing of a single report takes several months.³⁴ 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 it is uncertain whether iMMO will accept the request for a report.³⁵ 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.³⁶ 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.³⁷ Facts or circumstances which date from before the decision on the initial asylum application are considered to be new only if it is 'unreasonable to decide otherwise'³⁸ or if they could only be obtained after the previous decision.³⁹ The IND is restrictive in its consideration of whether a known fact or circumstance could not have been brought forward at the initial application.

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.'⁴⁰ If the applicant submits facts or

³¹ Art 3.114 Aliens Decree.

³² Art 69 Aliens Act (Vreemdelingenwet).

³³ 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)

³⁴ Ibid, p 95

³⁵ Evaluatie 2014, p 122.

³⁶ Section C1/4.4 Aliens Circular and ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3.

³⁷ AIDA, p 29.

³⁸ Ibid.

³⁹ Section C1/3.8 Aliens Circular, ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3

⁴⁰ ABRvS 06 March 2008, nr 200706839/V1, para 2.1.3.

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'.⁴¹

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*.⁴² In this judgment the ECtHR ruled that applicants who claim that Article 3 ECHR⁴³ will be violated upon their return to their country of origin, need to comply with the national procedural rules. 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 or she would expel the applicant.⁴⁴

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 apply⁴⁵, it has the competence to refuse the application by merely referring to its earlier decision.⁴⁶ The IND can also decide to take a decision on the substance of the application even though 'new facts or changed circumstances' are lacking.

2.3.1 'New facts or circumstances' or 'new elements or findings'?

The term 'new elements or findings' will be included in the new provisions of the Aliens Act 2000 which implement the RPD. According to the Secretary of State⁴⁷ and the Council of State⁴⁸ the term 'new facts or circumstances' included in Article 4:6 Awb has the *same meaning* as the term 'new elements or findings' which is used in the Procedures Directives in the context of subsequent asylum procedures (see further section 3). It may therefore be expected that the interpretation of the term 'new elements or findings' will be the same as the term 'new facts or changed circumstances'. The UNHCR already identified the Netherlands as having a 'limited',⁴⁹ 'strict',⁵⁰ 'restrictive',⁵¹ and

⁴¹ Section C1/3.8 Aliens Circular.

⁴² ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.

⁴³ 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).

⁴⁴ ABRvS 30 June 2014, nr 201301155/1/V2, ECLI:NL:RVS:2014:2483.

⁴⁵ Art 4:6 Awb.

⁴⁶ Ibid.

⁴⁷ TK 2014-2015 34088, nr 3, pp 11-12.

⁴⁸ ABRvS 28 June 2012, nr 201113489/1/V4, ECLI:NL:RVS:2012:BX0767.

⁴⁹ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC' COM (2010) 465 final, p 15 (hereafter: EC report 2010).

⁵⁰ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (March 2010), p 402 (hereafter: UNHCR 2010 report).

⁵¹ UNHCR 2010 Report, p 402.

‘narrow’⁵² interpretation of the term ‘new elements or findings’ in its report on the implementation of the Procedures Directive. This expert advice will argue that the Dutch restrictive interpretation may be contrary to EU law.

2.3.2 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.⁵³ The Council of State holds that a medical report has been written on the request of the applicant. It 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.⁵⁴ The same applies to applications rejected in the eight day AA-procedure, unless the applicant has indicated during this 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.⁵⁵

2.4 Judicial Review in subsequent asylum procedures

In subsequent asylum procedures judicial review by the Dutch courts in 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.⁵⁶ 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 1.3).⁵⁷ The Dutch courts have only applied the ‘Bahaddar exception’ in a few cases.⁵⁸ 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

⁵² UNHCR 2010 Report, p 402.

⁵³ ABRvS 11 December 2013, nr 201206788/1/V2, ECLI:NL:RVS:2013:2431.

⁵⁴ 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).

⁵⁵ ABRvS 4 December 2013, nr 201211051/1/V2, ECLI:NL:RVS:2013:2348, para 2.5.

⁵⁶ ABRvS 6 March 2008, nr 200706839/V1, para 2.1.2.

⁵⁷ ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94.

⁵⁸ 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.

his asylum account. The IND had not taken the medical report into account in its decision on the subsequent application.⁵⁹

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. It may be expected that this will not change after the implementation of the RPD, because the Secretary of State and the Council of State have indicated that the term 'new facts or circumstances' has the same meaning as the term 'new elements or findings' which is used in the RPD.

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, unless it considers the report to be a new fact. 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 sections we will discuss the EU legal framework with regard to medical reports, subsequent asylum procedures and judicial review. We will test whether Dutch law complies with this EU legal framework and recommend questions for a preliminary ruling where there is doubt about the interpretation of EU law.

⁵⁹ Rb Amsterdam 29 August 2014, AWB 14/17928.

3. The EU framework on medical reports and subsequent asylum applications

3.1 Introduction

In the previous section we have described the Dutch legal framework with regard to the examination of medical reports in subsequent asylum procedures by the IND and the courts. The aim of this expert advice is to test whether this legal framework complies with EU law. Therefore this section will set out the EU legal framework with regard to medical reports, subsequent asylum applications and judicial review. It will start by discussing the general purpose and scheme of the RPD. In sections 4 and 5 we will further examine the meaning of two specific phrases of the relevant EU legal framework, namely 'new elements or findings' (Article 40(2) and (3) of the RPD) and 'through no fault...incapable of asserting' (Article 40(4) of the RPD). Section 6 will focus on judicial review in subsequent asylum procedures.

3.2 Purpose of the Recast Procedures Directive

The Procedures Directives must be seen in light of the European Commission's efforts to reach harmonisation, motivated by the minimisation of secondary movements of asylum seekers. The establishment of the minimum framework was aimed at realising fairer and more efficient asylum procedures.⁶⁰ However, in striving for a Common European Asylum System (CEAS) since 1999, the Commission has encountered objections by many Member States.⁶¹ As a result of the difficult negotiations the PD contains many optional provisions and derogation clauses, such as removing Chapter II procedural guarantees during the subsequent applications process.⁶²

In its 2010 evaluation report, the Commission concluded that the PD had not been successful in 'creating a level playing field with respect to fair and efficient asylum procedures' and therefore promoted the drafting of the RPD as a tool to 'remedy the deficiencies identified' and 'to ensure full respect for the principle of non-*refoulement* and other rights enshrined in the EU Charter.'⁶³ The notes of the Commission on the draft of the RPD reiterated that 'procedural deficiencies in the legislative framework preventing a person to properly articulate his/her protection needs where the application is examined for the first time' and situations 'where evidence is obtained or testimony is given at a later stage, in particular in the case of survivors of torture' were important root causes of subsequent applications.⁶⁴

⁶⁰ EC 2010 Report, p 2. See also CJEU Case C-175/11, *HID and BA* [2013] ECLI:EU:C:2012:541, opinion of AG Bot, para 47.

⁶¹ T Strik, *Besluitvorming over asiel- en migratie richtlijnen: de wisselwerking tussen nationaal en Europees niveau* (Den Haag, Boom Juridische uitgevers, 2011), p 235.

⁶² *Ibid*, p 274.

⁶³ EC 2010 Report, p 15.

⁶⁴ European Commission, Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554 final (hereafter: Proposal RPD) and ANNEX (C7-0248/09), p 16.

Consequently, although the recast is also intended to leave room for ‘the particularities of national legal systems’,⁶⁵ an overall goal of the RPD is in fact ‘reducing divergent procedural arrangements, raising the standards of protection and ensuring consistent application across the EU.’⁶⁶ In addition to the abovementioned goals, the changes were intended to bring the RPD in line with the case law of the ECtHR and the CJEU,⁶⁷ ‘reduce exceptions to the procedural principles and guarantees ... and to provide for additional guarantees’⁶⁸ and, importantly, ‘introduce special guarantees for vulnerable asylum applicants ... includ[ing] rules dealing with medico-legal reports’.⁶⁹

3.3 Medical reports

The RPD introduces special procedural guarantees⁷⁰ to certain vulnerable groups due ‘to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or *as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence*’.⁷¹ The introduction of Article 18 into Chapter II of the RPD is in line with the aims of the RPD to ‘introduce special guarantees for vulnerable asylum applicants’.⁷²

Paragraph (1) of Article 18 provides that Member States must arrange (or in the alternative they may provide for the applicant to arrange) to be medically examined ‘subject to the applicant’s consent’ where:

1. there are ‘signs that might indicate past persecution or serious harm’ and
2. ‘the determining authority deems it relevant for the assessment of an application for international protection’.

The medical examination ‘shall be paid for out of public funds’ and the result of that examination, once available, ‘shall be submitted to the determining authority as soon as possible’.

Article 18(2) provides that where a Member State does not carry out a medical examination, it ‘shall inform the applicant that they may, on their own initiative and at their own cost, arrange for a medical examination concerning signs that indicate past persecution or serious harm’.

It is important to note that irrespective of how or when a medical examination was arranged, Article 18(3) obligates Member States to assess the result (ie, medical report) of a medical examination ‘along with other elements of the application’. This provision reflects the ECtHR case law which indicates that a medical report containing serious indications of past torture or ill-treatment or even documentation of serious scars and/or wounds allegedly caused by torture or ill-treatment may reverse the burden of proof. In such situation Member States are obliged to rebut

⁶⁵ European Commission, Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast) COM (2011) 319 final (hereafter: RPD amended proposal), Explanatory Memorandum, p 2.

⁶⁶ EC 2010 Report, pp 2 and 4. See also Recital 8 of the Preamble RPD.

⁶⁷ Proposal RPD, pp 6 and 9 and its ANNEX (C7-0248/09), p 18.

⁶⁸ Proposal RPD, p 6.

⁶⁹ Ibid.

⁷⁰ Art 24 RPD.

⁷¹ Recital 29 Preamble RPD, emphasis added.

⁷² Proposal RPD, Explanatory Memorandum, p 6.

either the content of the medical report or the presumption of past persecution or serious harm being a serious indication of future harm.⁷³

3.4 Subsequent asylum applications

Article 2(q) RPD defines a 'subsequent application' as 'a further application for international protection made after a final decision has been taken on a previous application'. Article 2(e) states that a 'final decision' means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status ... by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V' of the RPD (the first instance court or tribunal).

The Preamble of the RPD provides that Member States are able to decide a subsequent application to be inadmissible if no 'new evidence or arguments' are 'presented' because it would be 'disproportionate to oblige Member States to carry out a new full examination procedure'.⁷⁴ This is a slight change from the PD permitting Member States to apply procedures 'involving exceptions to the guarantees normally enjoyed by the applicant'.⁷⁵ Similarly, Article 33(2)(d) RPD provides that subsequent applications may be considered inadmissible if 'no new elements or findings' have been 'presented'. This is a significant change from Article 25(2)(f) PD, proclaiming 'identical' subsequent applications inadmissible. The change was made to clarify that the 'admissibility ground can be used if there are no new elements in case of a subsequent application. The link to subsequent applications (and their definition) [was] made clearer'.⁷⁶

3.4.1 The preliminary examination

Article 40(2) RPD instructs that a subsequent application 'shall be subject *first* to a preliminary examination'. A preliminary examination must determine whether the subsequent application contains 'elements or findings' that:

1. are 'new' having 'arisen or been presented';⁷⁷ and
2. 'relate' to the 'examination of whether the applicant qualifies' for international protection;⁷⁸ and
3. 'significantly add to the likelihood of the applicant qualifying' for international protection.⁷⁹

The same criteria were used in Article 32 PD.

⁷³ ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, para 42; ECtHR 10 March 2010, *RC v Sweden*, Appl no 41827/07, paras 50 and 53.

⁷⁴ Recital 36 Preamble RPD.

⁷⁵ Recital 15 Preamble PD.

⁷⁶ Detailed Explanation of the Amended Proposal: *Accompanying the document*: Amended proposal RPD ANNEX, 1 June 2011, p 33.

⁷⁷ Art 40(2)-(3) RPD and Art 32(3)-(4) PD.

⁷⁸ Art 40(2) RPD and Art 32(3) PD.

⁷⁹ Art 40(3) RPD and Art 32(4) PD.

Article 40(4)⁸⁰ RPD permits Member States an additional criterion of the preliminary examination, being that the applicant was ‘through no fault of his or her own, incapable of asserting’ the above criteria in a previous procedure, ‘in particular by exercising his or her right to an effective remedy’. Article 40(5) RPD⁸¹ clarifies that only when an application does not meet the above criteria and is not to be further examined, can the subsequent application be deemed inadmissible. A subsequent application that does meet the above criteria ‘shall be further examined in conformity with Chapter II.’⁸²

3.5 Appeals procedures and the right to an effective remedy

Article 46 RPD governs the basic requirements of the appeals procedures and is applicable to appeals in subsequent application. Article 46(1)(a)(ii) RPD refers to Article 33(2) RPD on inadmissible applications. In turn, that article is clearly linked to Article 40 on subsequent applications.⁸³ Consequently, Member States are obligated to ensure that applicant’s whose subsequent application has been deemed inadmissible by the national authorities ‘have the right to an effective remedy’,⁸⁴ which (amongst other guarantees) includes at least in appeals procedure before a court or tribunal of first instance ‘a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU’.

3.5.1 The EU right to an effective remedy

Article 46 RPD reflects the EU right to an effective remedy, which is laid down in Article 47 of the Charter. This Article provides amongst others that ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal’. Furthermore, ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. This provision is based on Articles 6 and 13 ECHR.’⁸⁵

3.5.2 The principle of effectiveness

The principle of effectiveness is closely related to the right to an effective remedy. It entails that national procedural rules should ‘not make it impossible in practice or excessively difficult to exercise the rights conferred’ to the individual by EU law.⁸⁶ This principle applies to the rights and

⁸⁰ Art 40(4) RPD and Art 32(6) PD.

⁸¹ The PD has no equivalent provision.

⁸² Art 40(3) RPD and Art 32(4) PD.

⁸³ Detailed Explanation of the Amended Proposal: *Accompanying the document*: Amended proposal RPD ANNEX, p 33.

⁸⁴ Art 46(1)-(2) RPD and Art 39(1) PD.

⁸⁵ Explanations relating to Art 47 of the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/17.

⁸⁶ Eg, CJEU Case C-383/13 PPU, *G and R* [2013] ECLI:EU:C:2013:533.

guarantees offered by the RPD as well as the right to asylum,⁸⁷ the prohibition of *refoulement*⁸⁸ and the right to an effective remedy.⁸⁹ Consequently national rules concerning (judicial review) in subsequent application may not undermine the effectiveness of these rights. The principle of effectiveness also applies to subsequent applications. Article 42(2) RPD explicitly states that national rules regarding the preliminary examination, including those that 'oblige' the applicant 'to indicate facts and substantiate evidence to justify a new procedure', 'shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.'⁹⁰

⁸⁷ Art 18 of the Charter.

⁸⁸ Art 19 of the Charter.

⁸⁹ Art 47 of the Charter. See also Recitals 13 and 27 Preamble and Arts 15(1), 16(2), 34(2), 35 and 39 PD and Recitals 8, 20, 25, 26, 29, 30 and 50 and Arts 6(2), 8(2) 14(1), 20(3), 22(1), 31(8)(h)(i), 42(2), 43(3) and 46(4) RPD.

⁹⁰ Art 42(2) RPD and Art 34(2) PD.

4. Are medical reports ‘new elements or findings’?

4.1 Introduction

Member States may stipulate that a preliminary examination needs to be conducted on a subsequent application for asylum. When considering a medical report in a subsequent application, a Member State must determine whether a medical report is an ‘element or finding’ that is ‘new’ having ‘arisen or been presented’ and whether it relates to the examination and significantly adds to the likelihood of an applicant qualifying for international protection. UNHCR found that the interpretation of these criteria, which were also displayed in Article 32 PD diverged widely among the Member States.⁹¹

Section 1 has explained that in the Dutch legal context the term ‘new elements and findings’ (or in national terms ‘new facts or changed circumstances’) is interpreted restrictively. This section will explore whether this restrictive interpretation is in conformity with EU law. In particular we assess whether a medical report as per the meaning of Article 18 RPD which has been submitted for the first time with a subsequent application should be considered a new element or finding. For this purpose we use systematic and linguistic interpretation. Our analysis will show that two factors may contribute to the differences in interpretation amongst Member States:

1. a lack of systematic and cohesive use of terms within the Procedures Directives themselves (see sections 4.2.2, 4.2.3)
2. inconsistencies between the language versions, with some language versions utilising terms, which are narrow and restrictive as a consequence of their ordinary meaning (see section 4.2.3).

The additional criterion permitted to Member States, being that it is through no fault of his or her own that an applicant did not submit new elements of findings at an earlier stage of the procedure, will be discussed in section 5 of this expert advice.

4.2 Systematic and linguistic interpretation of the Procedures Directives

4.2.1 Inconsistencies in the terms used in the context of subsequent applications

Looking at the RPD systematically highlights a number of inconsistencies in provisions on subsequent applications. For example, the key phrase, ‘elements or findings’, is repeated throughout the subsequent applications provision⁹² and the provisions on inadmissible applications⁹³ and withdrawal of international protection⁹⁴. However, the subsequent application recital⁹⁵ in the RPD

⁹¹ UNHCR 2010 Report, p 407.

⁹² Art 40 RPD and Art 32 PD.

⁹³ Art 33(2)(d) RPD, changed from ‘identical application’ in Art 35(2)(f) PD.

⁹⁴ Art 44 RPD.

⁹⁵ Art 36 RPD and Art 15 PD.

Preamble refers to ‘evidence or arguments’, while the provision regarding procedural rules in subsequent applications refers to ‘facts’, ‘evidence’ and separately, to ‘information’.⁹⁶

This inconsistent use of the terms ‘elements or findings’, which are relevant to the discussion of whether a medical report is an element or finding for the purposes of a subsequent application, are undermining the ability of Member States to uniformly interpret the RPD.

4.2.2 Medical reports as elements (or findings)

As has been highlighted above, the introduction of the medical examination under Article 18 was part of the stated aim of the RPD to improve procedural protection for vulnerable applicants in asylum cases. Article 18(3) RPD makes clear that ‘[t]he results of the medical examinations referred to in paragraphs 1 and 2 of that provision *shall* be assessed by the determining authority *along with the other elements* of the application.’

The duty of Member States ‘to assess the relevant elements of an application’ is provided in Article 4(1) QD. Article 4(2) QD puts forward a non-exhaustive list of what constitutes ‘elements referred to in paragraph 1’, including identity, nationality as well as ‘the reasons for applying for international protection’. Furthermore, paragraph (3) specifies that an assessment for international protection ‘includes taking into account ... (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm’. As provided by the detailed explanation of the RPD proposal,⁹⁷ Article 18 medical reports (ie, results of medical examinations) supporting claims of past persecution or serious harm fall within the non-exhaustive list of elements that can be provided by an applicant and should be considered by the authorities as per Article 4(2) and (3) QD.

It follows that medical reports should also be considered ‘elements of the subsequent application’ that a ‘Member State shall examine’.⁹⁸ It is important to note that the basic principles and guarantees of Chapter II RPD, of which Article 18 forms a part, do not apply to the preliminary examination of a subsequent application.⁹⁹ However, it is the classification of results of a medical examination as an ‘element’ of an application that is central to the discussion of the submission of medical reports in subsequent applications. Consequently, while the procedural guarantees around a medical examination¹⁰⁰ may be excluded during the initial stages of a subsequent application, a medical report, when presented by an applicant, must still be considered as an element and assessed as per the criteria of the preliminary examination.

⁹⁶ Art 42(2)(a) RPD and Art 34(2)(a) PD. The PD also referred to ‘information’ in Art 34(2)(b) and ‘elements with respect to ... circumstances or ... situation’ in Art 23(4)(h). These references were removed or reworded in the RPD.

⁹⁷ Proposal RPD ANNEX (C7-0248/09), p 9.

⁹⁸ Art 40(1) RPD. This was changed from the Art 32(1) PD ‘may examine’.

⁹⁹ Art 40(3) RPD and 32(4) PD.

¹⁰⁰ Such as the Member Stating having the obligation to arrange and pay for a medical examination if it is deemed relevant to an application for international protection (Art 18(1) RPD).

The coherence that comes from the consistent use of the term ‘elements’ (Dutch ‘elementen’) in the English and Dutch Procedures and Qualification Directives¹⁰¹ is reflected in most of the language versions¹⁰² to mean *a component part of a complex whole, one of the facts or conditions which determine the result of a process, deliberation, or inquiry*.¹⁰³ However, many of the language versions do not reflect the cohesion necessary for a uniform interpretation of medical reports as being one of the ‘elements’ of a subsequent application. While some of the different terms used, such as ‘components’, are synonymous with ‘elements’,¹⁰⁴ other language versions use more narrow terms such as ‘facts’, ‘data’, ‘information’, ‘documents’, ‘evidence’ and/or ‘circumstances’.¹⁰⁵ As with the word ‘findings’,¹⁰⁶ these terms can be narrow and restrictive in their meaning. In particular, a ‘fact’ is *an event or state of affairs known to have happened or existed* and could constitute *elements of the offence or parts of the cause of action*;¹⁰⁷ ‘evidence’ *tends to prove the existence or nonexistence of some fact*;¹⁰⁸ while ‘circumstances’ are *subordinate matters or details which can be viewed as extraneous ... but passing into the sense of subordinate parts of a fact*.¹⁰⁹ All these components can fall within the broader definition of an ‘element’ being *a component part of a complex whole*.¹¹⁰

Consequently, where only new facts (rather than elements or findings) are required by a Member State, this results in new evidence of *existing facts* not being accepted. For example, ‘if the applicant presents “new” evidence relating to issues raised in previous application, it is not likely that the subsequent application will be examined in the regular procedure’¹¹¹. Without a uniform interpretation of these terms, the linguistic and systematic differences will continue to manifest and result in the current significant divergence of Member States’ implementation of the subsequent applications criteria of the RPD, with potentially restrictive results.

¹⁰¹ The focus of the following analysis will be on Art 4(1), (2) QD and Arts 18(3) and 40(1)-(3) RPD. While Art 32(1)-(3) PD will not be referenced, it is important to note that some language versions, such as Czech, Estonian, Slovak and Swedish changed the terms they used during the writing of the RPD.

¹⁰² Bulgarian, Danish, French, Greek, Italian, Latvian, Maltese, Polish, Portuguese, Romanian, Slovenian.

¹⁰³ OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 26 January 2015, element (n.).

¹⁰⁴ Finnish uses two terms for elements, one in Art 4(1), (2) QD and Arts 18(3) and 40(2) and (3) RPD, and a similar term in Art 40(1) RPD; Latvian uses a term for elements in Arts 18(3), 40(1), (2) and (3) RPD, and a similar term meaning components in Art 4(1) and (2) QD.

¹⁰⁵ See Annex 1 attached to the expert advice.

¹⁰⁶ Ibid.

¹⁰⁷ J Law and EA Martin, *A Dictionary of Law* (Oxford University Press, 7 ed, 2009), available at www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248?rskey=uHyoSp&result=3 accessed 15 February 2015, fact (n.).

¹⁰⁸ Ibid, evidence (n.).

¹⁰⁹ OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 26 January 2015, circumstances (n.).

¹¹⁰ OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 26 January 2015, element (n.).

¹¹¹ UNHCR 2010 Report, p 405 (assessment of Finnish state practice).

4.2.3 Medical reports as ‘new’ elements or findings that ‘have been raised or presented’

The Dutch implementation of the ‘new’ criterion is that it is the duty of the applicant to present all information known to him in the initial application for asylum. For any facts or circumstances to be considered as ‘new’, it must have not been possible to submit them in the initial asylum procedure. This effectively means that these facts or circumstances must have occurred or come to the applicant’s knowledge (ie, arisen) after the appeal in the initial application procedure has been completed.¹¹² This position is also reflected in the practice of other Member States.¹¹³ As can be seen, this potentially bars the acceptance of a medical report as a new element in subsequent applications irrespective of whether the applicant mentioned prior torture or serious harm in their initial application.

It is therefore necessary to consider whether ‘new’ refers only to the existence of an element or finding or its knowledge by the applicant, or whether it in fact refers to an element or finding (be it circumstance, data, fact or evidence, see section 4.2.2) that has previously existed and was known to the applicant and has now been made *newly available* for the determining authority’s consideration. There are few guidelines regarding timings in the RPD.¹¹⁴ However, the phrase ‘have arisen or [have] been presented’ offers some guidance on the interpretation of what constitutes a ‘new’ element or finding.

Interpretation of the terms ‘arisen’ and ‘presented’

The term ‘arisen’ (Dutch ‘aan de orde zijn gekomen’) means *to spring up, come into existence or notice*.¹¹⁵ This is the meaning relied on by countries such as the Netherlands in their state practice, whereby they ‘generally require applicants to submit elements which were not known or could not have been known at the time of the previous examination’.¹¹⁶ The term ‘presented’ (Dutch ‘voorgelegd’) has the definition of *to submit, to bring into the presence of, to bring or lay before a court or authorities for consideration*.¹¹⁷ While ‘arisen’ does have a suggested temporal element in its definition, none exists in the meaning of ‘presented’.

It is important to note that, as with ‘arisen’, the term ‘presented’ is used consistently across the different language versions.¹¹⁸ The acceptance of both terms by Member States is supported by

¹¹² Art 83 Aliens Act, ABRvS 06 March 2008, nr 200706839/V1.

¹¹³ See eg, the UNHCR 2010 Report, p 401 (United Kingdom) and p 404 (France).

¹¹⁴ Art 34(2)(b) PD, which permits Member States to stipulate a time limit in which an applicant must submit newly obtained information, has been removed in the RPD.

¹¹⁵ OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 26 January 2015, Rise (v.) and arise (v.).

¹¹⁶ EC 2010 Report, p 12.

¹¹⁷ OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 26 January 2015, Present (v.).

¹¹⁸ **Presented:** Bulgarian, Czech, Danish, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish. **Arisen:** Czech, Danish, Finnish, French, German, Greek, Hungarian, Italian, Latvian (a term closer to discovered), Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish. However, the Bulgarian language version (in the PD and the RPD) uses two different terms: a term equivalent to ‘discovered’ in Arts 32(3) PD and 40(2) RPD; and a term closer to the meaning arisen in in Arts 32(4) PD and 40(3) RPD. The Estonian language version replaced a term close in meaning to arisen, which was used in Art 32(3) and (4) PD, with a term closer in meaning to

the fact that no changes of substance were made to either word during the recast.¹¹⁹ Interestingly, however, while Member States such as the Netherlands rely more heavily on implementing the term ‘arisen’,¹²⁰ ‘presented’ is the term that comes closest to systematic use across the Procedures Directives.¹²¹

The ‘or’ in the phrase ‘have arisen *or* [have] been presented’ suggests that an element can be new either when it has only recently come to light or existence, or alternatively, when it has been submitted to the determining authorities for the first time (irrespective of when a fact, circumstance or evidence existed and/or whether the applicant knew of it).

Fault is not relevant

Whether an element could have been presented earlier is not relevant to the question whether it should be considered ‘new’ within the meaning of Article 40(3) RPD. This is further supported by the existence of the possibility of applying the optional requirement mentioned in Article 40(4) RPD that an applicant is ‘through no fault of his or her own, incapable of asserting’ the elements or findings in a previous procedure. This criterion, by its very existence suggests that elements or findings may have existed in the previous procedure but were unable to be asserted by the applicant. It would therefore follow that narrowly interpreting the requirement for what constitutes ‘new’ elements or findings as only having come into existence or knowledge of the applicant after the final decision of a previous application would render this criterion superfluous and without function.

Furthermore it should be noted that Article 44 RPD provides that international protection be withdrawn ‘when new elements or findings arise’. Arguably the terms used in Articles 40(3) and 44 must be interpreted uniformly. If in subsequent asylum procedures elements can only be considered ‘new’ if they were not known or did not exist at the time of the earlier asylum decision, this should potentially also apply in cases of withdrawal of international protection. This could imply that international protection could not be withdrawn on the basis of elements which were known or existed at the time international protection was granted (eg facts on the basis of which an applicant could have been excluded from refugee status). Such an interpretation would be problematic.

Importantly it must be remembered that the assessment of whether an application is ‘new’ is an obligatory requirement of the preliminary examination. The optional ‘through no fault’ criterion mentioned in Article 40(4) RPD is not linked to the assessment of whether an element is ‘new’. It is a separate test that Member States *may* implement in addition to the core preliminary examination

established/identified in Art 40(2) and (3) RPD. The Maltese language version also changed the term for arisen used in the PD to a term more in line with discovered used in the RPD, but only in Art 40(2), Art 40(3) retained the term for arisen.

¹¹⁹ Mainly only grammatical changes were made to **Presented**: in eg, the Slovenian and Swedish versions; and for **Arisen**: in eg, the Bulgarian, Czech, Finnish, French, Greek, Italian, Portuguese, Romanian, Slovenian, Spanish and Swedish versions.

¹²⁰ The term arisen is only seen as part of a phrase together with presented in Art 40(2) and (3) RPD and Art 32(3) and (4) PD.

¹²¹ The term ‘presented’ is seen on its own in Recital 36 Preamble RPD and Recital 15 Preamble PD. Art 34(2)(b) PD also used the term ‘submission’ on prescribing time-limits on obtained information (this provision was removed for the RPD). Art 23 PD regarding the examination procedures used the term ‘raised’ when referring to new elements (this provision was substantially reworded in the RPD). The only variation is seen in Art 42(2)(a) RPD and Art 34(2)(a) PD, which talk about ‘indicating’ facts and ‘substantiating’ evidence.

criteria. Consequently, the ‘through no fault’ criterion (discussed in section 5 below) should not be a consideration when determining whether an element or finding, such as a medical report, is ‘new’ for the purposes of a preliminary examination of subsequent applications.

4.2.4 Relevance and significance of medical reports

Article 40(3) RPD provides that the new element must ‘significantly add to the likelihood of the applicant qualifying’ for international protection’ in order to warrant a full examination of the subsequent application. Do medical reports fulfil this condition?

According to Article 18 RPD, a medical report is the result of a medical examination carried out by qualified medical professionals concerning signs that might indicate past persecution or serious harm.¹²² A medical report that supports the existence of previous persecution or harm is considered to both relate¹²³ and add significantly to the likelihood of qualifying for international protection.¹²⁴ This follows from the acknowledgment in Article 4(4) QD that ‘[t]he fact that an applicant has already been subject to persecution or serious harm ... is a *serious indication* of the applicant’s well-founded fear of persecution or real risk of suffering serious harm’. A medical report which establishes a causal link between signs of physical or mental trauma and past torture or ill-treatment thus adds significantly to the likelihood of the applicant qualifying for international protection. This is sufficient to pass the test of the preliminary examination in the context of a subsequent application.¹²⁵ The presumption of a risk of future persecution or serious harm may be rebutted¹²⁶ by the Member State during a substantial examination of an application which complies with the guarantees of Chapter II RPD.

Importance of medical reports in the ECtHR’s case law

The relevance of medical reports to the examination of an application for asylum has also been recognised by the ECtHR. The ECtHR’s case law was a ‘key source of inspiration for developing further procedural safeguards for asylum applicants’.¹²⁷ The ECtHR in many cases has considered medical reports confirming the existence of physical torture both relevant and significant.¹²⁸ The ECtHR has held that once a medical report has been presented, a state would be in breach of its obligations under Article 3 of the ECHR if it was to dismiss it outright without a rebuttal.¹²⁹ This is

¹²² See Art 18(1) RPD.

¹²³ See Art 40(2) RPD and 32(3) PD.

¹²⁴ See Art 40(3) RPD and 32(4) PD.

¹²⁵ Art 40(3) RPD and 32(4) PD.

¹²⁶ Art 4(4) QD.

¹²⁷ Proposal RPD Explanatory Memorandum, p 6.

¹²⁸ ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, para 42. Additionally, evidence of physical scarring has also been held as putting an applicant at risk of future torture in the event of deportation, even while the origin of those scars as stemming from torture was not established. ECtHR 20 January 2014, *I v Sweden*, Appl no 61204/09, paras 59-69.

¹²⁹ ECtHR 19 September 2013, *RJ v France*, Appl no 10466/11, para 42.

due to the fact that the submission of such a report reverses the burden of proof from the applicant to the state to demonstrate that the psychological or physical trauma was otherwise caused.¹³⁰

This rebuttal is however outside the scope of a preliminary examination (which focuses solely on whether there are relevant and significant new elements or findings) and must be addressed in a further examination. It could therefore be argued that to dismiss a subsequent application that contains a medical report that confirms a causal link between physical and/or psychological trauma and persecution or serious harm, without a further examination of the applicant's claim, would put the Member State at risk of breaching its non-*refoulement* obligations.¹³¹

4.3 Conclusions and recommended questions for preliminary ruling

This section argues on the basis of a systemic and linguistic interpretation of the RPD that medical reports (whether presented in the initial or in a subsequent application) should be considered an 'element' within the meaning of Article 4 QD and 40(2) and (3) RPD. Furthermore it contends that for the question of whether a medical report (or any other element) should be considered as 'new', it is not relevant whether this report (or the facts or circumstances it substantiates) could have been presented in the initial asylum procedure for the following three reasons:

- the phrase 'have arisen or [have] been presented' suggests that an element can be 'new' either when it has only recently come to light or existence, or , when it has been submitted to the determining authorities *for the first time* (irrespective of when a fact, circumstance or evidence existed and/or whether the applicant knew of it);
- an interpretation of the term 'new' elements or findings as only having come into existence or knowledge of the applicant after the final decision of a previous application would render the 'through no fault' criterion laid down in Article 40(4) RPD superfluous and without function;
- such an interpretation would also make a uniform interpretation of the term 'new elements and findings' in Articles 40(2) and (3) and 44 (withdrawal of international protection) problematic .

Finally it was explained on the basis of Article 18 RPD and the ECtHR's case law, that medical reports should be considered to significantly add to the likelihood of the applicant qualifying for international protection.

¹³⁰ ECtHR 10 March 2010, *RC v Sweden*, Appl no 41827/07, paras 50 and 53. See however ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09).

¹³¹ Art 21 QD; Arts 18 and 19 the Charter; as well as Art 33 Geneva Convention.

4.3.1 Questions for preliminary ruling

Due to the wide divergence in national implementation by Member States, as well as the systematic and linguistic differences within and between the Procedures Directives, it is recommended that a CJEU interpretation should be requested, specifically of the phrases ‘new elements or findings ... have arisen or [have] been presented’:¹³²

1. Should a medical report be considered an ‘element or finding’ for the purposes of a preliminary examination of subsequent applications (Articles 40(2) and 40(3) RPD)?
2. Can an element or finding be interpreted as being ‘new’ irrespective of whether this element or finding:
 - a. supports facts (such as past persecution or serious harm) which have been brought forward during the first asylum procedure;
 - b. could have presented by the applicant in the initial or previous asylum procedure?

Or more particular with regard to medical reports:

3. Should a medical report which establishes a causal link between signs of physical or mental trauma and past persecution or serious harm be interpreted as a ‘new’ element or finding, irrespective of:
 - a. whether or not the applicant mentioned, indicated or showed signs regarding past persecution or serious harm in the initial asylum procedure;
 - b. whether the applicant could have (and therefore according to national law should have) presented the medical report in the initial asylum procedure; or
 - c. the moment the applicant requested and obtained the medical report?

¹³² Art 40(2) and (3) RPD and Art 32(3) and (4) PD.

5. Medical reports and the ‘through no fault ... incapable of asserting’ in subsequent applications for asylum

5.1 Introduction

Article 40(4) RPD stipulates with regard to subsequent applications that ‘Member States may provide that the application will *only* be further examined if the applicant concerned was, *through no fault of his or her own, incapable of asserting*’¹³³ the new findings or elements in the previous procedure. This section examines how this provision should be interpreted in particular in the context of medical reports which are submitted in a subsequent application.

It was explained in section 2.3 of this expert advice that in Dutch law, facts or circumstances which date from before the decision on the first asylum application are considered to be new only if it is unreasonable to decide otherwise¹³⁴ or if they could only be obtained after the previous decision.¹³⁵ A medical report which has been written on the request of the applicant is not considered to be ‘new’ if the applicant does not provide a legally justified reason the report could not have been requested in the initial procedure. The question is whether Dutch law is in conformity with Article 40(4) of the RPD.

This section deals with the question of whether Article 40(4) should be interpreted restrictively or not. Furthermore it argues that in the context of the assessment whether it can be considered the fault of the applicant that a medical report has not been presented in the initial asylum procedure the following questions should be taken into account:

1. Did the determining authority have the obligation under Article 18 RPD to arrange for a medical examination of the applicant in the initial procedure and did it fail to do so?
2. Did short time limits in the initial asylum procedure leave the applicant no other option than to submit the medical report in a subsequent asylum procedure?
3. Has the vulnerability of the applicant caused the late submission of the medical report?

5.2 A broad or a strict interpretation of Article 40(4) RPD?

It is relevant to assess first whether Article 40(4) RPD calls for a broad or a strict interpretation. An argument in favour of a broad interpretation, allowing for a large discretion to refrain from a full examination of subsequent applications, would be efficiency considerations. One of the goals of the RPD was to establish efficient asylum procedures.¹³⁶ Recital 36 of its Preamble provides:

Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full

¹³³ See also Art 32(6) PD.

¹³⁴ AIDA, p 29.

¹³⁵ Section C1/3.8 Aliens Circular, ABRvS 06 March 2008, nr. 200706839/V1, para 2.1.3.

¹³⁶ See recitals 4, 8 and 11 Preamble RPD.

examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.

This implies that Member States cannot be required to examine *the same application*¹³⁷ multiple times. However, as was concluded in section 3 of this expert advice, Article 40(4) RPD only applies where the applicant has presented ‘new elements or findings’ which significantly add to the likelihood of an applicant qualifying for international protection. In such a situation it would be inconsistent to speak of examining *the same application*.

An argument in favour of a strict interpretation of Article 40(4) RPD, allowing only limited discretion to refrain from a full examination of subsequent applications, is that Article 40(4) RPD derogates from the general rule laid down in Article 40(3) RPD. According to the case law of the CJEU, a faculty provided for in a directive derogating from the general rule must be interpreted strictly. Furthermore, the margin for manoeuvre offered to the Member States ‘must not be used by them in a manner which would undermine the objective of the Directive ... and the effectiveness thereof’.¹³⁸ One of the objectives of the Procedures Directives was to establish asylum procedures which are not only efficient but also *fair, effective and legally safe* and are *offering high protection standards*.¹³⁹

It should be concluded that the argument in favour of a strict interpretation of the discretionary power offered by Article 40(4) RPD seems to be more in line with the structure and purpose of the Directive than the argument in favour of a broad interpretation.

5.3 Failure of the determining authority to request a medical report

Section 3.3 explained that Article 18(1) RPD requires Member States to arrange (or provide that the applicant arranges) a medical examination regarding signs that might indicate past persecution or serious harm, where the Member State deems it *relevant for the assessment of an application for international protection*. If the determining authority finds that a medical report is not relevant, the applicant may arrange for a medical report himself or herself.¹⁴⁰ If this medical report is submitted in a subsequent application the determining authority should first establish whether this report should be considered a new element or finding *which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection*. If the answer to this question is affirmative, then the question arises whether Article 40(4) RPD may be applied, thus whether it is the applicant’s fault that the report has not been submitted during the first asylum procedure. Part of the examination should include the question of whether the determining authority could have decided in the initial asylum procedure that a medical report was not relevant in the meaning of Article 18 RPD. In this light it may be relevant whether signs of persecution or serious harm, such as scars or

¹³⁷ ‘Res judicata’ meaning a matter that has been adjudicated by a competent court and which therefore may not be pursued further by the same parties: OED Online, December 2014, Oxford University Press, available at www.oed.com accessed 10 June 2015.

¹³⁸ CJEU Case C-578/08 *Chakroun* [2010] ECR I-01839, para 43.

¹³⁹ Recital 8 Preamble RPD.

¹⁴⁰ Article 18(2) RPD.

psychological problems (eg post-traumatic stress disorder) existed and were known to the authorities at the time of the decision on the initial asylum application. It should be noted that according to Article 24(1) RPD 'Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees'. In the Netherlands the vulnerability of asylum applicants is assessed during the medical check (see section 2.2) and during the course of the asylum proceedings.

5.4 Time limits in the initial asylum procedure

In the Netherlands, lawyers may take steps to obtain a medical report in support of their client's asylum claim. These lawyers often notify the IND of this and ask the IND to postpone its decision until the report is ready. In practice, the IND often does not await the report, because it finds that the report will not be *relevant* to the decision.¹⁴¹ In this manner the IND effectively denies the applicant the possibility to submit that medical report in the initial application. Because of the short time limits in the AA-procedure (eight days for the administrative phase and a total of four weeks for the appeal procedure) the applicant may have no other option than to submit the medical report in a subsequent application. According to the Council of State the short time limits in the AA-procedure is not a legally justified reason for not submitting a medical report in the initial procedure.¹⁴²

Article 18 RPD does not require Member States to wait for the result of a medical examination before they make a decision. However it could be presumed that if the medical examination is being conducted because it is relevant for the assessment of the application pursuant to Article 18(1) RPD, there is an implied obligation on the Member State to await the results of that medical examination. If a Member State does not await the result of an Article 18(1) RPD medical examination prior to making a decision in an initial application, the medical report was not submitted until a subsequent application through no fault of the applicant.

Is there also a duty to await the results of an Article 18(2) RPD medical examination, which is conducted on the applicant's initiative and at his or her own cost? The RPD does not answer this question. It only provides in Article 18(3) RPD that 'the results of the medical examinations referred to in paragraphs 1 and 2 shall be assessed by the determining authority along with the other elements of the application'. It also indicates that the asylum applicant should be granted sufficient time to substantiate his or her asylum account. Article 31(2) RPD provides that the examination procedure is concluded as soon as possible, *without prejudice to an adequate and complete examination*. Furthermore the CJEU considered in *HID* that asylum applicants 'must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin'.¹⁴³ Also the ECtHR has recognised in its case law that 'time-limits should

¹⁴¹ Evaluatie 2014, p 122

¹⁴² ABRvS 4 December 2013, nr 201211051/1/V2, ECLI:NL:RVS:2013:2348, para 2.5.

¹⁴³ CJEU Case C-175/11, *HID and BA* [2013] ECLI:EU:C:2013:45, para 75.

not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim'.¹⁴⁴

It may be argued that the principle of effectiveness is violated if:

1. the applicant is, due to short time limits, reasonably not able to send a fully documented request for a medical examination and consequently submit the medical report during the initial asylum procedure; and
2. the medical report, which is considered a new element or finding which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection, is not taken into account because it is considered the applicant's fault that the report has not been submitted in the initial asylum procedure (Article 40(4) RPD) .

As a consequence, the short time limits in the initial procedure in combination with the broad interpretation of Article 40(4) RPD (see section 5.2) may render it impossible or excessively difficult in practice to exercise the right to asylum guaranteed by the QD.¹⁴⁵

5.5 Taking into account the vulnerability of the applicant

In the Netherlands some applicants who submitted a medical report in a subsequent application had already shown their scars or mentioned their psychological problems during the medical check at the start of the asylum procedure. Others were only able to talk about their past experiences of persecution and serious harm and/or the signs of physical or mental trauma resulting from them in a later stage of the initial procedure or after this procedure had finished. In some cases psychological problems only manifested themselves during or after the initial procedure. According to Dutch policy asylum applicants are expected to disclose or at least make mention of traumatic events immediately in the initial asylum procedure. New statements about traumatic experiences which were not mentioned in the initial asylum procedure and the medical report which substantiates them are not considered new facts or circumstances. The specific vulnerability of the applicant is not necessarily taken into account. This section argues that the vulnerability of the applicant should be taken into account when applying the 'through no fault' criteria of Article 40(4) RPD.

5.5.1 Relevant provisions in the RPD

Recital 29 of the Preamble RPD states that applicants may be in need of special procedural guarantees due to a range of circumstances including their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. It entreats Member States to 'endeavour to identify applicants in need of special procedural guarantees before a first instance decision is

¹⁴⁴ ECtHR 19 February 1998, *Bahaddar v the Netherlands*, Appl no 25894/94, para 45 and ECtHR 2 February 2012, *IM v France*, Appl no 9152/09.

¹⁴⁵ See also Art 42(2) RPD.

taken'. Member States should provide such applicants with 'adequate support, including sufficient time ... for their effective access to procedures and for presenting the elements needed.' The Explanatory Memorandum of the 2009 draft proposal of the RPD indicates that Article 18 on medical examinations is a special guarantee for vulnerable asylum applicants.¹⁴⁶

Several other provisions in the RPD recognise that vulnerable asylum applicants need more time and assistance to substantiate their asylum claim. Article 24 states that accelerated and border procedures may not be suitable for vulnerable asylum applicants. It also recognises that the need for special procedural guarantees may also become *apparent* at a later stage of the procedure. With regard to subsequent application recital 32 of the Preamble is relevant. It provides that 'the complexity of gender-related claims should be properly taken into account in procedures based on ... the notion of subsequent applications'.

5.5.2 Reasons for non-disclosure of past experiences of persecution or serious harm

An applicant may not request a medical report in the initial application due to the difficulty of disclosing traumatic experiences. A distinction can be made between three obstacles that may render it impossible for the applicant to tell his or her story within the timeframe of the initial application, namely shame, distrust and memory.

Shame as an inhibitor to disclosure

Asylum applicants who have lived through persecution, ill treatment or torture 'may experience shame, due to 'things they were forced to do, either deliberately by others or by force of the circumstances in which they found themselves.'¹⁴⁷ Shame has been shown to lead to avoidance behaviours, especially in cases in which the interviewer is a person in authority.¹⁴⁸ Avoidance responses are especially present in cases where the individual has been subject to sexual assault.¹⁴⁹ While individuals may be able to recall the traumatic event, they may find that they are unable to talk about it.¹⁵⁰ Shame is also an emotion that is strongly dependent on the social environment and cultural context.¹⁵¹ Most asylum seekers who come to Europe come from cultures in which honour and shame are deeply embedded and determine interaction and relations between individuals.¹⁵² Torture and sexual assault cross the accepted boundaries of interaction between people and constitute shameful events. In cultures where honour and shame are prominent, the response to shameful events is to remain silent about them.¹⁵³

Distrust as an inhibitor to disclosure

¹⁴⁶ Proposal RPD, p 6.

¹⁴⁷ J Herlihy and S Turner, 'Memory and seeking asylum', *European Journal of Psychotherapy & Counselling* (2007), p 268.

¹⁴⁸ Ibid, p 274.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ R Bruin, M Reneman and E Bloemen, *Care full Medico-legal reports and the Istanbul Protocol in asylum procedures* (Utrecht, Amnesty International, Pharos, Vluchtelingenwerk, 2006), p 63 (hereafter: Care Full).

¹⁵² Ibid.

¹⁵³ M Groen, 'De samenhang van schaamte en geweld', *Tijdschrift voor Psychotherapie* (2003), p 255-269.

Distrust may be another obstacle for the applicant to disclose traumatic events. It is one of the consequences of traumatising.¹⁵⁴ Distrust can focus in particular on government representatives, if the traumatic event has been caused by government authority in the country of origin.¹⁵⁵ A 'trustful atmosphere' is important for the applicant to be able to disclose his or her traumatic experiences.¹⁵⁶ By fostering a sense of trust it becomes more likely that the applicant elaborates more freely and effectively on his or her experiences.¹⁵⁷ It is not likely that distrust is curbed, and trauma is elaborated upon, during the one or two hearings by the IND within the short time frame of the initial application.

Memory as an inhibitor to disclosure

Memory also plays a role in the applicant's ability to disclose traumatic events. Many academic articles have been written on this topic, of which most conclude that psychological effects of traumatic events, such as PTSD, interfere with autobiographical memory which may lead to inconsistencies in the story the applicant tells.¹⁵⁸ This can make the applicant insecure about recounting the events or lie about the events.

5.6 Conclusion and recommended questions for preliminary ruling

This section argued that the 'through no fault' criteria of Article 40(4) of the RPD should be interpreted restrictively. The reason for that is that this provision derogates from the general rule that the substance of a subsequent application should be assessed according to the guarantees of Chapter II of the RPD if the applicant presented new elements or findings which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection. Furthermore it contended that when applying Article 40(4) the following questions should be taken into account:

1. Did the determining authority have the obligation under Article 18 of the RPD to arrange for a medical examination of the applicant in the initial procedure and did it fail to do so?
2. Did short time limits in the initial asylum procedure leave the applicant no other option than to submit the medical report in a subsequent asylum procedure?
3. Has the vulnerability of the applicant caused the late submission of the medical report?

5.6.1 Questions for preliminary ruling

¹⁵⁴ Care Full, p 67

¹⁵⁵ M Tankink, 'Zwijgen. Het omgaan met oorlogsherinneringen in Zuidwest-Oeganda', *Medische Antropologie* (2000), p. 207-224, cited in Care full.

¹⁵⁶ R Asgary and CL Smith 'Ethical and Professional Considerations Providing Medical Evaluation and Care to Refugee Asylum Seekers,' *American Journal of Bioethics* (2013), p 8.

¹⁵⁷ Ibid, p 4

¹⁵⁸ J Herlihy, R Jobson and S Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum', *Applied Cognitive Psychology* (2012), J Herlihy and S Turner, 'Memory and seeking asylum', *European Journal of Psychotherapy & Counselling* (2007) and H Rogers, S Fox and J Herlihy, 'The importance of looking credible: the impact of the behavioural sequelae', *Psychology, Crime & Law* (2015).

We would recommend the following questions for preliminary ruling:

Interpretation of Article 40(4) of the RPD

1. Does Article 40(4) of the RPD allow for a broad application in view of the purpose of the efficiency of asylum procedures (see recitals 4, 8, 11 and 32 of the Preamble RPD)? Or should Article 40(4) RPD be interpreted strictly because it derogates from the general rule that the substance of a subsequent application should be assessed according to the guarantees of Chapter II of the RPD if the applicant presented new elements or findings which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection (see CJEU Case C-578/08, Chakroun, para 43)?

The duty to request a medical report

2. What circumstances should be taken into account in the determination whether it is 'relevant' to order a medical examination in cases where the applicant shows signs of past persecution or serious harm (Article 18(1) RPD)?
 - a. Should the fact that the applicant has been identified under Article 24 RPD as a person in need of special procedural guarantees as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence, be considered such a circumstance?

Time limits in the asylum procedure

3. Under what circumstances can the determining authority refuse to wait for the result of a medical examination arranged by the determining authority or the applicant under Article 18(1) RPD?
4. Under what circumstances can the determining authority refuse to wait for the result of a medical examination arranged by the applicant under Article 18(2) RPD?
5. When applying Article 40(4) of the RPD, should the determining authority and the courts take into account whether the time limits in the initial asylum procedure allowed the applicant to request and/or submit a medical report within the meaning of Article 18 RPD in the initial asylum procedure (see Article 31(2) of the RPD and Case C-175/11, *HID* [2013], para 75)?
6. Is it contrary to the principle of effectiveness if:
 - a. the applicant is, due to short time limits, reasonably not able to send a fully documented request for a medical examination and subsequently submits the medical report during the initial asylum procedure; and
 - b. that medical report, which is considered a new element or finding which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection, is not taken into account because it is considered the applicant's fault that the report had not been submitted in the initial asylum procedure (Article 40(4) RPD).

Taking into account vulnerability

7. Should the determining authority and the courts take into account the vulnerability of the asylum applicant as referred to in recitals 29 and 32 of the Preamble and Article 24 of the RPD when applying Article 40(4) of the RPD?
8. Is the 'through no fault' requirement mentioned in Article 40(4) RPD met if applicants, that have not mentioned past traumatic experiences and/or scars, psychological or physical problems in the initial application, did not do so due to trauma-induced shame, distrust or memory loss?

6. Effective judicial review of subsequent applications

6.1 Introduction

Article 46(1) RPD requires Member States to ensure access to an effective remedy before a court or tribunal.¹⁵⁹ Furthermore it clearly specifies that Member States 'shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law'.¹⁶⁰ This ensures that the notion of effective remedy is in line with the case law of the CJEU and the ECtHR.¹⁶¹ This requirement also applies to the appeal against the decision to declare a subsequent application inadmissible.¹⁶²

In practice the IND may, in a subsequent application, examine the contents of a new medical report even though this medical report is not considered a 'new fact or changed circumstance' according to national law. If the IND subsequently concludes that the applicant does not meet the requirements for international protection, the applicant can appeal this decision before the district court.

According to the case law of the Council of State this court should assesses *ex officio* whether the medical report constitutes a 'new fact or changed circumstance' ('new element or finding'). If it concludes that the medical report is not a new fact or circumstance and the 'Bahaddar exception' does not apply, judicial review is limited to that finding.¹⁶³ On the basis of the 'ne bis in idem' principle the court is not allowed to review the substance of the IND's decision including the question whether the medical report contains serious indications that the applicant has been subjected to persecution or serious harm in the past.¹⁶⁴

This approach is potentially incompatible with Article 46 of Directive 2013/32/EU and the EU right to an effective remedy laid down in Article 47 of the Charter for the following reasons:

¹⁵⁹ Art 46 RPD and Art 39 PD.

¹⁶⁰ Art 46(3) RPD.

¹⁶¹ Proposal RPD and ANNEX (C7-0248/09), p 18; Detailed Explanation of the Amended Proposal: *Accompanying the document*: Amended proposal RPD, p 13.

¹⁶² Art 46(1)(a)(ii) and 40 RPD.

¹⁶³ See also section 2.4.

¹⁶⁴ ABRvS 4 April 2003, nr 200206882/1, ECLI:NL:RBSGR:2002:AF3708.

1. According to the Council of State the ‘ne bis in idem’ principle is intended to prevent the court from repeatedly having to decide regarding the same dispute.¹⁶⁵ However, if the applicant has presented ‘new elements or findings’ within the meaning of Article 40(2) and (3), the case cannot be considered ‘the same’ as in the initial asylum procedure. As we have argued in section 4.2.3, the question whether an element could have submitted in the initial asylum procedure is not relevant for the question whether it constitutes a ‘new element or finding’.
2. The fact that the Dutch courts are obliged to limit their review to an *ex officio* assessment of the existence of new facts or circumstances (new elements or findings), even where the IND has examined the substance of the case in accordance with Chapter II of the Procedures Directive, may violate the requirement of ‘full jurisdiction’ and rigorous scrutiny.

6.2 ‘Ne bis in idem’ and ‘new elements and findings’

6.2.1 A full examination by the IND: basis in the Directive

It may be assumed that in most cases in which the IND performs a full examination of a subsequent application, the elements presented by the applicant potentially substantiate a risk of *refoulement*. We argued in section 4 that in such a situation the elements should be considered ‘new elements or findings’ within the meaning of Article 40(2) ad (3) of the RPD. What the IND actually does in this situation is *refrain from applying Article 40(4) RPD*. The full examination of the application should comply with the Chapter II guarantees of the PRD including those provided in Article 18 on medical reports.

6.2.2 The ‘ne bis in idem’ principle applied by the courts

The ‘ne bis in idem’ principle applied by the Dutch courts in subsequent procedures prevents that the applicant, by appealing the rejection of a subsequent application, can achieve that the court examines the case as if the appeal concerned the initial asylum decision. According to the Council of State, the law does not provide the courts with discretion to the rule that an applicant can only appeal a decision once during a limited period of time. Therefore the ‘ne bis in idem’ principle also applies in situations where the administrative authorities have examined the substance of the subsequent application.

The CJEU recognises that principles of national law may warrant certain procedural rules, which may limit a person’s possibilities to rely on EU law. It held:

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the

¹⁶⁵ ‘[E]enzelfde geschil [kan] niet ten tweede male aan de rechter worden voorgelegd. See ABRvS 4 April 2003, nr 200206882/1, ECLI:NL:RBSGR:2002:AF3708.

basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.¹⁶⁶

The ‘ne bis in idem’ principle as applied in Dutch law may be considered a ‘basic principle’ of the Dutch system. However it may be questioned whether the application of this principle to subsequent applications can be justified where ‘new elements or findings’ within the meaning of Article 40(2) and (3) RPD have been presented. This is particularly so when the ‘ne bis in idem’ principle applies to a subsequent application where the applicant presented ‘new’ elements or findings and the IND could have used its discretionary power to declare the application inadmissible on the basis of Article 40(4) RPD (but did not do so, instead considering the application on its merits and rejecting it). In these instances, the application of the ‘ne bis in idem’ principle by the courts cannot be justified.

6.2.3 Reviewing medical reports in subsequent appeal proceedings

This expert advice argued that unless a medical report has been submitted in an earlier application, it meets the ‘new elements or findings’ that have been ‘raised or presented’ criteria (see section 4.2.3). Furthermore, it has been contended that medical reports that draw a link between past persecution or serious harm and physical or mental marks, will often significantly add to the likelihood of the applicant qualifying for international protection (see section 4.2.4). Therefore the application by the Dutch courts of the ‘ne bis in idem’ principle to cases in which a subsequent application was based on a new medical report is problematic.

6.3 Scope of judicial review: full jurisdiction and rigorous scrutiny

It could be possible that the IND finds that an element does not constitute a new element or finding, which significantly adds to the likelihood of the applicant qualifying for international protection in the meaning of Article 40(2) and (3) RPD. If the IND nevertheless decides to apply a full examination of the application in the light of this element, it has impliedly declared the subsequent application *admissible* for the purposes of Article 33 RPD. This is possible by virtue of Article 33(2) RPD.¹⁶⁷ In this situation as well as the situation described in section 6.2 the ‘ne bis in idem’ principle forces the court to limit its assessment to the ground for declaring the application admissible (the existence of new elements or findings). Consequently, the grounds for rejection of the subsequent application cannot be reviewed. It may be argued that this violates the requirement of a ‘full examination’ of both facts and points of law laid down in Article 46(3) RPD and the EU right to an effective remedy.

6.3.1 The CJEU’s case law

¹⁶⁶ CJEU Case C-312/93 *Peterbroeck* [1995] ECR I-04599, para 14 and Case C-276/01 *Steffensen* [2003] ECR I-3735, para 66.

¹⁶⁷ Art 25 PD.

The CJEU discussed in *Samba Diouf* what constitutes an effective remedy in an accelerated asylum procedure.¹⁶⁸ In that case, the CJEU clearly stated that

decisions against which an applicant for asylum must have a remedy under Article 39(1) of Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, *for formal or procedural reasons which preclude any decision on the substance*.¹⁶⁹

It considered that the principle of effective remedy is a fundamental principle of EU law¹⁷⁰ which is enshrined in Article 47 of the EU Charter.¹⁷¹ It made clear that for judicial review to be effective, the national courts must be able to review the legality of the asylum decision, as regards both the facts and the law.¹⁷² Furthermore the reasons which led the competent authority to reject the application for asylum should be 'the subject of a thorough review by the national court', within the framework of an action against the decision rejecting the application.¹⁷³ The CJEU did not accept that the national court would not be able to review a part of the asylum decision, in that case the grounds for processing the application in an accelerated procedure (grounds which coincided with the grounds for rejecting the application).

6.3.2 The full jurisdiction test

In *Samba Diouf* the CJEU refers to its earlier judgment in *Wilson*.¹⁷⁴ In *Wilson* the CJEU based the requirement of a review of both points of fact and points of law on the ECtHR's case law under Article 6 ECHR concerning the 'full jurisdiction test'. Therefore the ECtHR's case law under Article 6 ECHR may be useful to further clarify the requirements as to the scope and intensity of judicial review which follow from the EU right to an effective remedy.

When assessing whether a court or tribunal complies with the 'full jurisdiction' requirement, the ECtHR tests whether the court considered the submissions of the applicant 'on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts'.¹⁷⁵ The ECtHR applies this test on a case by case basis, carrying out an examination of both the case file and the relevant provisions of national law.¹⁷⁶ The ECtHR found violations of Article 6 ECHR in cases where the domestic courts or tribunals were precluded from determining a central issue in dispute and had considered themselves bound by the prior findings of administrative

¹⁶⁸ Case C-69/10, *Samba Diouf* [2011] ECR I-07151, para 45.

¹⁶⁹ *Ibid*, para 42, emphasis added.

¹⁷⁰ *Ibid*, para 35.

¹⁷¹ *Ibid*, paras 48-49.

¹⁷² *Ibid*, paras 57 and 61.

¹⁷³ *Ibid*, para 56.

¹⁷⁴ CJEU Case C-506/04 *Wilson* [2006] ECR I-08613.

¹⁷⁵ ECtHR 21 September 1993, *Zumtobel v Austria*, Appl no 12235/86, para 32.

¹⁷⁶ ECtHR 31 July 2008, *Družstevní Záložna Pila et al v the Czech Republic*, Appl no 72034/01, para 107, ECtHR 4 October 2001, *Potocka et al v Poland*, Appl no 33776/96, para 54, ECtHR 21 September 1993, *Zumtobel v Austria*, Appl no 12235/86, para 32.

bodies.¹⁷⁷ In *Terra Woningen* for example the Dutch District Court decided to set the rent for an apartment owned by the applicant at the legal minimum on the ground that the Provincial Executive had designated the area as one where soil cleaning was required. The District Court did not go into the question whether the Provincial Executive acted correctly in making this decision. According to the ECtHR, by doing so, the District Court deprived itself of jurisdiction to examine facts which were crucial for the determination of the dispute. It therefore found a violation of Article 6 ECHR.¹⁷⁸ In *Chevroi* a violation of Article 6 ECHR was found because the French Conseil d'Etat considered itself to be bound by an opinion of the Minister of Foreign Affairs concerning the applicability of a treaty between France and Algeria. It 'thereby voluntarily depriving itself of the power to examine and take into account factual evidence that could have been crucial for the practical resolution of the dispute before it'.¹⁷⁹

6.3.3 Reviewing medical reports in subsequent appeal proceedings

On the basis of these judgments it may be argued that the 'full jurisdiction' requirement and thus Articles 46(3) RPD and 47 of the Charter may be violated if the Dutch courts refrain from reviewing the grounds for rejecting a subsequent application claim for international protection. This includes a situation where the IND has assessed the substance of a medical report and concluded that this report does not lead to a well-founded fear of persecution or provide serious reasons for believing that the applicant will be subjected to serious harm. In such situation the Dutch courts deprive themselves of the power to examine and take into account factual evidence that could have been crucial for the practical resolution of the dispute before it.

6.4 Conclusions and recommended questions for preliminary ruling

The 'ne bis in idem' principle prevents the Dutch courts from reviewing the substance of a decision on a subsequent application if the applicant has not presented any new facts or circumstances, even if the IND did perform a full examination of this application. This section argued that this may violate Article 46(3) RPD and Article 47 of the Charter for two reasons:

1. It is inconsistent to apply the 'ne bis in idem' principle if the applicant has presented 'new elements or findings' in the meaning of Article 40(2) and (3) RPD. In such situation the court does not review 'the same case' as in the initial asylum procedure. The fact that an element could have been presented during the initial asylum procedure is not a relevant consideration when determining whether the element is 'new'. Therefore it can also not trigger the application of the 'ne bis in idem' principle.
2. The 'full jurisdiction' requirement which is developed in the ECtHR's case law under Article 6 ECHR and is incorporated in the EU right to an effective remedy does not allow a court to refrain voluntarily from assessing crucial grounds of an administrative decision.

¹⁷⁷ ECtHR 21 July 2011, *Sigma Radio Television v Cyprus*, Appl nos 32181/04 and 35122/05, para 157, ECtHR 31 July 2008, *Družstevní Záložna Píra et al v the Czech Republic*, Appl no 72034/01, para 111.

¹⁷⁸ ECtHR 28 November 1998, *Terra Woningen v the Netherlands*, Appl no 20641/92, paras 52-55. See also ECtHR 24 November 2005, *Capital Bank AD v Bulgaria*, Appl no 49429/99.

¹⁷⁹ ECtHR 13 February 2003, *Chevroi v France*, Appl no 49636/99, para 82.

6.4.1 Questions for preliminary ruling

In this light we propose the following questions for preliminary ruling:

1. Is the 'ne bis in idem' principle, as it is applied by the Dutch Council of State, a basic principle of Dutch law which should be taken into account in the assessment of whether the Dutch procedural rules concerning judicial review of decisions in subsequent applications render the exercise of EU law impossible or excessively difficult (the principle of effectiveness, see Case C-312/93 *Peterbroeck* [1995])?
2. Is the application of the 'ne bis in idem' principle justified in the situation that:
 - An applicant has presented a new element or finding (such as a medical report which has not been presented in the initial asylum procedure) in the meaning of Article 40(2) and (3); and
 - This element or finding adds significantly to the likelihood of the applicant qualifying for international protection?; and
 - The IND could have applied Article 40(4) RPD because the element could have been presented during the initial asylum procedure, but did not do so?
3. Is the 'full jurisdiction' requirement which has been incorporated in Article 46(3) RPD and 47 of the Charter violated in the situation that:
 - The 'ne bis in idem' principle prevents the Dutch courts from reviewing the substance of a decision on a subsequent application because the applicant was deemed not to have presented 'new facts or circumstances' ('new elements or findings'); and
 - The IND nonetheless performed a full assessment of this subsequent application in conformity with the guarantees of Chapter II RPD?

7 Summary of the expert opinion and recommended questions for preliminary ruling

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. It may be expected that this will not change after the implementation of the RPD, because the Secretary of State and the Council of State have indicated that the term ‘new facts or circumstances’ has the same meaning as the term ‘new elements or findings’ which is used in the RPD.

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 always limit its decision to the judgment of whether the medical report constitutes a new fact. The court will, on the basis of the ‘ne bis in idem’ principle, only review the IND’s assessment of the medical report, if it concludes that the report constitutes a new fact. 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.

The Recast Procedures Directive (RPD) intends to further harmonise the asylum procedures of the Member States. Furthermore it aims to raise the standards of protection and at the same time to ensure the efficiency of asylum procedures. The Directive has special regard to the special procedural needs of vulnerable asylum applicants. With regard to subsequent asylum applications Article 40(2) RPD instructs that a subsequent application ‘shall be subject *first* to a preliminary examination’. A preliminary examination must determine whether the subsequent application contains ‘elements or findings’ that:

1. are ‘new’ having ‘arisen or been presented’; and
2. ‘relate’ to the ‘examination of whether the applicant qualifies’ for international protection; and
3. ‘significantly add to the likelihood of the applicant qualifying’ for international protection.

Article 40(4) RPD permits Member States an additional criterion of the preliminary examination, being that the applicant was ‘through no fault of his or her own, incapable of asserting’ the above criteria in a previous procedure, ‘in particular by exercising his or her right to an effective remedy’. Member States are only required to assess the application in conformity with the procedural guarantees of Chapter II of the Directive if elements or findings as mentioned in Article 40(3) RPD have arisen or have been presented and Article 40(4) RPD does not apply.

With regard to medical reports Article 18(1) RPD provides that Member States must arrange (or in the alternative they may provide for the applicant to arrange) to be medically examined ‘subject to the applicant’s consent’ where there are ‘signs that might indicate past persecution or serious harm’ and ‘the determining authority deems it relevant for the assessment of an application

for international protection'. Article 18(3) RPD obligates Member States to assess the result (ie, medical report) of a medical examination 'along with other elements of the application'.

New elements or findings

This expert advice argues on the basis of a systemic and linguistic interpretation of the RPD that medical reports (whether presented in the initial or in a subsequent application) should be considered an 'element' within the meaning of Article 4 of the Qualification Directive and 40(2) and (3) RPD. Furthermore it contends that for the question of whether a medical report (or any other element) should be considered as 'new', it is not relevant whether this report (or the facts or circumstances it substantiates) could have been presented in the initial asylum procedure for the following three reasons:

- the phrase 'have arisen or [have] been presented' suggests that an element can be 'new' either when it has only recently come to light or existence, or , when it has been submitted to the determining authorities *for the first time* (irrespective of when a fact, circumstance or evidence existed and/or whether the applicant knew of it);
- an interpretation of the term 'new' elements or findings as only having come into existence or knowledge of the applicant after the final decision of a previous application would render the 'through no fault' criterion laid down in Article 40(4) RPD superfluous and without function;
- such an interpretation would also make a uniform interpretation of the term 'new elements and findings' in Articles 40(2) and (3) and 44 (withdrawal of international protection) problematic .

Finally it explains on the basis of Article 18 RPD and the ECtHR's case law, that medical reports should be considered to significantly add to the likelihood of the applicant qualifying for international protection.

Through no fault

This expert advice also argues that the 'through no fault' criteria of Article 40(4) of the RPD should be interpreted restrictively. The reason for that is that this provision derogates from the general rule that the substance of a subsequent application should be assessed according to the guarantees of Chapter II of the RPD if the applicant presented new elements or findings which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection. Furthermore it contends that when applying Article 40(4) the following questions should be taken into account:

1. Did the determining authority have the obligation under Article 18 of the RPD to arrange for a medical examination of the applicant in the initial procedure and did it fail to do so?
2. Did short time limits in the initial asylum procedure leave the applicant no other option than to submit the medical report in a subsequent asylum procedure?
3. Has the vulnerability of the applicant caused the late submission of the medical report?

Effective judicial review

Finally the expert advice addresses the right to effective judicial review in subsequent asylum procedures. Article 46 RPD governs the basic requirements of the appeals procedures and is applicable to appeals in subsequent application. Member States are therefore obligated to ensure that applicant's whose subsequent application has been deemed inadmissible by the national authorities 'have the right to an effective remedy'. This includes at least in appeals procedure before a court or tribunal of first instance 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU'.

In the Netherlands the 'ne bis in idem' principle prevents the Dutch courts from reviewing the substance of a decision on a subsequent application if the applicant has not presented any new facts or circumstances, even if the IND did perform a full examination of this application. This section argued that this may violate Article 46(3) RPD and Article 47 of the Charter for two reasons:

1. It is inconsistent to apply the 'ne bis in idem' principle if the applicant has presented 'new elements or findings' in the meaning of Article 40(2) and (3) RPD. In such situation the court does not review 'the same case' as in the initial asylum procedure. The fact that an element could have been presented during the initial asylum procedure is not a relevant consideration when determining whether the element is 'new'. Therefore it can also not trigger the application of the 'ne bis in idem' principle.
2. The 'full jurisdiction' requirement which is developed in the ECtHR's case law under Article 6 ECHR and is incorporated in the EU right to an effective remedy does not allow a court to refrain voluntarily from assessing crucial grounds of an administrative decision.

7.1 Recommended questions for preliminary ruling

The phrases 'new elements or findings ... have arisen or [have] been presented'

- Should a medical report be considered an 'element or finding' for the purposes of a preliminary examination of subsequent applications (Articles 40(2) and 40(3) RPD), taking into account that some language versions of Article 18(3) RPD qualify medical reports as 'facts', 'data', 'evidence', 'information', 'circumstances' instead of 'elements'.
- Can an element or finding be interpreted as being 'new' irrespective of whether this element or finding:
 - supports facts (such as past persecution or serious harm) which have been brought forward during the first asylum procedure;
 - could have (and therefore according to national law should have) presented by the applicant in the initial or previous asylum procedure;

More particular with regard to medical reports:

- Should a medical report which establishes a causal link between signs of physical or mental trauma and past persecution or serious harm be interpreted as a 'new' element or finding, irrespective of:

- whether or not the applicant mentioned, indicated or showed signs regarding past persecution or serious harm in the initial asylum procedure;
- whether the applicant could have (and therefore according to national law should have) presented the medical report in the initial asylum procedure; or
- the moment the applicant requested and obtained the medical report?

Through no fault

- Does Article 40(4) of the RPD allow for a broad application in view of the purpose of the efficiency of asylum procedures (see recitals 4, 8, 11 and 32 of the Preamble RPD)? Or should Article 40(4) RPD be interpreted strictly because it derogates from the general rule that the substance of a subsequent application should be assessed according to the guarantees of Chapter II of the RPD if the applicant presented new elements or findings which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection (see CJEU Case C-578/08, Chakroun, para 43)?

The duty to request a medical report

- Under what circumstances should the determining authority under Article 18(1) RPD deem it relevant to order a medical examination if the applicant shows signs of past persecution or serious harm?
- Should the fact that the applicant has been identified under Article 24 RPD as a person in need of special procedural guarantees as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence, be considered such a circumstance?

Time limits in the asylum procedure

- Under what circumstances can the determining authority refuse to wait for the result of a medical examination arranged by the determining authority or the applicant under Article 18(1) RPD?
- Under what circumstances can the determining authority refuse to wait for the result of a medical examination arranged by the applicant under Article 18(2) RPD?
- When applying Article 40(4) of the RPD, should the determining authority and the courts take into account whether the time limits in the initial asylum procedure allowed the applicant to request and/or submit a medical report within the meaning of Article 18 RPD in the initial asylum procedure (see Article 31(2) of the RPD and Case C-175/11, *HID* [2013], para 75)?
- Is it contrary to the principle of effectiveness if:
 - the applicant is, due to short time limits, reasonably not able to send a fully documented request for a medical examination and subsequently submits the medical report during the initial asylum procedure; and
 - that medical report, which is considered a new element or finding which significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection, is not taken into account because it is considered the applicant's fault that the report had not been submitted in the initial asylum procedure (Article 40(4) RPD).

Taking into account vulnerability

- Should the determining authority and the courts take into account the vulnerability of the asylum applicant as referred to in recitals 29 and 32 of the Preamble and Article 24 of the RPD when applying Article 40(4) of the RPD?
- Is the 'through no fault' requirement mentioned in Article 40(4) RPD met if applicants, that have not mentioned past traumatic experiences and/or scars, psychological or physical problems in the initial application, did not do so due to trauma-induced shame, distrust or memory loss?

Effective judicial review of subsequent asylum procedures

- Is the 'ne bis in idem' principle, as it is applied by the Dutch Council of State, a basic principle of Dutch law which should be taken into account in the assessment of whether the Dutch procedural rules concerning judicial review of decisions in subsequent applications render the exercise of EU law impossible or excessively difficult (the principle of effectiveness, see Case C-312/93 *Peterbroeck* [1995])?
- Is the application of the 'ne bis in idem' principle justified in the situation that:
 - An applicant has presented a new element or finding (such as a medical report which has not been presented in the initial asylum procedure) in the meaning of Article 40(2) and (3); and
 - This element or finding adds significantly to the likelihood of the applicant qualifying for international protection?; and
 - The IND could have applied Article 40(4) RPD because the element could have been presented during the initial asylum procedure, but did not do so?
- Is the 'full jurisdiction' requirement which has been incorporated in Article 46(3) RPD and 47 of the Charter violated in the situation that:
 - The 'ne bis in idem' principle prevents the Dutch courts from reviewing the substance of a decision on a subsequent application because the applicant was deemed not to have presented 'new facts or circumstances' ('new elements or findings'); and
 - The IND nonetheless performed a full assessment of this subsequent application in conformity with the guarantees of Chapter II RPD?

Annex 1

Explanation Footnote 105

- Czech uses the term for elements in Article 40(1) recast PD, and a term synonymous with elements meaning requisites/essentials in Article 4(1), (2) QD, a term meaning aspects in Article 18(3) recast PD, and a term meaning facts in Article 40(2)-(3) recast PD.
- Estonian uses a term that translates as evidence/data/facts in Article 4(1), (2) QD, but uses a term for documents in Articles 18(3), 40(1), (2), (3).
- German uses the term meaning elements in Article 40(1), (2), (3) recast PD, a term meaning data/information in Article 18(3) recast PD, and the term meaning evidence in Article 4(1), (2) QD.
- Hungarian uses the term for elements in Articles 18(3) and 40(1) recast PD, but a term meaning evidence in Article 4 QD, and a term meaning circumstances in Article 40(2)-(3) recast PD.
- Spanish uses the term elements in Article 4(1), (2) QD and Article 18(3) recast PD, but a term meaning data in Article 40(1), (2), (3) recast PD.
- Slovak uses a term for requisites/essentials in Article 4(1), (2) QD, a term meaning data in Articles 18(3) and 40(1) recast PD, and a term equivalent to facts/elements in Articles 40(2)-(3) recast PD.
- Interestingly, both the Czech and Slovak language versions had used the term for elements in Article 32(1), (3), (4) PD before changing it in the recast PD rewrite.
- Swedish uses the term more closely aligned to elements meaning parts in Article 18(3) recast PD, a synonymous term meaning factors is used in Article 4(1), (2) QD, and a term meaning facts is used in Article 40(1), (2), (3) of the recast PD.

Explanation footnote 106

Findings' (Dutch 'bevindingen') can fall into one of three categories of definitions.

- The first category of terms used is based on a broad, ordinary meaning definition of 'findings' beings *something that is found or discovered* ('finding' (n.), OED Online, accessed 26 January 2015).
 - Used by Czech, Slovak (two similar terms, one used in Article 32(3) and (4) PD) and the other in Article 40(2) and (3) recast PD), Slovenian. Polish used the term for information in the PD, but changed it for a term more aligned with the ordinary meaning of findings in the recast PD. Other languages, eg, Danish and Swedish, use an even broader term with a meaning more equivalent to information.
- The second category suggest a more narrow definition of *information discovered as a result of an inquiry or investigation, or a decision made by a judge or jury* (Finding (n.) Oxford Dictionaries, accessed 8 February 2015).
 - Used by German, Greek and Italian.

- The third category of terms is not related to either of the above definitions of findings. It could be argued, that the third category of terms fall within a subcategory of the ordinary meaning of findings, being *a find or discovery*.
 - Bulgarian and Hungarian use the term for facts, Romanian uses the term for data, Estonian and Finnish use a term for evidence, Spanish uses a term for circumstances, Portuguese uses a combination of evidence in Articles 32(3) PD and 40(2) recast PD and facts in Articles 32(4) PD and 40(4) recast PD.
- Other language versions have even more pronounced linguistic and systematic inconsistencies.
 - Maltese replaced a narrower results-type conclusions used in the PD, with the broader discovery-type findings, but only Article 40(2) recast PD, retaining conclusions in Article 40(3) recast PD; Latvian standardised the use of the terms facts in Article 32(3) PD and the broader term information in Article 32(4) PD to the more narrow facts in the recast PD, Article 40(2) and (3); French similarly replaced the term for facts in Article 32(4) PD and findings in Article 32(3), with facts in the recast PD, Article 40(2) and (3).