(Late) submission of new asylum motives during the appeal before first instance courts and the requirement of a full and *ex nunc* judicial examination of Article 46(3) RAPD

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1. Introduction

This expert opinion has been written on the request of the lawyers F.M. Holwerda and F.W. Verweij in the context of the preliminary questions referred to the CJEU in their cases[1]. The expert opinion was written in cooperation with the Strategic Litigation Committee of the Dutch Council for Refugees.

An asylum applicant who receives a negative decision on his or her asylum application has the right to an effective remedy.[2] According to Article 46(3) of the recast Asylum Procedures Directive (Directive 2013/32/EU, henceforth also: RAPD) Member States 'shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs'. This requirement was not included in the original Procedures Directive (Directive 2005/85/EC, henceforth: APD).

In the Netherlands an *ex nunc* review of the asylum decision by the first instance courts was introduced in 2001. According to the case-law of the highest administrative court in asylum cases in the Netherlands, the Administrative Jurisdiction Division of the Council of State (henceforth: AJD), this *ex nunc* judicial review does not include (most) new asylum motives. The AJD defines a new asylum motive as a ground for asking international protection in the Netherlands against an expected treatment in the country of origin[3], which has been submitted by the asylum applicant after the negative decision of the determining authority (in the Netherlands the Immigration and Naturalisation Service, henceforth: IND). In its case-law the AJD makes a distinction between three types of asylum motives:

1. Asylum motives, which are based on facts or circumstances, which arose during the appeal phase and therefore did not exist at the moment of the decision of the IND (type 1);
2. Asylum motives, which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase due to the fault of the asylum applicant (type 2);
3. Asylum motives, which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase for justified reasons (type 3).

The AJD ruled that only the third category of new asylum motives, can be taken into account by the first instance courts.[4]

After the implementation of the RAPD, several first instance courts in the Netherlands found that Article 46(3) RAPD requires them to take into account all new asylum motives.[5] They asked the State Secretary of Security and Justice to assess these new asylum motives during the appeal phase. However, the Secretary of State refused, arguing that the first instance courts could not take into account new asylum motives. As a result, the courts declared the appeal well-founded and quashed the asylum decision. Other first instance courts followed the AJD's standing case law and ruled that new asylum motives could not be taken into account during the appeal phase.[6]

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[1] CJEU Case C-586/17.

[2] Art 46(1) 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 (recast) [2013] OJ L 180/13 and Art 47 of the Charter of Fundamental Rights of the European Union.

[3] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 1.

[4] AJD 21 June 2013, ECLI:NL:RVS:2013:35, para 3.3.

[5] See eg District Court Den Haag, zp Haarlem 18 January 2016, ECLI:NL:RBDHA:2016:629, 13 May 2016, AWB 16/7115, 28 December 2016, ECLI:NL:RBDHA:2016:16667, 20 March 2017, AWB 16/21442 and District Court Den Haag, zp Zwolle 15 February 2016 and 18 May 2016, AWB 14/26371.

[6] District Court Den Haag zp Rotterdam 15 August 2015, AWB 15/5011 and Rb Den Haag 22 August 2017, AWB

On 4 October 2017 the AJD decided to refer the following questions for a preliminary ruling:

> 1(a) Does Article 46(3) of Directive 2013/32/EU read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, preclude a system under which the administrative court of first instance in asylum cases may not, in principle, take into account a ground for asylum first put forward by a foreign national in the judicial proceedings before it when assessing that action?
>
> 1(b) Does it matter in this regard whether a *de facto* new ground for asylum is put forward, that is to say, a ground for applying for international protection based on facts and circumstances which arose after the decision of the determining authority on the application for international protection, or whether it is a ground for asylum which was initially withheld, that is to say, a ground for applying for international protection which is based on facts and circumstances which arose before the decision of the determining authority on the application for international protection and which the foreign national knew about but was at fault for not disclosing in the administrative phase?
>
> 1(c) Does it matter in this regard whether the ground for asylum is put forward in the framework of judicial proceedings before the administrative court of first instance in asylum cases challenging a decision of the determining authority on a first application or on a subsequent application for international protection?
>
> 2. If Question 1(a) is answered in the affirmative, does EU law then also preclude an administrative court of first instance in asylum cases from choosing to refer the examination of a ground for asylum first put forward in the judicial proceedings before it for a fresh procedure before the determining authority, in order thereby to safeguard the due process of law in the judicial proceedings or to prevent those proceedings from being unduly delayed?[7]

The AJD referred the questions in two cases with different types of new asylum motives. The first case deals with a stateless Palestinian, who stated during the administrative phase that he left Lebanon in 2003 due to poor economic circumstances in the refugee camp where he was staying. He first submitted in the appeal phase that he fears persecution due to his involvement with Hamas. He was advised not to reveal his involvement with Hamas in the first step of the asylum process due to its status as a terrorist organisation. The new asylum motive in this case is thus based on facts and circumstances, which already existed at the moment of the IND's decision.[8]

The second case concerns a Palestinian, who first stated that he fled from the war in Syria. The application was rejected because he was registered at UNWRA in Lebanon and was therefore excluded from refugee protection on the basis of Article 12(2)(a) of the of the Recast Qualification Directive[9] (Directive 2011/95/EU, henceforth: RQD). He first stated in his appeal against this decision that he fears being persecuted by his father-in-law due to his remarriage in 2015. He also added that his ex-wife threatens to make his family secrets public, and cannot be sent back for this reason.

16/30733.

[7] Case C-586/17, AJD 4 October 2017, ECLI:NL:RVS:2017:2669.

[8] Type 2 asylum motive mentioned above.

[9] Directive of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless person 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 (recast)[2011] OJ L 337

These facts and circumstances, arose after the IND's decision.[10]

It should be noted that the cases in which the AJD referred these questions are not typical for the asylum cases in which new asylum motives are submitted during the appeal phase. New asylum motives often concern conversions to Christianity[11] or sexual orientation[12].

This expert opinion will examine the questions referred by the AJD. It will essentially address the question whether under EU law first instance courts may be precluded to take into account new asylum motives, as is the case in the Netherlands at the moment. If the courts may not be precluded to take new asylum motives into account, it is relevant to assess whether they are required to take such asylum motives into account or still have discretion to refer them to a subsequent asylum procedure, for example in order to guarantee the proper conduct of proceedings. The expert opinion will first address the first and last question referred by the AJD (questions 1a and 2). Subsequently it will examine the relevance of fault of the asylum applicant and whether it concerns a first or subsequent asylum procedure (questions 1b and 1c).

The expert opinion will first briefly set out the EU and national legal framework in Chapter 2. In Chapter 3 the text, system and purpose of the relevant EU legislation will be discussed. Chapter 4 will examine how the relevant EU legislation should be interpreted in the light of the right to an effective remedy. The relevance of fault of the asylum applicant and the relevance of the fact that it concerns a first or subsequent asylum procedure will be addressed in Chapter 5. Finally, Chapter 6 will draw conclusions and provide answers to the preliminary questions.

[10] Type 1 asylum motive mentioned above.

[11] See eg AJD 21 June 2013, ECLI:NL:RVS:2013:35, 26 May 2008, ECLI:NL:RVS:2008:BD3183.

[12] See eg District Court Den Haag, zp Haarlem 18 January 2016, ECLI:NL:RBDHA:2016:629, 13 May 2016, AWB 16/7115, 28 December 2016, ECLI:NL:RBDHA:2016:16667 and 20 March 2017, Awb 16/21442, District Court Den Haag zp Amsterdam, 29 November 2016, AWB 15/18112.

2. EU and national legal framework

This Chapter will briefly set out the most important provisions of EU legislation. Furthermore, it will address Dutch legislation and case law relevant to the preliminary questions at issue. In order to better understand the preliminary questions, it is necessary to pay some attention to the history of the *ex nunc* judicial review in the Netherlands.

2.1 The Recast Asylum Procedures Directive

The AJD has asked the Court of Justice of the European Union (henceforth: CJEU) to interpret Article 46(3) RAPD in the light of Article 47 of the Charter. Article 46(3) RAPD states:

> Member States shall ensure that an effective remedy provides for 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, at least in appeals procedures before a court or tribunal of first instance'.

Apart from Article 46(3) RAPD the provisions concerning subsequent asylum procedures are particularly relevant, because they address the scope of the appeal of the previous asylum procedure. Article 40(1) RAPD states:

> Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

Subsequent asylum applications may be declared inadmissible if no new elements or findings have arisen or have been presented by the asylum applicant, which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection.[13] However, Member States may also declare a subsequent asylum claim inadmissible if the new elements or the findings that have been presented by the applicant, could have been provided in the previous procedure, 'especially by using the right to an effective remedy under Article 46'.[14]

2.2 Recast Qualification Directive

Article 4 RQD concerns the assessment of asylum claims. It provides that it is the duty of the applicant to submit 'as soon as possible' all the relevant elements which are needed in order to substantiate his or her application for international protection. According to Article 4(2) the term 'elements' includes the applicant's statements and all the documentation at the applicant's disposal regarding amongst other things the reasons for applying for international protection. Member States should assess asylum applications on an individual basis and take into account the relevant statements and documentation presented by the applicant.[15]

Article 13 RQD provides for a right to be granted refugee status for persons who qualify as a refugee. Similarly, Article 18 RQD states that persons in need of subsidiary protection shall be granted a subsidiary protection status.

[13] Artt 33(2)(b), 40(2) and 40(3) RAPD.
[14] Art 40(4) and (5) RAPD.
[15] Art 4(3) RQD.

2.3 The Charter of Fundamental Rights of the European Union

Article 47 of the Charter guarantees the right to an effective remedy and to a fair trial. It provides that everyone whose rights and freedoms guaranteed by EU law 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. Article 47 also states that everyone shall have the possibility of being advised, defended and represented and that free legal assistance shall be made available to those who lack sufficient resources in so far as this is necessary to ensure effective access to justice.

Article 47 of the Charter is based on Articles 6 and 13 of European Convention on Human Rights (henceforth: ECHR). Article 52(3) of the Charter states that when the rights in the Charter 'correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'. This means that the right to an effective remedy under Article 47 of the Charter may not include less guarantees than Articles 6 and 13 ECHR. The CJEU uses the case law of the European Court of Human Rights (henceforth: ECtHR) under Article 6 and 13 ECHR as a source of inspiration for the interpretation of Article 47 of the Charter.[16] In this expert opinion we will therefore also include the ECtHR's case law in our assessment.

In the context of asylum, Article 18 and 19 of the Charter should be considered relevant. Article 18 states that the right to asylum shall be guaranteed with due respect for the Refugee Convention and the Treaty establishing the European Community. Article 19 of the Charter prohibits collective expulsions and the removal, expulsion or extradition to a State, where there is a serious risk of death penalty, torture or other inhuman or degrading treatment or punishment.

2.4 Dutch legal framework

In the Netherlands the administrative courts of first instance normally review administrative decisions *ex tunc*.[17] In 2001 the Dutch legislator introduced an *ex nunc* judicial review for first instance courts in asylum cases in Article 83 of the Aliens Act. The aim of this provision was to prevent that asylum applicants would submit subsequent asylum applications.[18] It concerned a discretionary power for the court to take into account new facts and circumstances. The court could choose to refuse to take into account such facts and circumstances in the light of the proper conduct of proceedings.[19]

In its case law the AJD gave a very strict interpretation of Article 83 Aliens Act. It limited the *ex nunc* judicial review to facts and circumstances which could not (and therefore did not need to) be submitted during the administrative phase.[20] If it could be attributed to the applicant that the facts or circumstances were not brought forward in the administrative phase, they could not be examined by the court.[21] Moreover, it held that new asylum motives were excluded from the *ex nunc* judicial review. New asylum motives should be submitted in a subsequent asylum procedure.[22]

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[16] See eg. CJEU Case C-562/13 *Abdida* [2014], para 52, Case C-348/16 *Moussa Sacko* [2017], paras 40, 47.
[17] Art 8:1 of the General Administrative Law Act (*Algemene wet bestuursrecht*, henceforth: GALA) provides that an administrative decision can be challenged before the administrative court. Art 8:69 GALA states that the administrative court decides on the basis of the grounds of appeal, the submitted documents, the preliminary examination, and the examination during the court hearing.
[18] TK 1998-1999, 26 732, nr 3, p 78.
[19] Ibid, pp 78-79.
[20] AJD 3 August 2001, ECLI:NL:RVS:2001:AF6653.
[21] Ibid.
[22] AJD 26 May 2008**,** ECLI:NL:RVS:2008:BD3183.

In 2010 the legislator changed the text of Article 83 Aliens Act. It considered in the explanations to the change of law that the courts should be able to include 'all facts and circumstances' in its assessment. This would prevent subsequent asylum procedures and 'reinforce the existing judicial review in the light of the ECtHR's requirement of a full and *ex nunc* judicial assessment of the question whether expulsion would violate Article 3 ECHR'.[23] Several years later the AJD decided that indeed all new facts and circumstances should be included in the *ex nunc* judicial review, irrespective whether they could have been submitted during the administrative phase.[24] However, it continued to exclude new asylum motives from the *ex nunc* judicial review. Only asylum motives which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase for justified reasons may be taken into account by the first instance court.[25] The AJD considered that it could not be derived from the parliamentary documents that the legislator wanted to depart from the AJD's case law that asylum motives are excluded from the *ex nunc* judicial review.[26]

In July 2015 the Dutch legislator implemented the recast Procedures Directive. Article 46(3) RAPD was implemented in Article 83a Aliens Act. The original implementation proposal stated that the *ex nunc* review had to be extended to include new asylum motives.[27] In its comments on the implementation proposal the AJD wrote to the Secretary of State that it did not favour an *ex nunc* assessment of new asylum motives.[28] The reasons for this are also mentioned in the judgment of 4 October 2017, referring the preliminary questions and will be discussed below. The State Secretary was convinced by the AJD and deleted the text concerning new asylum motives in Article 83a Aliens Act.[29]

Currently two provisions in the Aliens Act concern the *ex nunc* judicial review. Article 83 provides that the first instance court takes into account facts and circumstances, which were submitted after the asylum decision and changes in policy which have been announced after the asylum decision. The new facts or circumstances must be relevant for the decision on the asylum claim. Courts may refrain from taking into account new facts, circumstances or policy if this would harm the proper conduct of proceedings or lead to unacceptable delay. If the applicant did not substantiate the new facts or circumstances submitted during the appeal the court may provide the opportunity to make them plausible within a specified time limit. The Minister should inform the court and the applicant as soon as possible whether the new facts, circumstances or policy will lead to a confirmation, modification or withdrawal of the asylum decision. The court may provide the applicant the opportunity to respond in writing. All of this may not harm the proper conduct of proceedings or lead to unacceptable delay.

Article 83a implements Article 46(3) RAPD and provides that the judicial review carried out by the first instance court includes a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the need for international protection.

[23] TK 2008-2009, 31 994, nr 3, p 6.
[24] AJD 21 June 2013, ECLI:NL:RVS:2013:36.
[25] AJD 21 June 2013, ECLI: NL:RVS:2013:35, 19 July 2013, ECLI:NL:RVS:2013:434.
[26] AJD 21 June 2013, ECLI: NL:RVS:2013:35.
[27] TK 2014-2015, 34 088, nr 3, p 23.
[28] AJD, letter to the State Secretary of 30 January 2014, Annex with TK 2014-2015, 34 088, nr 3.
[29] TK 2014-2015, 34 088, nr 3, p 23.

3. Text, system and purpose of the RAPD

This Chapter will analyse whether the text, system and purpose of Article 46(3) RAPD and the other relevant provisions of the RAPD mentioned in the previous chapter, preclude a system under which the administrative court of first instance in asylum cases may not, in principle, take into account a ground for asylum first put forward by a foreign national in the judicial proceedings before it when assessing that action.

3.1 Text

Article 46(3) RAPD

According to Article 46(3) RAPD the examination by the first instance court should be full and *ex nunc* of both facts and points of law. The term '*ex nunc*' derives from the Latin and may translated as 'as of now'. This suggests that new information should be included in the court's examination.

Article 46(3) RAPD explicitly provides that the remedy should include, where applicable, 'an examination of the international protection needs'. This is thus a specification of the requirement of a full and *ex nunc* examination. The word 'examination', 'Prüfung' in German, 'examen' in French, 'onderzoek' in Dutch, seems to imply an active role of the court. This may imply that the court should not limit itself to the scope of the asylum decision, which is contested before the court. Otherwise the word 'review', 'Kontrolle', 'contrôle' or 'toetsing' could have been used. An 'examination of the international protection needs' can only be done on the basis of the asylum motives submitted by the applicant. Article 46(3) RAPD does not explicitly address the question whether the court should take into account new asylum motives. However, the requirement of an *ex nunc* examination of the international protection needs does seem to point in the direction of such requirement.[30]

Article 40(1) RAPD

Article 40(1) concerns the situation in which the applicant makes further representations or lodges a subsequent asylum application, while a previous asylum procedure has not yet been finished. It should be noted that a subsequent asylum application is defined as a further application for international protection made after a final decision has been taken on a previous application.[31] A decision on the asylum application, which is no longer subject to a remedy before a first instance court is considered a final decision.[32] The questions addressed in this expert opinion, thus may concern the situation in which the applicant makes 'further representations' during the appeal before the first instance court.

According to Article 40(1) the Member State 'shall examine' such representations 'in the context of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar the competent authorities can take into account and consider all the elements underlying the further representations within this framework'.[33] This implies that, if there is still an appeal pending and the national court can take into account and consider all the elements underlying the further representations, the court has an obligation to do so.[34]

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[30] In the same vein District Court Den Haag, zp Haarlem 18 January 2016, ECLI:NL:RBDHA:2016:629, para 3.8.2.
[31] Art 2q RAPD.
[32] Art 2e in connection with 46 RAPD.
[33] It follows from the system of the RAPD that a court or tribunal may be considered a 'competent authority'. Art 20(3) RAPD on legal assistance refers to a 'court or tribunal or other competent authority'. The term 'competent authority' should be distinguished from the term 'determining authority' which is defined in Art 2(f) RAPD as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such case'.
[34] Before the recast, Art 32(1) APD stipulated that a 'Member State may examine these further representations or the elements of the subsequent application', implying a discretionary power.

The question arises however, whether new asylum motives fall under the term 'further representations'. The term 'representation' is only used in Article 40(1) RAPD and the similar provision Article 40(7) RAPD, which concerns asylum cases falling within the scope of the Dublin Regulation (Regulation 604/2013[35]). Article 40(1) mentions that the competent authorities should be able to take into account and consider 'all the elements underlying' the further representations. The term 'element' is defined in Article 4(2) RQD and includes 'the applicant's statements and all the documentation at the applicant's disposal' for instance concerning his reasons for international protection. Representations thus concern claims by the applicant, which can be substantiated with statements and/or documentation. They would thus typically include reasons for international protection (asylum motives).

Also in other language versions Article 40(1) mentions a particular word, which does not correspond with other provisions in the RAPD, for instance 'alegaciones' (allegations) in Spanish and 'περαιτέρω διαβήματα' (further steps) in Greek. However, most language versions seem to use the word 'statements'.[36] Sometimes the same word for 'statement' is used as in Article 16 RAPD[37], concerning the content of the personal interview and sometimes (also) the same word as used in Article 4(2) RQD concerning the relevant elements for the assessment of the asylum application[38]. The word 'statements' may include statements concerning new asylum motives.

Moreover, it should be examined whether the term 'further' means 'new', in the sense that the representations have not been mentioned during the administrative phase. Other language versions also use the word 'further'[39], 'supplementary'[40] or 'additional'[41]. These words imply that something is added to what already existed. They do not exclude that the term 'further representations' (also) includes *new* asylum motives brought up by the applicant. Moreover, the French and Romanian version use the word 'new' instead of 'further'[42]. These language versions thus make explicit that the obligation in Article 40(1) also applies to *new* representations brought up by the applicant.

3.2 System

The AJD considers in its judgment of 4 October 2017 that the RAPD emphasises the administrative phase. It refers to the fact that the Directive contains important guarantees for the administrative phase, including concerning the personal interview.[43] The Directive includes only one provision on the appeal phase and several guarantees concerning amongst others access to information, the right to an interpreter, notification of the decision and the right to legal assistance.[44] The AJD seems to suggest that it follows from the fact that the RAPD primarily focuses on the administrative phase, that assessment of new asylum motives should preferably take place during the administrative phase instead of the appeal phase.

First of all, the sole fact that the number of provisions concerning the administrative phase is

[35] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.

[36] The term 'forklaringer 'in Danish, 'verklaringen' in Dutch, 'declarations' in French, 'Angaben' in German, 'dichiarazioni' in Italian, 'declarações' in Portugese, 'declarații' in Romanian and 'utsagor'in Swedish.

[37] In Dutch, French, Italian, Portuguese, Romanian, Swedish.

[38] In Danish, Dutch, French, German, Italian, Portuguese, Swedish.

[39] The term 'yderligere' in Danish, 'verdere' and 'nadere' in Dutch, 'weiteren' in German, 'ulteriori' in Italian, 'ytterligare' in Swedish.

[40] The term 'suplementares' in Portugese.

[41] The term 'aditionales' in Spanish.

[42] The term 'nouvelles' declarations' in French and 'declaratii noi' in Romanian.

[43] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 8.3.1.

[44] Artt 10(4), 12(2) and 20 RAPD.

much larger as compared to the number of provisions concerning the judicial phase, does not imply that new asylum motives should be assessed (only) in the administrative phase. The EU legislator may have included more provisions on the administrative phase because it found it more necessary to harmonise this phase of the asylum procedure. It also does not mean that the legislator wanted that all aspects of the assessment which are not explicitly mentioned in Article 46 RAPD (such as new asylum motives) should be addressed only in the administrative phase. The reference to the RQD in Article 46(3) RAPD indicates that there is no strict division between the assessment in the administrative and judicial phase.

It should be noted in this context, that the guarantees for the appeal phase mentioned in RAPD are complemented with the guarantees following from the right to an effective remedy and a fair trial guaranteed by Article 47 of the Charter. These rights include amongst others the rights of the defence[45], the right of access to a court or tribunal[46] and the right of equality of arms[47]. Furthermore, the guarantees of Chapter II RAPD do not apply to the preliminary examination of subsequent asylum applications.[48] If new asylum motives are not taken into account in the appeal phase, the applicant is forced to lodge a subsequent asylum application. The guarantees offered in the appeal phase should thus be compared to those offered in a subsequent asylum application. This expert opinion will make this comparison in section 4.4.3.

3.3 Purpose

The RAPD has several purposes, which are relevant in the context of the questions at issue. These will briefly be discussed in this section. The purpose of prevention of abuse, which is mentioned in the Commission proposal and in the AJD's judgment (but not in the Preamble to the RAPD), is only relevant with regard to new asylum motives, which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase due to the fault of the asylum applicant (type 2). Therefore, this purpose will be addressed in Chapter 5, which discusses the relevance of the fault of the asylum applicant. This purpose does not seem to be relevant for the answer to the more general question whether first instance courts should take into account new asylum motives (preliminary questions 1a and 2).

Respect for the non-refoulement principle and fundamental rights

The RAPD aims to guarantee the non-refoulement principle and fundamental rights of asylum applicants. Recital 3 of the Preamble to the RAPD states that the Common European Asylum System is based on the full and inclusive application of the Refugee Convention, 'thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution'.[49] Furthermore, the Preamble mentions that the RAPD seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter.[50]

According to the Commission proposal for the RAPD, the RAPD aimed to strengthen the procedural rights of asylum applicants in comparison with the APD. The amendments made in the RAPD were informed by evolving case law of the CJEU regarding the general principles of Community Law, such as the rights of the defence, the principle of equality of arms, and the right to effective judicial protection and the case law of the ECtHR.[51] The requirement of a full and *ex nunc*

[45] CJEU Case C-300/11 *ZZ* [2013], para 55.
[46] CJEU Case C-348/16 *Mousso Sacko* [2017], para 32.
[47] Ibid.
[48] Art 42 RAPD.
[49] Recital 3 Preamble RAPD.
[50] Recital 60 Preamble RAPD.
[51] European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, pp 6-7.

examination by first instance courts was also included in the RAPD in order to ensure compliance with the established case law of the CJEU and ECtHR.[52]

Quality and efficiency of decision-making

According to the RAPD, asylum procedures should be 'fair and efficient'.[53] Member States shall ensure that the examination procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.[54] This is considered to be in the interests of both Member States and asylum applicants.[55] The time-limit for decisions of the determining authority is six months.[56] Member States are free to lay down time-limits for the decisions of first instance courts.[57]

According to the RAPD it is in the interests of both Member States and applicants 'to ensure a correct recognition of international protection needs already at first instance'.[58] The Commission proposal for the RAPD mentions that the RAPD aims to improve both the efficiency and the quality of decision making 'by "frontloading" services, advice and expertise and encouraging MS to deliver, within a reasonable time, robust determinations at first instance'.[59] This should 'allow the asylum authorities to take robust decisions, based on complete and properly established factual circumstances of the claim, improve the defendability of negative decisions and reduce risk of their annulment by appeal bodies'.[60]

Prevention of subsequent asylum procedures

The RAPD does not mention that it aims to prevent subsequent asylum procedures. However, the Commission proposal for the RAPD states that it intends to 'reduce the root causes of repeated applications', by requiring the determining authority 'to take all necessary efforts to establish and assess the elements of the initial application in line with the cooperative requirement set out in Article 4(1) of the Qualification Directive'.[61] Article 40(1) RAPD can also be understood as a measure to prevent subsequent asylum applications.[62] Also Article 40(4) RAPD suggests that it can be expected of asylum applicants that they submit new elements or findings in the appeal phase. The fact that the asylum applicant has not submitted new elements or finding during the appeal phase of the previous procedure, may lead to the inadmissibility of a subsequent asylum application.[63]

3.4 Sub conclusion and application to the Dutch situation

The RAPD does not explicitly address the question whether the first instance courts may be precluded from taking into account new asylum motives (Preliminary question 1a) or are even

[52] European Commission, Amended proposal for a Directive of the European Parliament on common procedures for granting and withdrawing international protection status (Recast), COM (2011) 319 Annex, p 13.
[53] Recital 4, 8, 39, Preamble RAPD. See also European Commission, Amended proposal for a Directive of the European Parliament on common procedures for granting and withdrawing international protection status (Recast), COM (2011) 319, p 1, which mentions that the procedure should be 'fast and fair'.
[54] Art 31(2) RAPD.
[55] Recital 18 Preamble RAPD.
[56] Art 31(3) RAPD.
[57] Art 46(10) RAPD.
[58] Recital 22 Preamble RAPD.
[59] European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, pp 4-5.
[60] Ibid, p 5.
[61] European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, p 4.
[62] See also AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 8.3.3.
[63] Art 40(5) RAPD. See further Chapter 5.

required to do so (Question 2). However, both in the text, system and purpose of the RAPD arguments can be found that such courts should in principle take into account new asylum motives. A prohibition for first instance courts to take new asylum motives into account, as is currently applicable in the Dutch asylum system, seems particularly problematic.

It was argued in this section that the requirement of an '*ex nunc*' examination of the international protection needs suggests that the court should take into account new asylum motives. Moreover, it was contended that new asylum motives should fall under the term 'further representations' mentioned in Article 40(1) RAPD. Such further representations should in principle be included in a pending appeal procedure. The court may only refer such further representations to a subsequent asylum procedure, if it cannot take into account and consider all the underlying elements (statements and documentation).

Finally, the inclusion of new asylum motives in the appeal procedure promotes the aim of the RAPD as mentioned in the Preamble and the Commission proposals to enhance the procedural protection of asylum applicants, to ensure the correct recognition of international protection needs as soon as possible and preferably in the first asylum procedure and to prevent subsequent asylum applications.

It should be noted in this context that the only reason why the Dutch courts cannot take into account new asylum motives, is the AJD's case law. The Aliens Act nor any other law precludes that the courts take into account new asylum motives. Dutch law requires the courts to carry out an *ex nunc* examination, which includes new facts, circumstances and policy.[64] There is no reason to believe that, if the court takes into account new asylum motives, it will not be able to examine the underlying statements and documentation.[65] Indeed the Dutch first instance courts are able to examine one type of asylum motives, namely asylum motives, which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase for justified reasons (type 3).[66] This shows that they are able to examine new asylum motives and the underlying elements under national law.

The AJD asks the CJEU how Article 46(3) RAPD should be interpreted in the light of Article 47 of the Charter. Therefore, the next chapter of this expert opinion will interpret the relevant EU legislation in the light of the right to an effective remedy guaranteed by Article 47 of the Charter. It will show that the general prohibition for first instance courts to take into account new asylum motives is not in conformity with the right to an effective remedy. It also addresses the question whether national courts may refuse to take into account new asylum motives on an individual basis.

[64] Artt 83 and 83a Aliens Act. See also section 2.4 of this expert opinion.
[65] AJD 21 June 2013, ECLI:NL:RVS:2013:36.
[66] Ibid, see also the introduction and section 2.4 of this expert opinion.

4. The right to an effective remedy

This chapter will examine how Article 46(3) and 40 RAPD should be interpreted in the light of the right to an effective remedy guaranteed by Article 47 of the Charter. It will first argue that the exclusion of new asylum motives from the *ex nunc* examination of the first instance court should be considered a limitation to the right to an effective remedy.

Subsequently it will contend that the exclusion of new asylum motives from the examination by the first instance court may only be considered to respect the essence of the right to an effective remedy, if it does not deprive the asylum applicant of an effective remedy. If the court refers a new asylum motive to a subsequent asylum procedure, which does not suspend the expulsion (in the administrative and/or appeal phase), the applicant is deprived of an effective remedy.

Moreover, this chapter argues that a prohibition for first instance courts to taken into account new asylum motives is not proportionate. The first ground for this prohibition is that the subsequent asylum procedure would provide a better framework for the assessment of a new asylum motive. This ground relates to the division of tasks between the administrative and the judiciary in the Dutch asylum system. The second ground is that inclusion of new asylum motives in the examination by the first instance court would lead to delays in the asylum procedure. This chapter argues that it is questionable that these grounds are suitable and necessary measures to justify a prohibition of the assessment of new asylum motives by first instance courts. Moreover, it is questioned whether these grounds should be granted more weight than the interests of the applicant in the assessment of the asylum motive during the appeal phase. In order to establish whether it is indeed in the applicant's interest that new asylum motives are assessed during the appeal phase, the guarantees offered in first and subsequent asylum procedures will be compared.

Finally, this chapter will address the question whether national first instance courts have the discretionary power to decide to refer a new asylum motive to a subsequent asylum procedure in order to guarantee the proper conduct of proceedings or to prevent undesirable delay.

It should be noted that the objective to prevent abuse should not play a role in the context of preliminary questions 1a and 2 referred to the CJEU by the AJD. It is only relevant in the context of question 1b regarding asylum motives, which are based on facts or circumstances, which existed at the moment of the decision of the IND, and were submitted during the appeal phase due to the fault of the asylum applicant (type 2). This objective (and this type of asylum motive) will therefore be discussed in Chapter 5 on the relevance of the fault of the asylum applicant.

4.1 Limitation of the right to an effective remedy

The requirement of a 'full and ex nunc examination' laid down in Article 46(3) RAPD is based on the ECtHR's case law.[67] The ECtHR held in *Salah Sheekh v the Netherlands* that 'in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and ex nunc assessment is called for'. [68] It considered that '[I]t is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities.'[69] The ECtHR itself systematically applies an *ex nunc* assessment of the cases before it with regard to both new developments in the country of origin and the situation of the applicant.[70]

[67] The requirement of an *ex nunc* assessment by first instance courts in asylum cases is not unique under EU law. In *Orfanopoulos* the CJEU held that the principle of effectiveness requires that national courts perform an *ex nunc* assessment of the threat to public policy posed by an EU citizen against whom an expulsion measure was taken. CJEU Case C-482/01 *Orfanopoulos and Oliveiri* [2004].

[68] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 136. See also ECtHR 17 July 2008, *NA v The United Kingdom*, Appl no 25904/07, paras 112 and 119.

[69] ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 136.

[70] Concurring opinion of Judge Bianku with ECtHR (GC) 23 March 2016, *F.G. v Sweden*, Appl no 43611/11.

The ECtHR also requires national authorities, including courts, to apply an *ex nunc* assessment. In *F.G v Sweden* the ECtHR found that Article 3 ECHR would be violated, if the applicant would be returned to Iran 'without a proper ex nunc assessment by the Swedish authorities of the consequences of his religious conversion'. [71] It should be noted that this conversion constituted a new asylum motive in that case, because the applicant first relied on it in the appeal before the first instance court.[72] The ECtHR reproached the first instance court for the fact that 'it never made an assessment of the risk that the applicant might encounter, as a result of his conversion', even though it was aware of it.[73]

Judge Bianku in his concurring opinion with *F.G. v Sweden* considered that this judgment affirms that the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on removal. He refers to 'the consistent approach of ex nunc analysis taken in Strasbourg, also used by national courts for many years in their risk assessment, and now codified at EU level', referring to Article 46(3) RAPD.[74] It may be derived from this that the procedure limb of Article 3 ECHR requires national court to carry out an *ex nunc* examination, which arguably includes new asylum motives.[75]

Article 46(1) and (3) RAPD make clear that the right to an effective remedy requires a full and *ex nunc* examination by the national court. The exclusion of new asylum motives from this examination should thus be considered a limitation of the right to an effective remedy, which is also guaranteed by Article 47 of the Charter. According to Article 52(1) of the Charter such a limitation should:

1. be provided for by law;
2. respect the essence of those rights and freedoms
3. be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others; and
4. be in conformity with the principle of proportionality.

The interpretation of Article 46(3) RAPD should be in conformity with these requirements.[76] In the following sections this expert opinion will examine whether these requirements are met.

4.2 Legal basis for the limitation

The exclusion of new asylum motives from the *ex nunc* examination is based on the AJD's standing case law, not on a provision in the RAPD[77] or an explicit provision in Dutch national law. According to the AJD, the exclusion of new asylum motives follows from Articles 8:1 and 8:69 GALA. These provisions limit the scope of review of the administrative court in first instance to the scope of the administrative decision, which is challenged in the appeal.[78] This is arguably sufficient to comply with the condition that the limitation of Article 47 of the Charter is 'provided for by law'. It should be noted in this regard that the ECtHR accepts that a limitation is 'prescribed by law' if it follows from

[71] ECtHR (GC) 23 March 2016, *F.G. v Sweden*, Appl no 43611/11, paras 115 and 156.
[72] Ibid, paras 150-152.
[73] Ibid, paras 153-156.
[74] Concurring opinion of Judge Bianku with ECtHR (GC) 23 March 2016, *F.G. v Sweden*, Appl no 43611/11. An *ex nunc* assessment is also applied in expulsion cases under Article 8 ECHR. See ECtHR 23 June 2008, Appl no 1638/03, para 93. The ECtHR refers to the CJEU's judgment in *Orfanopoulos*.
[75] This was also recognised by the Dutch legislator. See TK 2008-2009, 31 994, nr 3, p 6.
[76] CJEU Case C-300/11 *ZZ* [2013], paras 51-52.
[77] Compare CJEU Case C-601/15 PPU *J.N.* [2016], para 51.
[78] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 6.2. A new asylum motive does not fall within the scope of the determining authority's decision. According to the AJD, Art 83 Aliens Act does not deviate from Artt 8:1 and 8:69 GALA.

case law, provided that it meets the requirement of accessibility and foreseeability.[79] The AJD's case law should be considered accessible and sufficiently precise.

4.3 Essence of the right to an effective remedy

According to the CJEU's case law the essence of the right to an effective remedy guaranteed in Article 47 of the Charter is not respected, where legislation does not provide 'for any possibility for an individual to pursue legal remedies'.[80] The exclusion of new asylum motives concerns one aspect of the scope of judicial review. It is not very likely that it should be considered to affect the essence of the right to an effective remedy, if two conditions are fulfilled.

First it should be guaranteed that the new asylum motive will be rigorously scrutinised in the context of a subsequent asylum procedure. Secondly, the applicant should be allowed to remain on the territory of the State during the administrative phase as well as the appeal phase of this procedure. Article 3 ECHR requires a 'rigourous scrutiny' of the risk of a violation of Article 3 ECHR by the determining authority and an independent body (in this case, the first instance court).[81] Such risk assessment should include all asylum motives, including motives relied on in a later stage of the procedure.[82]

4.3.1 The right to remain in subsequent asylum procedures

If the asylum applicant is not allowed to stay on the territory of the Member State during the administrative and appeal phase and therefore risks to be expelled before such rigorous scrutiny has taken place, the applicant does not have access to an effective remedy.[83] This follows from the ECtHR's case law concerning Article 3 and 13 ECHR[84], which requires in asylum cases that the first instance appeal or the request for an interim measure have automatic suspensive effect.[85] This suspensive effective should be provided for by law and not depend on practical arrangements.[86] In asylum cases a remedy cannot be considered effective if the applicant may request an interim measure, but this request does not automatically suspend the expulsion.[87] The CJEU has interpreted Article 47 of the Charter in line with this case law.[88]

The RAPD provides that the appeal or the request for an interim measure should have automatic suspensive effect in first asylum procedures.[89] In subsequent asylum procedures exceptions to this requirement are allowed. According to the RAPD the applicant has the right to

[79] ECtHR 26 April 1979, *Sunday Times*, Appl no 6538/74, para 49. The law is accessible if the citizen 'is able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'. Foreseeable means that 'the law is formulated with sufficient precision to enable the citizen to regulate his conduct'.

[80] CJEU Case C-362/14 *Schrems* [2015], para 95.

[81] ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98, para 39, ECtHR 19 January 2016, *M.D. and M.A. v Belgium*, Appl no 58689/12, paras 66-67, ECtHR (GC) 23 March 2016, *F.G. v Sweden*, Appl no 43611/11, paras 123 and 156. See also Recital 34 Preamble RAPD.

[82] ECtHR (GC) 23 March 2016, *F.G. v Sweden*, Appl no 43611/11, paras 153 and 156.

[83] ECtHR 26 April 2007, *Gebremedhin v France*, Appl no 25389/05, para 66.

[84] In this context it should be noted that Art 13 ECHR only requires an effective remedy if there is an arguable claim of a violation of Art 3 ECHR. However, whether there is such arguable claim should be assessed by an independent body. Expulsion before the moment such assessment has taken place, would violate Art 13 ECHR. See also ECtHR 20 September 2007, *Sultani v France*, Appl no 45223/05, paras 50-51.

[85] ECtHR 26 April 2007, *Gebremedhin v France*, Appl no 25389/05, para 66, ECtHR 5 October 2016, *A.M. v the Netherlands*, Appl no 29094/09, para 67.

[86] ECtHR 5 February 2002, *Conka v Belgium*, Appl no 51564/99, para 83.

[87] ECtHR 5 October 2016, *A.M. v the Netherlands*, Appl no 29094/09, para 67.

[88] CJEU Case C-562/13 *Abdida* [2014], para 53.

[89] Art 46(5) and (8) RAPD.

remain on the territory of the Netherlands from the moment he lodges a second asylum application.[90] However, this may be different, if the subsequent application has been made merely in order to delay or frustrate the return process.[91] If the applicant lodges a third or further asylum application, the Member State may refrain from granting the right to remain.[92] The Netherlands has implemented these exceptions to the right to remain.[93]

The appeal against a negative decision taken in a subsequent asylum procedure does not have suspensive effect, if the application has been declared inadmissible or rejected as manifestly unfounded. In a second asylum procedure the request for an interim measure will have suspensive effect, unless the subsequent application has been made merely in order to delay or frustrate the return process.[94] In a third asylum procedure the request for an interim measure does not need to have automatic suspensive effect.[95] The Netherlands implemented these exceptions to the right to a remedy with automatic suspensive effect in its legislation.[96]

The exclusion of the new asylum motive from the examination by the first instance court and the following referral to a subsequent asylum procedure may thus deprive the applicant of an effective remedy. Deprivation of the right to an effective remedy does not respect the essence of Article 47 of the Charter. This already indicates that the general prohibition for first instance courts to include a certain type of new asylum motives (type 1) in their assessment, which does not take into account the right to remain in the subsequent asylum procedure, is not in conformity with Article 47 of the Charter. In the next section it will furthermore be argued that such prohibition is not proportionate.

4.4 Proportionality of the limitation

The AJD mentions two grounds that would justify the (generic) exclusion of new asylum motives from the examination by the first instance court. First it refers to the ground that a subsequent asylum procedure would provide a better framework for the examination of new asylum motives. This ground relates closely to the distinctive roles of the determining authority and the court in the Dutch asylum system. Secondly, inclusion of new asylum motives would lead to delays in the appeal procedure before the first instance court.

First, it should be noted with regard to both justification grounds that the necessity of the exclusion of new asylum motives from the examination by the first instance courts can be doubted. The AJD itself recognised that asylum motives based on facts or circumstances, which existed at the moment of the decision of the IND, but were submitted during the appeal phase for justified reasons (type 3[97]), can be taken into account by the first instance court. Apparently, Articles 8:1 and 8:69 GALA do not preclude this.

It is not clear why the AJD thinks that the distinctive roles of the determining authority and the court or potential delays do not stand in the way of including this type of new asylum motives, but do necessitate the exclusion of the other types of asylum motives. In particular in cases in which the new asylum motive is based on facts or circumstances, which did not exist at the moment of the decision of the IND (type 1[98]), there are no other grounds for justification, which may explain the different approach taken by the AJD. Prevention of abuse may only be a justification for excluding

[90] Artt 9(1) and (2) and 41 RAPD.
[91] Art 41(1)(a) RAPD.
[92] Art 41(1)(b) RAPD.
[93] Art 3.1 Aliens Decree.
[94] Art 41(2)(c) and 41(1)(a) RAPD.
[95] Art 41(2)(c) and 41(1)(b) RAPD.
[96] Artt 7.3(2) and 3.1(2) Aliens Decree.
[97] See the Introduction of this expert opinion.
[98] Ibid.

asylum motives, which were submitted late due to the fault of the asylum applicant (type 2[99]). This will be addressed in Chapter 5.

Secondly, it should be noted that the AJD does not leave the first instance courts discretion to decide whether they take into account new asylum motives. It therefore does not allow the national court to take into account the specific circumstances of the case at issue, such as the expected delay caused by the examination of the new asylum motive. In *Moussa Sacko* the CJEU held:

> While Article 46 of Directive 2013/32 does not require a court or tribunal hearing an appeal against a decision rejecting an application for international protection to hear the applicant in all circumstances, it does not, nonetheless, authorise the national legislature to prevent that court or tribunal ordering that a hearing be held where, having found that the information gathered during the personal interview conducted in the procedure at first instance is insufficient, it considers it necessary to conduct a hearing to ensure that there is a full and *ex nunc* examination of both facts and points of law [..].[100]

It may be derived from this judgment that the prohibition for first instance courts to include certain types of new asylum motives in their assessment is not in conformity with Article 46(3) RAPD.

Finally, it may be questioned whether the two grounds for exclusion of new asylum motives are valid and whether they should be granted more weight than the interest of the asylum applicant. The following sections will first address the distinctive roles of the determining authority and the court and the prevention of delay in the appeal procedures as grounds of justification. After that, the interest of the asylum applicant in inclusion of the new asylum motives in the appeal phase will be discussed. This interest lies in the difference in procedural guarantees offered in a first or a subsequent asylum procedure.

4.4.1 The distinctive roles of the determining authority and the court

Both the State Secretary and the AJD are of the opinion that a subsequent asylum procedure provides a better framework for the examination of new asylum motives than the appeal phase. This opinion should be understood in the light of the AJD's case law concerning the scope and intensity of judicial review in asylum cases. In the Netherlands the intensity of judicial review in asylum cases is a much-debated issue. Until the implementation of the RAPD the Dutch first instance courts applied a marginal (reasonability) review of (the most important parts of) the credibility assessment by the determining authority.[101] It is not certain that the scope and intensity of judicial review which should, according to the AJD, be applied by the first instance courts in asylum cases, complies with Article 46(3) RAPD. If Article 46(3) RAPD requires a broader and/or more intensive examination by first instance court, the ground that a subsequent asylum procedure provides a better framework for the examination of new asylum motives may not be valid.

According to the AJD, Article 46(3) RAPD does not require the first instance courts to replace the asylum decision taken by the determining authority with its own assessment of the case.[102] Furthermore, it held that Article 46(3) RAPD does not provide a standard with regard to the intensity of judicial review.[103] The AJD considered that Union law as well as the ECtHR's case law allow national courts to leave discretion to the determining authority with regard to the assessment of the

[99] Ibid.
[100] Case C-348/16 *Moussa Sacko* [2017], para 48.
[101] AJD 27 January 2003, ECLI:NL:RVS:2003:AF5566.
[102] AJD 13 April 2016, ECLI:NL:RVS:2016:891. An English version of this judgment is available via www.raadvanstate.nl.
[103] AJD 13 April 2016, ECLI:NL:RVS:2016:890, para 5.1. An English version of this judgment is available via www.raadvanstate.nl.

credibility of statements which are not substantiated. In the AJD's view, the first instance courts are not better placed than the determining authority to carry out such credibility assessment. For that reason, the first instance courts need to pay deference to the determining authority's decision about the credibility of unsubstantiated statements.[104] The judicial review of such decisions was intensified from a reasonability review to a somewhat deferent review (*een enigszins terughoudende toets*). Many commentators found that it is questionable whether such deferent review fulfils the requirement of a 'full examination' laid down in Article 46(3) RAPD and that the AJD should have referred preliminary questions about this issue to the CJEU.[105] The AJD considered Article 46(3) RAPD 'acte clair' on this point.[106]

The Dutch first instance courts thus do not perform their own credibility assessment, nor do they apply a full review of the credibility assessment by the determining authority of unsubstantiated statements. In many cases new asylum motives will concern issues (conversion, sexual orientation), for which a new interview will be necessary and in which the applicant's statements will remain (largely) unsubstantiated. It does not fit in the Dutch system that the first instance courts will hear the applicant about the new asylum motives and examine new asylum motives themselves, Therefore, these courts are not allowed to do so.

However, there is no reason to assume that an assessment of new asylum motives by first instance courts does not fit into the system of the RAPD. As was mentioned before in section 3.1 of this expert opinion Article 46(3) RAPD requires these courts to carry out a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs. This seems to imply an active role of these courts. It cannot be derived from Article 46(3) RAPD that first instance courts have insufficient powers to address new asylum motives.

Referral to the determining authority

Even if the CJEU would rule that Article 46(3) RAPD allows first instance courts to refrain from carrying out their own assessment of (the credibility of) new asylum motives, this does not render the exclusion of new asylum motives from the assessment of the first instance court necessary in the Dutch system. Dutch law provides such courts with possibilities to take into account new asylum motives during the appeal phase, without carrying out their own credibility assessment. Several provisions enable the first instance courts to request the State Secretary to interview the applicant and assess the credibility of the applicant's statements and the risk of persecution and serious harm.[107] Arguably, these provisions should be used in order to comply with the requirement of an *ex nunc* examination of the international protection needs.[108]

4.4.2 Delays in the appeal procedure

Another justification for the exclusion of new asylum motives from the examination by the first

[104] Ibid, para 9.

[105] See K.E. Geertsema, 'De nieuwe rechterlijke toetsing asiel', *Asiel&Migrantenrecht* 2016, nr 5, pp 230-235 and the annotations with the AJD's judgments of 13 April 2016 of M. Reneman in *AB* 2016/195, the annotation of S. Kok in *JV* 2016/194.

[106] AJD 13 April 2016, ECLI:NL:RVS:2016:890, para 10.

[107] Art 83(5) Aliens Act requires the determining authority to inform the court and the applicant as soon as possible whether the new facts, circumstances or policy will lead to a confirmation, modification or withdrawal of the asylum decision. Article 8:51a GALA provides the first instance court a discretionary power to apply a so-called formal administrative loop (*bestuurlijke lus*). In an administrative loop, the administrative body is given the opportunity to rectify a deficiency in its decision before the court makes a final judgment. Finally, courts may apply an informal administrative loop, which is not laid down in the law. This enables the IND for example to subject the applicant to an additional interview. See eg District Court Den Haag zp Amsterdam, 29 November 2016, AWB 15/18112.

[108] Compare CJEU Case C-213/13 *Impresa Pizzarotti* [2014], para 62.

instance courts is that it would lead to delays in the appeal phase. It should be noted in this regard that the Netherlands have a very quick general asylum procedure, which takes eight (working) days.[109] Most asylum cases are processed in this general asylum procedure[110] or in an accelerated asylum procedure[111].[112] In all these cases the time-limit for the first instance courts to take a decision is four weeks from the moment the appeal was lodged, irrespective of whether they were admissible or manifestly unfounded or not.[113] This four-week time-limit for decision-making also applies to cases, which could not be decided in the general asylum procedure, for example because they were too complex, and were declared manifestly unfounded in the extended asylum procedure.[114] The reason for the four-week time-limit is that it would stimulate the courts to decide quickly.[115] Moreover, the Dutch government still wanted to be able to exclude applicants from reception facilities four weeks after their rejection in the general asylum procedure.[116] It is almost impossible to comply with the four-week time-limit, if a new asylum motive should be examined during the appeal before the first instance court.[117]

As was set out in section 3.3 of this expert opinion quick decision-making is one of the aims of the RAPD. Its importance is also recognised by the CJEU.[118] The prevention of delays in the asylum procedure may thus be an objective of general interest that justifies a limitation of the right to an effective remedy. However, the CJEU has also considered that speed of the asylum procedure may not affect the quality of decision-making.[119] In *Moussa Sacko* the CJEU held that the right to a hearing before a court cannot be dispensed with on grounds of speed, if it is necessary in order to carry out the full and *ex nunc* examination required.[120] It is thus questionable whether a prohibition for national courts to include new asylum motives in their examination can be based on grounds of speed alone.

The question should furthermore be raised whether the exclusion of new asylum motives from the examination of the first instance courts is indeed a suitable and necessary measure to prevent delay in the asylum procedure as a whole.[121] The assessment of a new asylum motive may lead to delay in some, but not in all cases. If asylum applicants need to raise the new asylum motive in a subsequent asylum procedure, it will normally take several weeks before the determining authority will examine this application.[122] The asylum applicant will be interviewed about his new asylum motives on day one of the subsequent asylum procedure.[123] An intended negative decision

[109] Art 3.110 Aliens Decree.
[110] In 2015 74% of all asylum applicants received a decision in the general asylum procedure. TK 2016/17, 34 550 VI, nr 11, p 115. The estimated percentage was 50% in 2011, more than 60% in 2012 and more than 70% in 2013. K. Zwaan e.a., *Evaluatie Herziene Asielprocedure*, WODC 2014, p 50.
[111] The accelerate procedure can be applied to Dublin cases, cases of asylum applicants originating from safe countries of origin or cases of asylum applicants who received international protection in another EU Member State. Art 3.109c and 3.109ca Aliens Decree.
[112] In July and August 2016 it concerned 20 % of all asylum cases. TK 2016/17, Aanhangsel van de Handelingen, nr 47, p 3.
[113] Art 83b Aliens Act.
[114] The extended asylum procedure has a time-limit of six months for taking the decision.
[115] TK 2014-2015, 34 088, nr 3, p 24. The Government found that this was necessary to prevent long term uncertainty about the applicant's future perspective.
[116] Ibid, p 25.
[117] Ibid, p 26. There is no sanction when the court does not meet the time limit. One of the reasons is that this could negatively influence the national courts' willingness to ensure final dispute resolution.
[118] Case C-348/16 *Moussa Sacko* [2017], para 44, Case C-175/11 *H.I.D. and B.A.* [2013].
[119] Case C-175/11 *H.I.D. and B.A.* [2013], para 75. See also Recital 20 Preamble RAPD and ECtHR, *I.M. v France*, Appl. no. 9152/09, 2 February 2012, para 147.
[120] Case C-348/16 *Moussa Sacko* [2017], para 45.
[121] Compare Case C-348/16 *Moussa Sacko* [2017], para 42.
[122] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 10.5.2.
[123] Art 3.118b(2)(a) Aliens Decree.

may be taken on the same day.[124] More complex subsequent asylum applications are referred to the general or extended asylum procedure. If the application is rejected, the applicant needs to lodge an appeal and (potentially) a higher appeal. This means that it will at least take several extra months before the applicant has certainty about his future perspective.

Moreover, it is not clear why the determining authority is able to interview an applicant on new asylum motives in the context of a subsequent asylum procedure and take an intended rejection within several weeks, while this would not be possible during the appeal phase. In complex cases the appeal phase will take longer, but so would a subsequent asylum procedure.

4.4.3 Comparing procedural guarantees in first and subsequent asylum procedures

In the proportionality test the interests of the Member State should be balanced against the interests of the asylum applicant. The interest of the applicant in inclusion of new asylum motives in the assessment of the appeal by the first instance court lies in the fact that during the appeal phase in the first asylum procedure more procedural guarantees are offered than in a subsequent asylum procedure. The State Secretary argues that inclusion of new asylum motives in the examination of the first instance court may not necessarily be in the interest of the asylum applicant, because a subsequent asylum procedure would offer a better framework for the assessment of the facts.[125] For this reason this section compares the procedural guarantees offered in both procedures. The comparison should in the first place be done on the basis of the guarantees included in the RAPD, which apply to all Member States. Secondly it is relevant to look at the legal position of applicants under Dutch law. Annex I and II with this expert opinion also contain an overview of the relevant procedural provisions under EU law and Dutch law.

Assessment of a new asylum motive in a subsequent asylum procedure

Subsequent asylum applications may be considered inadmissible if no new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection.[126] If the subsequent asylum application cannot or will not be declared inadmissible, the determining authority should be examined in conformity with the guarantees of Chapter II RAPD. In such a situation the application may be rejected as manifestly unfounded.[127] This may be done in an accelerated procedure[128], which may negatively affect the chances of the applicant. In the Netherlands subsequent asylum applications may be processed in an accelerated asylum procedure, which takes a maximum of three days.[129]

The determining authority should assess whether new elements or findings are presented in a preliminary examination.[130] There is a risk that in a preliminary examination a new asylum motive will be assessed in isolation from the other asylum motives brought forward in the first asylum procedure. The determining authority will examine whether the asylum motive significantly adds to the likelihood that the applicant will qualify for international protection. This risk of an isolated assessment is less significant when the asylum motive is included in the appeal against the rejection of the first asylum application.

It is important that all asylum motives are examined in a coherent manner. A combination of measures taken against the applicant may amount to persecution, while on their own these measures would not be qualified as such.[131] Furthermore, the combination of several grounds of

[124] Art 3.118b(2)(c) Alien Decree.
[125] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 10.2.
[126] Artt 33(2)(d) and 40(2), (3) and 5 RAPD.
[127] Art 32(2) and 31(8)(f) RAPD.
[128] Art 31(8)(f) RAPD. This also applies to unaccompanied minors. See Art 25(6)(a)(ii).
[129] Art 3.118b Aliens Decree.
[130] Artt 40(2) and 40(3) of the APD.
[131] Art 9(1)(b) RQD, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,

persecution may lead to a well-founded fear of persecution.[132] A new asylum motive may also add a risk factor that should be taken into account together with other risk factors in the assessment of the risk of serious harm.[133]

Moreover, the fact that an asylum motive has only been mentioned in a subsequent asylum procedure may have negative consequences for the credibility assessment.[134] This was also recognised by the AJD.[135] The fact that the decision that the asylum account presented in the first asylum procedure is not credible has become final, may negatively influence the credibility assessment of the statements concerning the new asylum motive in the subsequent asylum procedure.[136]

The right to a personal interview

The RAPD allows Member States to conduct the preliminary examination of a subsequent asylum application on the basis of a written submission, without conducting a personal interview.[137] Additionally, authorities *other* than the determining authority may conduct the personal interview in the preliminary examination of the subsequent asylum claim.[138]

In the Netherlands asylum applicants are offered a personal interview in a subsequent asylum procedure.[139]

The right to free legal assistance

In subsequent asylum procedures asylum applicants do not have the right to free legal assistance during the administrative phase.[140] During the appeal phase they do have a right to free legal assistance, unless the applicant's appeal is considered to have no tangible prospect of success.[141] The same rules apply to first asylum procedures. When a new asylum motive is included in the examination by the first instance court, the applicant has access to a free lawyer, while this may not be the case during the administrative phase of the subsequent asylum procedure.

In the Netherlands asylum applicants who lodge a subsequent asylum application do receive free legal assistance during the administrative phase. However, the compensation paid to the lawyer is lower in a subsequent than in a first asylum procedure.[142]

Access to reception facilities

The Reception Conditions Directive provides that Member States may reduce or completely withdraw material reception conditions for subsequent applicants.[143] The Netherlands makes use of this possibility.[144] An asylum applicant does receive reception again, if the IND decides that the application cannot be examined in the three-day accelerated procedure and refers the case to the general or extended asylum procedure. The applicant therefore does not have reception from the

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reedited version, Geneva (2011), paras 14, 35, 55, 201.

[132] UNHCR Handbook, paras 33, 67.

[133] ECtHR 17 July 2008, *NA v the United Kingdom,* Appl no 25904/07.

[134] Compare CJEU Joined Cases C-148/13 to C-150/13 *A. B. and C.*, paras 70-71.

[135] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 10.4.

[136] M. Reneman, J. de Lange and J. Smeekes, Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken, Interpretatie en waardering en geloofwaardigheidsbeoordeling in asielzaken, Interpretatie en waardering van medische rapporten door de IND van medische rapporten door de IND, *Asiel&Migrantenrecht* 2016, nr 10, pp 460-473.

[137] Art 34(1) and 42(2)(b) RAPD.

[138] Art 34(2) RAPD.

[139] Art 3.118(2)(a) Aliens Decree. See also AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 10.3.

[140] Art 20 RAPD.

[141] Art 20(3) RAPD.

[142] Art 5a(5) Regulation Compensation Legal Aid (*Besluit vergoedingen rechtsbijstand*).

[143] Art 20(1)(c) RAPD.

[144] Art 10(1)(e) Regulation benefits asylum seekers (*Regeling Verstrekkingen Asielzoekers*).

moment he indicates to the IND that he want to lodge a subsequent asylum application until the moment of the asylum decision or the referral to the general or extended asylum procedure. This may reduce his opportunities to prepare the subsequent asylum application and have contact with his lawyer.

During the appeal phase in the first asylum procedure the applicant has a right to reception if the appeal has suspensive effect. If the appeal does not have suspensive effect, the asylum applicant has a right of reception during the period for voluntary return or if the request for interim measure has been granted.[145]

Date of entry of the asylum status

Articles 13 and 18 RQD provide that refugees and persons eligible for subsidiary protection should be granted a refugee/subsidiary protection status. The RAPD and RQD do not contain requirements with regard to the date of entry of such status.

In the Netherlands the asylum status is granted retroactively from the date of the asylum application.[146] This means that if a new asylum motive leads to an asylum status during the appeal phase in the first asylum procedure the asylum status will be granted from the date of the first asylum application. If the new asylum motive is submitted in a subsequent asylum procedure, the asylum status will be granted from the date of the subsequent asylum application. This means for example that the applicant will be eligible for a long-term resident status at a later moment in time.

4.4.4 Sub conclusion proportionality

It was contended in this section that the general prohibition for first instance courts to include a certain type of new asylum motives (type 1) in their examination cannot be considered a suitable and necessary limitation of the right to an effective remedy. Moreover, the referral of a new asylum motive to the subsequent asylum procedure has negative consequences for the position of the asylum applicant. It should therefore be concluded that this prohibition cannot be considered proportionate.

4.5 Requirement or discretionary power for the first instance court?

The question remains whether the first instance court has the discretionary power to decide to refer a new asylum motive to a subsequent asylum procedure in order to guarantee the proper conduct of proceedings or to prevent undesirable delay (preliminary question 2). It was argued in section 4.3 that the essence of the right to an effective remedy would not be respected if the asylum applicant would be deprived of an effective remedy as a result of the referral of the new asylum motive to a subsequent asylum procedure. This situation occurs if it is not guaranteed that:

1. the new asylum motive will be rigorously scrutinised during the subsequent procedure; and
2. the applicant is allowed to remain on the territory of the Member State during the administrative phase and the first instance appeal of the subsequent asylum procedure.

In other situations, the court should make a proportionality assessment taking into account the specific circumstances of the case. As was noted in section 4.4.2 of this expert opinion it is questionable whether the objective of preventing delay can be granted much weight in this assessment.

The court should take into account the interest of the proper conduct of proceedings. It

[145] Art 5 Regulation Reception Asylum Applicants (*Regeling Verstrekkingen Asielzoekers*).
[146] Art 44(2) Aliens Act.

should for example examine whether the rights of the defence and the principle of equality of arms can be ensured when the new asylum motives are examined during the appeal proceedings. In principle, in the Dutch situation, the procedures laid down in Dutch law[147] ensure that both parties have the opportunity to defend themselves and respond to the other party's arguments.

4.6 Sub conclusion: the right to an effective remedy

This chapter first argued on the basis of the ECtHR's case law that the exclusion of new asylum motives from the examination of the first instance court should be considered a limitation of the right to an effective remedy. Such a limitation should meet the requirements laid down in Article 52(1) of the Charter. It may be accepted that the limitation is provided for by law. It was contended however that the essence (the very existence) of the right to an effective remedy is not respected if the referral of a new asylum motive to a subsequent asylum procedure deprives an asylum applicant of an effective remedy. This situation occurs if it is not guaranteed that:

1. the new asylum motive will be rigorously scrutinised during the subsequent procedure; and
2. the applicant is allowed to remain on the territory of the Member State during the administrative phase and the first instance appeal of the subsequent asylum procedure.

Moreover, there are several reasons to conclude that the limitation cannot be considered proportionate. First, it is not clear why one type of new asylum motives (type 3) can be included in the examination of the first instance court, while the other two types are excluded. Furthermore, it is questionable whether Article 46(3) RAPD allows for a prohibition for first instance courts to take into account certain types of new asylum motives, without allowing the first instance court to take a decision on the basis of the specific circumstances of the case at issue.

The first ground for limitation brought forward in the AJD's judgment is that the subsequent asylum provides a better framework for the examination of new asylum motives. This ground is only valid if the AJD's interpretation of Article 46(3) RAPD is right. According to the AJD this provision allows a (somewhat) deferential judicial review of the decision on the credibility of statements, which have not been substantiated. The examination of new asylum motives by first instance courts, does not fit into the Dutch asylum system. However, it was contended that such examination does fit in the system of the RAPD.

Even if first instance courts are allowed under Article 46(3) RAPD to refrain from an assessment of (the credibility of) new asylum motives, this does not make the limitation of the right to an effective remedy proportionate. Arguably this limitation cannot be considered necessary in the light of the role of first instance courts in the Dutch system. Dutch law grants first instance courts the possibility to refer the case back to the determining authority for an interview and assessment of credibility and risk, during the appeal phase.

The second ground for limitation is prevention of delay of the asylum procedure. It was argued that it is questionable whether exclusion of new asylum motives from the examination of the first instance courts is a suitable and necessary measure to achieve this objective. Delay of the asylum procedure as a whole will not occur in all cases in which an asylum motive is included in the assessment of the appeal before the first instance court.

Moreover, this section showed that the referral of a new asylum motive to the subsequent asylum procedure has several negative consequences for the asylum applicant. There is a risk that in such procedure the new asylum motive will be examined in isolation instead of in coherence with other asylum motives. It may also have consequences for the credibility assessment. In subsequent asylum procedures the RAPD allows Member States to make exceptions to the right to a personal interview and the right to reception. Moreover, the RAPD grants asylum applicants a right to free

[147] Art 83 Aliens act and 8:51a GALA.

legal assistance during the appeal phase, but not in the administrative phase of a (first or subsequent) asylum procedure. In the Netherlands asylum applicants have access to free legal assistance during the administrative phase. However, lawyers receive less compensation in subsequent asylum procedures than in first asylum procedures. Finally, the referral of new asylum motives to a subsequent asylum procedure has consequences for the date of entry of the asylum status.

It should be concluded that the general prohibition for first instance courts to take into account a certain type of new asylum motives cannot be considered proportionate. The next Chapter will examine whether this is different if the new asylum motive was submitted late through the fault of the asylum applicant or submitted during the appeal concerning a decision taken in a subsequent asylum procedure.

Finally, it was concluded that national courts may assess on the basis of the individual circumstances of the case whether a new asylum motive should be excluded from its examination in order to prevent delay or ensure the proper conduct of proceedings. This is only different, if it is not guaranteed that the new asylum motive will be rigorously scrutinised during the subsequent procedure and that the applicant is allowed to remain on the territory of the Member State during the administrative phase and the first instance appeal of the subsequent asylum procedure.

5. Relevance of the fault of the asylum applicant

The AJD asks whether it is relevant whether:

1. the new asylum motive has been submitted late through the fault of the asylum applicant (asylum motive type 2[148], preliminary question 1b); and
2. the asylum motive has been submitted in the context of an appeal against a decision concerning a first application or in the context of an appeal against a decision concerning a subsequent application for international protection (preliminary question 1c).

Both these nuances stem from the assumption that allowing new asylum motives in the appeal could lead to abuse by asylum applicants. Asylum applicants could wait to mention a new asylum motive in order to delay their expulsion or extend their right to reception. The question should therefore be answered whether the objective of prevention of abuse may justify the exclusion of new asylum motives, which were submitted late through the fault of the asylum applicant.

It should be noted here that, if the asylum applicant submits a new asylum motive during the appeal of a subsequent procedure, which is based on facts and circumstances which arose after the administrative decision taken in this subsequent procedure (type 1) there is no fault of the asylum applicant. As a result, the objective of preventing abuse cannot play a role. In a third or further asylum procedure the applicant may not have the right to remain[149] or the right to a remedy with suspensive effect[150]. As was argued in section 4.3 of this expert opinion in such situation a referral of the new asylum motive to a third asylum procedure would not respect the essence of the right to an effective remedy. The exclusion of such new asylum motives from the appeal in a subsequent asylum procedure would violate Article 46(3) RAPD read in the light of Article 47 of the Charter. The question arises however, whether the same applies to new asylum motives, which were submitted in the appeal of a subsequent (second or further) asylum procedure due to the fault of the asylum applicant.

This section will first address the concept of 'fault'. Subsequently, it will address the text, system and purpose of the relevant provisions of the RAPD and their interpretation in the light of the right to an effective remedy.

5.1 The concept of 'fault'

The AJD wants to know whether new asylum motives which were submitted during the appeal phase due to the fault of the asylum applicant may be excluded from the examination of the first instance court. In the Netherlands a wide interpretation of 'fault' is applied.[151]

It may be questioned whether the term 'fault' implies intent of the applicant to abuse the asylum procedure, or whether it would also include negligence. If negligence is sufficient, many aspects should be taken into account in the assessment whether it is the applicant's fault that he has not submitted the new asylum motive during the administrative phase. It is for example relevant whether the applicant is vulnerable in the meaning of Article 24 RAPD and whether the new asylum

[148] See the Introduction of this expert opinion.
[149] Art 41(1)(b) RAPD.
[150] Art 41(2)(c), 41(1)(b) and 46(8) RAPD.
[151] The AJD does not consider an element new if it could have been and therefore should have been submitted in an earlier stage. It expects asylum applicants to at least mention traumatic experiences (such as rape) and their incapability to talk about these experiences in the first interview on their asylum motives. For example in AJD 22 January 2013, ECLI:NL:RVS:2013:3370, the AJD did not accept that the applicant was too ashamed to talk about rape in the first asylum procedure, even though she substantiated this with a statement from a psychotherapist. See also AJD 21 November 2012, 20111 3386/1/V2. See also W.J. van Bennekom and J. H van der Winden, *Asielrecht* (Den Haag, Boom Juridische Uitgevers, 2011), p 134.

motives concern intimate aspects of the applicant's life.[152] Moreover, it is relevant to know how much time was offered during the asylum procedure to bring forward all relevant elements and whether the applicant was assisted by a lawyer. Asylum applicants may also not be aware that a certain aspect of their personality (such as sexual orientation) or events in the country of origin constitute a (separate) asylum motive or have valid reasons to refrain from mentioning them. When establishing whether it is the applicant's fault that he has not submitted the asylum motive earlier, the difficult human and material situation, in which asylum applicants may find themselves should be taken into account.[153]

5.2 Text, system and purpose of the RAPD

This section will look at the text, system and purpose of the RAPD and RQD.

5.2.1 Text and system

Article 46(3) RAPD concerning the *ex nunc* examination by the first instance court does not make any reference to the relevance of the fault of the asylum applicant.[154] Article 4(1) RQD requires asylum applicants 'to submit as soon as possible all the elements needed to substantiate the application for international protection'. If an asylum applicant waits to submit such elements and only mentions them in a subsequent asylum procedure, this may lead to inadmissibility of the asylum application. Article 40(4) RAPD allows Member States to provide that a subsequent asylum application 'will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy' pursuant to Article 46 RAPD.

This seems to imply that it may be expected from the asylum applicant to submit new asylum motives during the appeal phase of the previous asylum procedure. It also suggests that such asylum motives will be taken into account during the appeal phase. It is questionable whether these new asylum motives may be excluded from the appeal in the previous asylum procedure, because it is the applicant's fault that he has not submitted them in the administrative phase.

5.2.2 Purpose

The term 'abuse' is not mentioned in the RAPD. According to the Commission, the RAPD aims to prevent abuse of the asylum procedure, through improving procedural guarantees and the quality of asylum decision-making[155], but also through possibilities to apply accelerated and border procedures.[156] In particular, the RAPD contains special provisions for subsequent asylum applications 'with a view to enabling Member States to subject a subsequent application to an admissibility test in line with the res judicata principle and to derogate from the right to remain in the territory in cases

[152] CJEU Joined Cases C-148/13 to C-150/13 *A. B. and C.*, paras 70-71.
[153] CJEU Case C-429/15 *Danqua* [2016], para 46.
[154] As was mentioned by the AJD (AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 11.1) this is different in the European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final. Art 53(3) provides that 'the applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been aware of at an earlier stage or which relate to changes to his or her situation'.
[155] See eg European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, p 6.
[156] European Commission, Amended proposal for a Directive of the European Parliament on common procedures for granting and withdrawing international protection status (Recast), COM (2011) 319, p 5.

of multiple subsequent applications thus preventing abuse of asylum procedures'.[157] Article 40(4) and (5) RAPD allow Member States to declare an asylum application inadmissible, if it is the applicant's fault that he did not submit new elements and findings in the previous procedure, in particular by exercising his or her right to an effective remedy before the first instance court. This provision clearly aims to prevent abuse.

As was mentioned in section 5.1.1 of this expert opinion Article 46(3) RAPD concerning the *ex nunc* examination by the first instance court does not make any reference to fault of the asylum applicant. The RAPD proposals also do not mention that the *ex nunc* examination may be omitted in case of abuse of the asylum applicant.

5.3 The right to an effective remedy

It was argued in section 4.1 that the exclusion of new asylum motives from the examination of the first court should be considered a limitation of the right to an effective remedy. Also here, it should be examined whether such exclusion respects the essence of the right to an effective remedy and whether it is proportionate.

5.3.1 The essence of the right to an effective remedy

Limitations of the right to an effective remedy must respect the essence of this right. It was argued in section 4.3 that this is not the case if the referral of a new asylum motive to a subsequent asylum procedure deprives an applicant of an effective remedy. An applicant is deprived of an effective remedy if it is not guaranteed that:

1. the new asylum motive is subjected to a rigorous scrutiny by the determining authority and the first instance court; and
2. the applicant is allowed to remain in the territory of the Member State during the examination by the determining authority and the court.

Arguably, this should not be different, if the new asylum motives were brought forward late through the applicant's fault. Under the principle of non-*refoulement* guaranteed by Article 3 ECHR, national authorities have an obligation to assess all information brought to their attention. The ECtHR has held in its case law that new documents and statements, including new asylum motives should be subjected to a rigorous scrutiny, irrespective of whether it was the applicant's fault that they were submitted late.[158] In *F.G. v Sweden* the ECtHR held that 'regardless of the applicant's conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran'.[159] If the risk exists that the applicant will be expelled before the rigorous scrutiny has taken place, this would violate Article 3 and 13 ECHR.[160] As a result the EU principle of refoulement guaranteed by Articles 4 and 19 of the Charter and the right to an effective remedy guaranteed in Article 47 of the Charter would also be violated in such situation.[161]

It should be noted in this regard that in the Netherlands the determining authority may declare a subsequent asylum application inadmissible if the applicant could have (and therefore should have) submitted an element during the administrative phase of the previous (first) asylum

[157] European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, p 8.
[158] ECtHR 19 January 2016, *M.D. and M.A. v Belgium*, Appl no 58689/12, paras 66-67.
[159] ECtHR 23 March 2016, *F.G. v Sweden*, Appl no 43611/11, para 156.
[160] ECtHR 26 April 2007, *Gebremedhin v France*, Appl no 25389/05.
[161] CJEU Case C-562/13 *Abdida* [2014]. This also follows from Article 52(3) of the Charter.

procedure. The Dutch legislator has not implemented Article 40(4) RAPD[162]. According to the AJD an element cannot be considered 'new' in the meaning of Articles 33(2)(d) and 40(2) and (3) RAPD, if it could have been submitted in the administrative phase of the previous asylum procedure. As a result, new asylum motives which have been submitted late through the applicant's fault may be excluded from the examination of the appeal and may not be considered a 'new element' in the meaning of Articles 33(2)(d) and 40(2) and (3) RAPD. It is therefore not guaranteed that a new asylum motive will be rigorously examined, if it could have been submitted during the administrative phase of the previous (first) asylum procedure. Dutch legislation requires both the determining authority[163] and the courts[164] to examine whether special and individual facts and circumstances will necessitate a full examination of the asylum claim, if no new elements or findings have been submitted. Even though this may prevent violations of the non-refoulement principle, in practice this so-called Bahaddar-exception is seldom applied.[165] This may be explained by the very high threshold, which should be met: there should be an evident (*onmiskenbaar*) risk of a violation of Article 3 ECHR upon return.[166]

5.3.2 Proportionality test in the light of the objective to prevent abuse

If a new asylum motive would be rigorously examined in the subsequent asylum procedure it is referred to and the applicant is allowed to stay in the Member State during that procedure, the essence of the right to an effective remedy will not be violated. However, the question remains whether it is proportionate to prohibit first instance courts to include the new asylum motive in their assessment of the appeal. In section 4.4 of this expert opinion it was concluded that the distinctive roles of the determining authority and the court and the interest in preventing delays in the asylum procedure cannot justify such general prohibition.

The question arises whether this may be justified in the interest of the objective to prevent abuse. It still seems to follow from the CJEU's judgment in *Moussa Sacko*, that first instance must have the opportunity to balance the interests in the individual case and include new asylum motives if necessary to ensure a full and *ex nunc* examination.[167] The general interest in preventing abuse of the asylum procedure may be taken into account in this balancing act.

5.4 Sub conclusion: relevance of the fault of the asylum applicant

This section first argued that, if the concept of 'fault' includes negligence (as it does in the Netherlands), many factors have to be taken into account, which may explain and justify the late submission of the asylum motive.

The text of Article 46(3) RAPD nor the rest of the RAPD refers to the relevance of the fault of the asylum applicant or the aim to prevent abuse. The system of the RAPD, in particular Article 40(4) RAPD seems to imply that asylum applicants are expected to mention asylum motives during the appeal phase of the previous asylum procedure (instead of during a subsequent asylum procedure). Therefore, it is questionable whether these new asylum motives may be excluded from the appeal, because it is the applicant's fault that he has not submitted them in the administrative phase.

It was argued that Articles 3 and 13 ECHR require a rigorous scrutiny of all asylum motives,

[162] AJD 6 October 2017, ECLI:NL:RVS:2017:2718. According to the AJD this is not necessary, to be able to declare a subsequent asylum application inadmissible on the ground that the element was submitted late through the applicant's fault.
[163] Art 31(7) Aliens Act.
[164] Art 83.0.a. Aliens Act.
[165] See eg T.P Spijkerboer, *De Nederlandse rechter in het vreemdelingenrecht* (Den Haag, Sdu, 2014), pp 305-306. The AJD refers to the exception in AJD 4 October 2017, ECLI:NL:RVS:2017:2669, para 10.5.1.
[166] AJD 30 June 2014, ECLI:NL:RVS:2014:2483.
[167] Case C-348/16 *Moussa Sacko* [2017], para 48.

also if it is the applicant's fault that they are submitted late. The essence of Article 47 of the Charter is not respected, if it is not guaranteed that the new asylum motive will be subjected to a rigorous scrutiny by the determining authority and the first instance court and the applicant is allowed to remain in the territory of the Member State during the examination by the determining authority and the court.

Moreover, a general prohibition for first instance courts to take into account new asylum motives which have been submitted late should not be considered proportionate. Instead, first instance courts should examine on an individual basis whether a reference of a new asylum motive to a subsequent asylum procedure would be a proportionate measure. The fact that the asylum motive has been submitted late due to the applicant's fault, may be taken into account in this context.

6 Conclusion

This expert opinion examined the question whether the Recast Procedures Directive (Directive 2013/32/EU, henceforth RAPD) allows a system in which first instance courts are precluded to take into account new asylum motives, as is the case in the Netherlands at the moment (preliminary question 1a). It also considered whether first instance courts have discretion to refer new asylum motives to a subsequent asylum procedure in order to safeguard due process or prevent undue delay (preliminary question 2). Finally, it addressed the relevance of the fault of the asylum applicant and the fact that the new asylum motives were submitted in the appeal of a subsequent asylum procedure.

The expert opinion examined the text, system and purpose of the relevant provisions of the RAPD and interpreted these provisions in the light of the right to an effective remedy laid down in Article 47 of the Charter of Fundamental Rights of the European Union.

The text, system and purpose of the RAPD

The RAPD does not explicitly address the question whether the first instance courts are required to take into account new asylum motives or are allowed to refer such motives to a subsequent asylum procedure. However, both in the text, system and purpose of the RAPD arguments can be found that such courts should in principle take into account new asylum motives. It was argued that the requirement of an '*ex nunc'* examination of the international protection needs suggests that the court should take into account new asylum motives. Moreover, it was contended that new asylum motives should fall under the term 'further representations' mentioned in Article 40(1) RAPD. Such further representations should in principle be included in a pending appeal procedure. The court may only refer such further representations to a subsequent asylum procedure, if it cannot take into account and consider all the underlying elements (statements and documentation).

Finally, the inclusion of new asylum motives in the appeal procedure promotes the aim of the RAPD to enhance the procedural protection of asylum applicants, to ensure the correct recognition of international protection needs as much as soon as possible, preferably in the first asylum procedure and to prevent subsequent asylum applications. It should be noted in this context that in the Dutch asylum system courts of first instance are able to take into account the elements underlying new asylum motives. The prohibition for first instance courts to take into account certain types of new asylum motives is based on the case law of the Administrative Jurisdiction Division of the Council of State (AJD).

The right to an effective remedy

This expert opinion contended on the basis of the ECtHR's case law that the exclusion of new asylum motives from the examination of the first instance courts should be considered a limitation of the right to an effective remedy guaranteed in Article 47 of the Charter. Such limitation should meet the requirements laid down in Article 52(1) of the Charter. It was argued that the essence (the very existence) of the right to an effective remedy is only respected, if it is guaranteed that both the determining authority and the first instance court subject the new asylum motive to a rigorous scrutiny and the applicant is allowed to remain on the territory of the Member State during the procedure.

Moreover, there are several reasons to conclude that a general prohibition for first instance courts to take into account new asylum motives cannot be considered proportionate. First, it is not clear why one type of new asylum motives can be included in the examination of the first instance court, while the other two types are excluded.[168] Furthermore, it is questionable whether Article 46(3) RAPD allows for a generic exclusion of certain types of new asylum motives, without allowing

[168] See the Introduction of this expert opinion for an explanation of the different types of asylum motives under Dutch law.

the first instance court to take a decision on the basis of the specific circumstances of the case at issue.

The first ground for limitation brought forward in the AJD's judgment is that the subsequent asylum procedure provides a better framework for the examination of new asylum motives. This ground is only valid if the AJD's interpretation of Article 46(3) RAPD is right. According to the AJD this provision allows a (somewhat) deferential judicial review of the decision on the credibility of statements, which have not been substantiated. The examination of new asylum motives by first instance courts, does not fit into the Dutch asylum system. However, even if the CJEU allows such deferential review under Article 46(3) RAPD, the measure to exclude new asylum motives from the assessment in appeal is not necessary. Dutch law grants first instance courts the possibility to refer the case back to the determining authority for an interview and assessment of credibility and risk, during the appeal phase.

The second ground for limitation is the prevention of delay of the asylum procedure. It was argued that it is questionable whether the generic exclusion of new asylum motives from the examination of the first instance courts is a suitable and necessary measure to achieve this objective. The assessment of new asylum motives during the appeal phase may lead to delay in some cases. However, if the applicant is required to submit the new asylum motive in a subsequent asylum procedure, this will also lead to delay.

Finally, the referral of a new asylum motive to the subsequent asylum procedure has several negative consequences for the asylum applicant. There is a risk that in such procedure the new asylum motive will be examined in isolation instead of together with other asylum motives. It may also have negative consequences for the credibility assessment, because the decision about the credibility of the applicant's account has become final in the previous asylum procedure. EU law allows Member States to make exceptions in subsequent asylum procedures to the right to a personal interview and the right to reception facilities. Moreover, the RAPD grants asylum applicants a right to free legal assistance during the appeal phase, but not in the administrative phase of a (first or subsequent) asylum procedure. In the Netherlands applicants have access to free legal assistance during the administrative phase. However, lawyers receive less compensation in subsequent asylum procedures than in first asylum procedures. Finally, the referral of new asylum motives to a subsequent asylum procedure has consequences for the date of entry of the asylum status.

Requirement or discretionary power for the first instance court?

The expert opinion concluded that national courts may assess on the basis of the individual circumstances of the case whether a new asylum motive should be excluded from its examination in order to prevent delay or ensure the proper conduct of proceedings. However, it should be stressed again that the EU principle of *refoulement* and the right to an effective remedy always require that new asylum motives are subjected to a rigorous scrutiny in a subsequent asylum procedure by the determining authority and the first instance court and that the applicant is allowed to remain on the territory of the Member State until such scrutiny has taken place.

The relevance of the fault of the asylum applicant

With regard to question 1b and 1c this expert opinion first addressed the concept of 'fault'. It argued that if this concept includes negligence (as it does in the Netherlands), many factors have to be taken into account, which may explain and justify the late submission of the asylum motive.

The text of the RAPD does not refer to the relevance of the fault of the asylum applicant or the aim to prevent abuse. The system of the RAPD, in particular Article 40(4) RAPD seems to imply that asylum applicants are expected to mention asylum motives during the appeal phase of the previous asylum procedure (instead of during a subsequent asylum procedure). Therefore, it is questionable whether these new asylum motives may be excluded from the appeal, because is the applicant's fault that he has not submitted them in the administrative phase.

Articles 3 and 13 ECHR require a rigorous scrutiny of all asylum motives, also if it is the applicant's fault that they are submitted late. The essence of Article 47 of the Charter is not

respected, if it is not guaranteed that the new asylum motive will be subjected to a rigorous scrutiny by the determining authority and the first instance court and the applicant is allowed to remain in the territory of the Member State during the examination by the determining authority and the court.

Moreover, a general prohibition for first instance courts to take into account new asylum motives which have been submitted late should not be considered proportionate. Instead, first instance courts should examine on an individual basis whether a reference of a new asylum motive to a subsequent asylum procedure would be a proportionate measure.

6.1. Answers to the preliminary questions

Question 1a

Article 46 (3) RAPD read in conjunction with Article 47 of the Charter precludes a system, under which first instance courts in asylum cases are prohibited to take into account in their assessment of the appeal, asylum motives that have been submitted for the first time in that appeal.

Question 1b

For the answer to question 1a it is not relevant whether the asylum motive is genuinely new or submitted late through the applicant's fault. A general prohibition for first instance courts to take into account new asylum motives, which were submitted late due to the fault of the applicant, should not be considered proportionate. First instance courts should be able to assess the proportionality of the exclusion of a new asylum motives on the basis of the individual circumstances of the case. In this context the court may take into account the circumstance that the asylum motive was submitted late due to the applicant's fault in its proportionality assessment. However, it should always be guaranteed that the new asylum motive will be subjected to a rigorous scrutiny in the subsequent asylum procedure by the determining authority and the first instance court and that the applicant is allowed to remain on the territory of the Member State during the procedure before both instances.

Question 1c

For the answer to question 1a it is not relevant whether the asylum motive is put forward in the framework of a first instance appeal challenging an asylum decision on a first application or on a subsequent asylum application. A general prohibition for first instance courts to take into account new asylum motives, which were submitted in the framework of the appeal against a decision taken in a subsequent procedure, should not be considered proportionate. The right to an effective remedy guaranteed in Article 47 of the Charter would be violated, if it is not guaranteed that the new asylum motive will be subjected to a rigorous scrutiny by the determining authority and the first instance court in the subsequent asylum procedure. Moreover, it should be guaranteed that the applicant is allowed to remain on the territory of the Member State during the subsequent procedure before both instances. It is relevant to take into account whether the ground for asylum is put forward in the framework of a first application or a subsequent asylum application, where this has consequences for the applicant's right to remain on the territory of the Member State during the subsequent asylum procedure, in which the new asylum motive would have to be submitted.

Question 2

National courts may assess on the basis of the individual circumstances of the case whether a new asylum motive should be excluded from its examination in order to ensure the proper conduct of proceedings or prevent undue delay. However, Article 47 of the Charter requires that it is guaranteed that the new asylum motive will be subjected to a rigorous scrutiny in the subsequent asylum procedure by the determining authority and the first instance court and that the applicant is allowed to remain on the territory of the Member State during the procedure before both instances.

Annex 1

Comparison procedural guarantees RAPD

	First procedure		Second procedure		Subsequent procedures (third or further)	
	Application	*Appeal*	*Application*	*Appeal*	*Application*	*Appeal*
Right to remain	Yes	Yes, appeal or request for an interim measure has suspensive effect	Yes, but discretion to make exception if applicant frustrates the return process	Yes, appeal or request for an interim measure has suspensive effect, but discretion to make exception if applicant frustrates the return process	At the discretion of the Member State	At the discretion of the Member State
	Art 9(1) RAPD	Art 46(5) and (8) RAPD.	Art 9(2) and 41(1) RAPD	Art 41(2)(c) and 46(8) RAPD	Art 9(2) and 41(1)(b) RAPD	Art 41(2)(c) and 46(8) RAPD
Application accelerated procedure	Yes, possible on specific grounds		Yes, only fact that it concerns a subsequent application is sufficient		Yes, only fact that it concerns a subsequent application is sufficient	
	Art 31(8) RAPD		Art 31(8)(f) and 40(5) RAPD		Art 31(8)(f) and 40(5) RAPD	

The right to a personal interview	Yes		Preliminary examination may be done on the basis of written statements only		Preliminary examination may be done on the basis of written statements only	
	Art 14 RAPD		Art 42(1)(b) RAPD		Art 42(1)(b) RAPD	
Free legal assistance	Legal and procedural information free of charge	Free legal assistance, but exceptions possible	No right to free legal information or assistance during preliminary examination	Free legal assistance, but exceptions possible	No right to free legal information or assistance during preliminary examination	Free legal assistance, but exceptions possible
	Art 19(1) RAPD	Art 20 APD	Art 40(3) and 42 RAPD	Art 20 APD	Art 40(3) and 42 RAPD	Art 20 APD
Reception conditions	Yes	Yes	Discretion Member State (can be reduced or withdrawn)	Discretion Member State (can be reduced or withdrawn)	Discretion Member State (can be reduced or withdrawn)	Discretion Member State (can be reduced or withdrawn)
	Art 17 RRCD	Art 17 and 20(1) RRCD	Art 20(1)(c) RRCD	Art 20(1)(c) RRCD	Art 20(1)(c) RRCD	Art 20(1)(c)RRCD

Annex 2

Comparison procedural guarantees Dutch law

	First procedure		Second procedure		Subsequent procedures (third or further)	
	Application	*Appeal*	*Application*	*Appeal*	*Application*	*Appeal*
Right to remain	Yes	Yes, appeal or request for an interim measure has suspensive effect.	Yes, but discretion to make exception if applicant frustrates the return process	Yes, appeal or request for an interim measure has suspensive effect, but discretion to make exception if applicant frustrates the return process	No right to remain	Appeal and request for an interim measure have no suspensive effect
	Art 3.1(2) Aliens Decree	Art 82(2) Aliens Act (Appeal) Art 7.3(1) Aliens Decree	Art 3.1(2)(e) Aliens Decree	Art 82(2) Aliens Act and Art 7.3(1) and 3.1(2)(e) Aliens Decree	Art 3.1(2)(a) Aliens Decree	82(2) Aliens Act and Art 7.3(2) and 3.1(2)(a) Aliens Decree
Application accelerated procedure	Only Dublin/safe country of origin/asylum status in other Member State		Yes, three-day procedure may be applied		Yes, three-day procedure may be applied	
	Art 3.109ca Aliens Decree		Art 3.118b Aliens Decree		Art 3.118b Aliens Decree	
The right to a personal interview	Yes		Yes		Yes	
	Art 3.113(2) Aliens Decree		Art 3.118b(2)(a) Aliens Decree		Art 3.118b(2)(a) Aliens Decree	

Free legal assistance	Yes	Yes	Yes, but lower compensation for lawyer in case of rejection	Yes, but lower compensation for lawyer in case of unfounded appeal	Yes, but lower compensation for lawyer in case of rejection	Yes, but lower compensation for lawyer in case of unfounded appeal
	Art 12 Legal Aid Law[169]	Art 12 Legal Aid Law	Art 5a(5) Regulation Compensation Legal Aid[170]	Art 5a(6) Regulation Compensation Legal Aid	Art 5a(5) Regulation Compensation Legal Aid	Art 5a(6) Regulation Compensation Legal Aid
Reception conditions	Yes	Yes, unless appeal has no suspensive effect and an interim measure has not (yet) been granted and the period for voluntary return has passed	Yes, from one day before the start of the (three-day) asylum procedure until the asylum decision	No, unless the appeal or an interim measure suspends the negative asylum decision	Yes, from one day before the start of the (three-day) asylum procedure until the asylum decision	No, unless the appeal or an interim measure suspends the negative asylum decision
	Art 3 Regulation benefits asylum seekers[171]	Art 5 Regulation benefits asylum seekers	Art 3 Regulation benefits asylum seekers	Art 5 Regulation benefits asylum seekers	Art 3 Regulation benefits asylum seekers	Art 5 Regulation benefits asylum seekers

[169] *Wet op de rechtsbijstand*.
[170] *Besluit vergoedingen rechtsbijstand*.
[171] *Regeling Verstrekkingen Asielzoekers.*