SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN THE CASE BETWEEN MIR ISFAHANI AND THE NETHERLANDS – APPLICATION 31252/03

A. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes this opportunity to make written submissions to the Court in the case of *Mir Isfahani v the Netherlands* (Application 31252/03).[1] General human rights principles and the various bodies established to monitor and ensure their implementation, in particular the European Court of Human Rights (the Court), are of increasing relevance to UNHCR's mandate to protect refugees and other persons of concern to the Office.

2. UNHCR has been entrusted by the General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problem of refugees. The supervisory responsibility of UNHCR is formally recognized in Article 35 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article II of its 1967 Protocol.

3. This submission is made in order to assist the Court in clarifying the appropriate standard and burden of proof in asylum cases as well as the scope of judicial review, in particular in relation to credibility issues. It is restricted to questions of refugee law and does not take any position on the individual case of *Mir Isfahani*. UNHCR will focus primarily on the procedural guarantees necessary for an effective implementation of the *refoulement* prohibition in Article 33 of the 1951 Convention. In doing so, UNHCR is not directly addressing the relationship between the 1951 Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, some of the legal principles outlined in regard to the 1951 Convention may have relevance to comparable protection issues under the ECHR.

B. EFFECTIVE IMPLEMENTATION OF THE *NON-REFOULEMENT* PRINCIPLE THROUGH PROCEDURAL GUARANTEES

4. Article 33(1) of the 1951 Convention states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This provision prohibits the removal of a refugee to a place where his or her life or freedom would be threatened by reason of one or more of the five Convention grounds.

5. The 1951 Convention does not contain any provisions regarding the procedure to be adopted for the determination of refugee status. It is left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

6. However, given the importance of accurate and expeditious identification of those in need of protection for the effective implementation of the 1951 Convention, UNHCR has consistently emphasized that fair and efficient procedures are an essential element in the full and inclusive application of the Convention. The Executive Committee of the High Commissioner's Programme (ExCom), a body of

[1] UNHCR's request for leave to submit statements was introduced on 15 April and granted on 28 April 2005.

State representatives to guide UNHCR's policy, has repeatedly underlined the importance of proper procedures for determining refugee status[2] and has outlined a number of basic requirements for such a procedure. It has also requested that UNHCR elaborate a Handbook containing the basic requirements to be met in the refugee status determination procedure (RSD). The procedural standards contained in the Handbook are based on State practice at the time and UNHCR's own experience in conducting mandate recognitions.[3] UNHCR has also issued a "Note on Burden and Standard of Proof in Refugee Claims", dated 16 December 1998 (see attachment 1). Most recently, in the context of the Global Consultations on International Protection, UNHCR submitted a background document on fair and efficient asylum procedures.[4] The recommendations below are based primarily on these documents.

C. THE DUTCH ASYLUM PROCEDURE

7. UNHCR has on a number of occasions expressed its concerns with regard to some provisions of the Dutch asylum procedure.[5] The case at hand is illustrative in particular of two problematic aspects of the current Dutch asylum system:

(i) burden of proof and standard of proof as regards credibility, especially for asylum-seekers without documentation, and

(ii) the limitations of judicial review of the first instance assessment.

(i) Burden of Proof and Standard of Proof as regards Credibility, especially for Asylum-seekers without Documentation

Description of the Dutch Practice

a) Standard and burden of proof in regular cases

8. According to Article 28 of the Dutch Aliens Act, applications for asylum are in first instance examined and decided by the Minister for Aliens Affairs and Integration - in practice the Immigration and Naturalization Department (IND), an authority working under this Minister's responsibility. In examining the application and assessing the credibility of the asylum-seeker's statement, the IND has a considerable margin of appreciation.

9. The general principle concerning the burden of proof in asylum cases is laid down in Article 31 paragraph 1 of the Aliens Act 2000: an application for an asylum-related residence permit will be rejected if the alien did not make it plausible that his or her application was based on circumstances which, by themselves or in connection with other facts, form a legal basis for granting the permit.[6] The Council of State, the highest judicial authority in asylum cases, has interpreted this paragraph as placing on the asylum-seeker the burden of making "the facts and circumstances underlying his or her application plausible".[7]

---

[2] ExCom Conclusion No. 8 (XXVIII) of 1977, para. (a) (see attachment 2); ExCom Conclusion No. 28 (XXXIII) of 1982, para. (c); ExCom Conclusion No. 29 (XXXIV) of 1983, para. (h); ExCom Conclusion No. 65 (XLII) of 1991, para. (o); ExCom Conclusion No. 71 (XLIV) of 1993, para. (i); ExCom Conclusion 74 (XLV) of 1994, para. (i); ExCom Conclusion No. 82 (XLVIII) of 1997, para. (d) (ii) and (iii); ExCom Conclusion No. 93 (LIII) of 2002, para. (a).

[3] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979, reedited 1992.

[4] Global Consultations on International Protection, 2nd meeting: Asylum Processes (Fair and Efficient Asylum Procedures) EC/GC/01/12 of 31 May 2001 (see attachment 3).

[5] 'Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations', of July 2003 (see attachment 4); Comments by the Office of the United Nations High Commissioner for Refugees to the draft text of the Aliens Decree, 13 September 2000 (see attachment 5); Comments by the Office of the United Nations High Commissioner for Refugees to the draft text of the Aliens Law adopted by the Second Chamber of Parliament, 12 July 2000 (see attachment 6).

[6] Legal bases for granting this status are laid down in Article 29 Aliens Act 2000.

[7] Council of State, 30 November 2004, 200405142/1.

10. In its jurisprudence, the Council of State acknowledges that most asylum-seekers are not able to substantiate their claims with convincing proof. Accordingly, a full establishment of facts is substituted by a credibility assessment. If the first instance asylum authority, the IND, considers the asylum-seeker's account credible, it holds the account of facts and circumstances to be true.[8] Thus, the asylum-seeker is considered to have met the standard of proof concerning the establishment of the facts if a positive credibility assessment is made by the IND.

11. To guide decision-makers in assessing the credibility of asylum claims, the Minister has laid down policy regulations containing detailed standards to be applied. The general rule in these policy regulations is that the account of the asylum-seeker is considered to be credible if he or she has answered the interviewer's questions as completely as possible and if his or her account is generally consistent, not improbable and compatible with country of origin information.[9]

12. As set out above, according to the Council of State's position it is the responsibility of the asylum-seeker to substantiate his or her claim. On that basis, it ruled in several cases that it is not the responsibility of the interviewer to elicit the merits of the claim by posing questions, but it is the responsibility of the asylum-seeker to bring forward the reasons for his or her flight, mainly during the interview.[10] The Council of State thereby limits the responsibility of the interviewer to inform the asylum-seeker about which issues are relevant for the asylum claim (and should therefore be addressed in the interview) and to inform him or her about the privacy regulations which ensure the confidentiality of the information given.[11]

13. In the policy regulations on credibility assessment, no specific reference is made to the credibility assessment of the accounts of traumatized persons or victims of torture. According to the general trend in the jurisprudence, the asylum-seeker's argument that he or she was not capable of explaining the merits of his or her claim comprehensively at the time of the interviews only has a chance of success if the reports of the interview give reason to believe that he or she could not answer the questions because of his or her mental state.[12]

b) Higher Standard of Proof for Specific Cases

14. A higher standard of proof is required in certain cases listed in Article 31 paragraph 2(a)–(f) of the Aliens Act 2000*, inter alia* if the applicant has not submitted all documents necessary for the assessment of the claim and the lack of documentation is attributable to him or her.[13] According to the Council of State, the asylum-seeker is required to submit documentary proof regarding each of the following: identity; nationality; travel route; and the reasons for leaving the country of origin.[14] According to the Council of State, the asylum-seeker is in principle always held responsible for lack of documentary proof,

[8] Council of State, 27 January 2003, 200206297/1, JV 2003/103; see also: Schuurmans, Bewijslastverdeling in een bestuursrechtelijke context, in: Nederlands Tijdschrift voor Bestuursrecht, 2004/1, p.1.
[9] Supra footnote 7 and C1/3.2 Aliens Circular 2000.
[10] See e.g. 28 December 2001, 200105344/2, JV 2002/73. During a standard interview on the merits (nader gehoor) the following routine is implemented. The asylum-seeker is asked to tell about the events which made him/her leave his/her country and is given the opportunity to give these accounts without interruption. After this phase more specific questions are asked by the interviewer.
[11] For more jurisprudence and information on this duty to inform the asylum-seeker, see e.g. T.P. Spijkerboer and B.P. Vermeulen, Vluchtelingenrecht Ars Aequi Libri, Nijmegen 2005.
[12] See e.g. Council of State, 23 October 2003, 200304131/1, JV 2003/538 in which case reports of a psychologist were submitted. However, see also: Council of State, 26 November 2004, 200405301/1, NAV 2005/35. This line of reasoning also means that the principle that all merits relevant to the claim should be brought forward in first instance is applied strictly to traumatized asylum-seekers and victims of torture as well. See e.g. Council of State, 3 February 2004, 200305993/1, JV 2004/112 and 8 August 2003, 200303436/1, JV 2003/439.
[13] Article 31 paragraph 2(f).
[14] C1/5.8.2 and C1/5.8.3 Aliens Circular 2000; Council of State, 23 October 2003, 200305029/1.

as it is primarily up to him or her to substantiate his or her claim.[15] An exception is made only in special circumstances, for example if the asylum-seeker makes it plausible that he or she left the country of origin in an acute flight situation or if he or she was forced to hand over travel documents to the "travel agent" (smuggler) before entering a safe country.[16] The argument that the asylum-seeker was dependent on the "travel agent" does not diminish the asylum-seeker's responsibility to substantiate his or her asylum claim at the higher standard of proof.[17] To UNHCR's knowledge, exceptions have not been found to be applicable in any judgement of the Council of State. The higher standard of proof is even applied in cases of vulnerable asylum-seekers such as minors or traumatized persons.[18]

15. Current jurisprudence holds that the IND has the primary role in determining which documents are "necessary" to assess the asylum claim and whether the asylum-seeker's explanation of his or her absence is credible. Only limited judicial review of these aspects is allowed.[19]

16. Where the lack of documents is attributed to the applicant, this regularly leads the IND to conclude that the sincerity and the credibility of the asylum-seeker's accounts are affected by this fact. Furthermore, the interpretation of the higher standard of proof required under Article 31 paragraph 2 (a)-(f) is laid down in jurisprudence of the Council of State. The Council of State ruled that in these cases the statements of the asylum-seeker shall not include any gaps, vagueness, incongruent changes, or contradictions.[20] The asylum-seeker's statement should have a "positive persuasiveness" (*positive overtuigingskracht*) in order to meet the credibility standard.[21] The principle of the benefit of the doubt is not applied.

17. In its jurisprudence, the Council of State has upheld IND decisions in which some vague or surprising elements in the statements of the asylum-seeker were used to argue that the statements lacked positive persuasiveness, without providing a specific explanation as to why these elements led to the conclusion that the entire statement was not considered to be credible. [22] Furthermore, when assessing the credibility of the accounts, the IND is not required to distinguish between elements which do or do not relate to the core motives for flight.[23] It therefore appears that in these cases any vagueness, contradiction or gap in the asylum-seeker's account may, without further motivation, lead to the conclusion that his or her whole claim is not considered to be credible. During 2002 the Ministry of Justice concluded in 77.6 to 88.5 percent of all asylum cases that the asylum-seeker did not have "sufficient documents"[24] and UNHCR estimates that this percentage has not significantly decreased since then.

[15] Council of State, 15 March 2005, 200500388/1.
[16] C1/5.8.2 and C1/5.8.3 Aliens Circular 2000.
[17] Council of State, 23 January 2004, 200306979/1, JV 2004/14 and 23 September 2004, 200405455/1, JV 2004/430.
[18] For example, the Council of State quashed judgments of District Courts in which the court had taken the young age of the asylum-seeker into account and therefore concluded that the lack of documents was not attributable to the asylum-seeker (Council of State, 8 May 2003, 200301405/1, JV 2003/ 287). For similar judgements on a handicapped asylum-seeker, a sick asylum-seeker and a victim of human trafficking Council of State, 27 November 2003, 200305667/1. 10 December 2004, 200408632/1, JV 2005/57 and 15 April 2005, 200410352/1.
[19] Council of State, 31 October 2002, 200304638/1, JV 2003/2.
[20] The relevance of the condition "concerning relevant specifics" (op het niveau van relevante bijzonderheden) applied in the Council of State's standard argumentation has so far not been clarified by the Council of State. See also para 17.
[21] Council of State, 27 January 2003, 200206297/1, JV 2003/103.
[22] Council of State, 11 August 2003, 200304080/1, JV 2003/441. For comparison with a case where the higher standard of proof is not applied and such a conclusion is required: Council of State, 22 August 2003, 200303352/1, JV 2003/451.
[23] Council of State 28 December 2001, 200105344/1, JV 2002/73. See also footnote 20 supra.
[24] These are average percentages per month. Source TK 2001-2002, 19637, nr. 675, TK 2002-2003, 19637, nrs. 686 and 731.

UNHCR views

a) Burden and standard of proof

18. While it is a general legal principle that the duty to prove the correctness of a claim lies with the person who submits it, it has been acknowledged that, in relation to asylum applications, the nature of such claims needs to be taken into account when considering who should bear the burden of proof. Furthermore, the potentially serious consequences of an erroneous decision, which may lead to *refoulement* in violation of Article 33(1) of the 1951 Convention, also warrants an adaptation of the general principle.

19. In UNHCR's view, given the particularities of the refugee situation, the asylum applicant has discharged the burden of proof once he or she has made a genuine effort to substantiate his or her story. It is then up to the adjudicator to ascertain and evaluate the facts provided, based on the adjudicator's familiarity with the objective situation in the country of origin as well as relevant matters of common knowledge, and to verify the alleged facts which can be substantiated. The adjudicator needs to use all means at his or her disposal to research information which would facilitate the evaluation of the case. Reference to relevant country of origin and human rights information by the adjudicator will assist in assessing the objective situation in an applicant's home country. Other evidence, such as documents or the testimony of witnesses who can support the applicant's claim to refugee status or who have expertise on relevant country conditions, should also be permitted during the determination procedure.

20. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misinterpretation or concealment of material facts. Thus, while the burden of proof rests, in principle, on the applicant, there is a "shared" duty to ascertain and evaluate all relevant facts on the part of the adjudicator.

21. The adjudicator must take into account the particularities of the situation in which refugees find themselves; the standard of proof in relation to factual assertions should not be placed at too high a threshold. The adjudicator needs to assess all the evidence, both oral and documentary. Consideration should be given to the fact that, due to the passage of time or the intensity of past events, the applicant may not be able to remember all the factual details and thus may be vague, or he or she may be confused and thus unable to recount the facts accurately, or to provide details. While these elements are to be taken into account in the final assessment of credibility, they should not be used as decisive factors in rejecting a claim. The applicant should be given the opportunity to clarify perceived contradictions or aspects of the claim which the adjudicator considers not to be credible. Even if there are inconsistencies or exaggerations in the evidence presented, the adjudicator must proceed to assess the evidence which is found to be credible, in order to determine if it supports the claim to refugee status in its totality. The rejection of some of the evidence on account of a lack of credibility does not necessarily lead to rejection of the entire asylum claim. The claim must still be assessed on the basis of the information that was found to be truthful, including documentary evidence relevant to the applicant's situation and evidence regarding persons in similar situations.

22. Credibility is established where the applicant has presented a claim that is coherent, consistent and plausible, does not contradict generally known facts or the situation in the country of origin and is therefore, on balance, capable of being believed. However, it is often the case that after the applicant has made a genuine effort to substantiate his or her story, there is still a lack of evidence for some of his or her statements; it is hardly possible, nor indeed necessary for an applicant to prove every factual assertion in the claim. In the case where there is some doubt as to the truth of some factual assertions of the applicant,

but the applicant's story is on the whole coherent, consistent and plausible, then the "benefit of the doubt" should be given in regard to any unproven assertions.

23. Persons who have suffered trauma or who are suffering from mental or emotional disorders require special care. In such cases, whenever possible, the adjudicator should obtain expert medical advice. A medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his or her case. In any event, it will be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g., from friends, relatives and other persons closely acquainted with the applicant. It may also be necessary to draw certain conclusions from the surrounding circumstances.

24. In a number of decisions, the UN Committee against Torture has noted that torture survivors may be unable to provide exact details about the elements of their claims.[25] Moreover, the memory of individuals who are under stress or who have suffered harm or are fearful of expressing themselves to a person in authority, can play a crucial role in an applicant's (in)ability to provide testimony which is consistent and coherent. In such cases, more reliance on objective facts and an appropriate exercise of the principle of the "benefit of the doubt" may be warranted.

b) Documentary evidence and corroboration

25. Lack of documentation does not in itself render a claim abusive. The fact that refugees are often forced to flee without documentation was intensively discussed during the drafting process of the 1951 Convention and is recognized by Article 31(1) of the 1951 Convention, which exempts refugees under certain conditions from punishment for illegal entry. The UNHCR Executive Committee reaffirmed in 1981, during its thirty-second session, that asylum-seekers should not be "exposed to any unfavourable treatment" solely on the ground that their presence in the country is considered unlawful.[26] Many asylum-seekers have valid reasons for absence of or reliance on fraudulent documents, for example because they were forced to leave their countries without documents or they have been compelled to protect the identity of the individuals who assisted them in reaching the asylum country.[27] There is therefore no justification for imposing a higher standard of proof in such cases.

26. The requirement for documentary proof in relation to the reasons for leaving the country amounts to imposing a requirement for corroborative evidence in relation to this part of the claim. Given the special situation of asylum-seekers, they should not be required to produce all the evidence needed to corroborate their statements. Failure to produce documentary evidence should not prevent the claim from being accepted if the statements of the applicant are, overall, plausible and credible.

27. The application of a high standard of proof results in the risk that it cannot be met even though the applicant has a genuine claim. Too high a standard of proof may therefore increase the risk of *refoulement* contrary to Article 33 of the 1951 Convention.

Conclusions

28. The heavy emphasis in Dutch jurisprudence on the first interview concerning the merits (*nader gehoor*), does not always sufficiently take into account the particularities of the specific case, nor does it reflect the need to apply the specific standard of proof of factual assertions applicable in refugee cases.

[25] CAT 20-11-1998, 101/1997, see also CAT, 12-5-1999, 124/1998.
[26] ExCom Conclusion No. 22 (XXXII) of 1981, para B Nr.2 (a)
[27] Global Consultation on International Protection, 2nd meeting: Asylum Processes (Fair and Efficient Asylum Procedures) EC/GC/01/12 of 31 May 2001, para 35f with reference to A/AC.96/914, para 23.

Moreover, the procedures also do not provide sufficient safeguards to guarantee that the special situation of persons who have suffered or are suffering from trauma or mental or emotional disorders is taken into account.

29. The strict application of the requirement for documentary proof of identity, nationality, travel route and reasons for leaving the country does not take sufficient account of the special situation of asylum-seekers, who may not be in a position to provide documentary evidence to substantiate their assertions.

30. Where the lack of documentation is attributed to the applicant, this results in the application of a standard of proof which is significantly higher than usual. Current Dutch practice may in effect make it extremely difficult for the asylum applicant to prove his or her claim and may therefore lead to *refoulement* of refugees. UNHCR's concern is intensified by the fact that the higher standard of proof appears to be the rule rather than the exception.

(ii) Limitations in the Scope of Judicial Review

Description of the Dutch practice

a) Right to Appeal

31. As mentioned above, since the implementation of the Aliens Act 2000, Dutch practice has assigned the central role in the asylum process to the Minister of Aliens Affairs and Integration - in practice: the Immigration and Naturalization Department (IND). Negative decisions by the IND on an asylum application in first instance may be appealed to the District Court. The District Court's decisions – positive or negative – may be appealed by the asylum-seeker or by the authorities to the Council of State which is the highest administrative court dealing with asylum cases in the Netherlands since April 2001.

32. The appeal authorities do not have the authority to fully examine the IND's credibility assessment of the asylum-seeker's account. In its jurisprudence developed since April 2001, the Council of State has ruled that the determination of the credibility of the asylum-seeker's account is primarily a responsibility of the IND, and that the IND has a margin of appreciation when applying the official policy regulations to the credibility assessment in an individual case. Therefore, the Council of State argues, judicial review (by the District Courts and the Council of State) of the IND's assessment of credibility is limited to the assessment of whether the IND could reasonably have come to its conclusion (*terughoudende toets*).[28] Since most rejections of asylum requests are based on the (negative) assessment of the applicant's credibility, judicial review on the merits of the asylum-seeker's case is limited in the majority of decisions.

33. Moreover, the question of which documents are "necessary" to assess the asylum claim is one to be answered primarily by the IND. Like the review of the asylum-seeker's credibility, the decision on the imposition of the higher standard of proof by the IND in compliance with Article 31 of the Aliens Act 2000 is generally also subject to limited judicial review only.

34. So far, no judgement is known to UNHCR in which the Council of State reversed the application of the higher standard of proof, since it did not find, in any case to date, that the IND could not reasonably

[28] Council of State, 27 January 2003, 200206297/1, JV 2003/103. Notwithstanding this principle, the general principles that the decision should also include a motivation and should be prepared with due care are applicable.

have applied this standard. Successful appeals of asylum-seekers at the Council of State on the credibility assessment are rare, especially when the higher standard of proof is applied. [29]

b) Late submission of evidence

35. Furthermore, the "necessary documents" and their translation should be submitted before the IND arrives at a decision on the application. Documents submitted later, for instance when a negative IND decision is appealed to the District Court, may only be admitted by the District Court if the asylum-seeker makes plausible that he or she was unable to submit them earlier, e.g. because he or she was in an acute situation when he or she fled the country of origin.[30] This requirement is applied strictly. Potentially important documents which are submitted at the appeal stage may therefore not be considered.[31]

UNHCR views

a) Right to Appeal

36. The provision of a meaningful appeal is a fundamental requirement in the context of refugee status determination, where the consequences of an erroneous decision can be particularly serious. Its scope should take into consideration the consequences of incorrect first instance decisions. An oversight of existing international protection needs can cause irreparable harm. Procedures in place in most States recognize that standards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures. State practice generally permits at least one appeal or review which involves considerations of both fact and law. A key procedural safeguard, deriving from general administrative law and essential to the concept of effective remedy, is that the appeal be considered by an authority different from and independent of that making the initial decision. The possibility for the appeal or review authority to gain a personal impression of the applicant through an interview or a hearing is another important safeguard.[32]

37. The UNHCR Executive Committee has included the requirement for a substantial judicial review among the basic requirements for an asylum procedure. Its Conclusion No. 8 states that:

> "If the applicant is not recognized [as a refugee], he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system."[33]

38. This Conclusion envisages an appeal which reviews the merits of the first instance decision. The term "formal reconsideration" goes beyond a review of limited scope. It implies a new consideration of the case, including the reasons for the initial decision. This is also borne out by the Committee's stipulation to afford applicants a "reasonable time" to make their submission in order to effectively exercise a full right of appeal. The importance of an appeal mechanism was reiterated by the Executive Committee in 1983 in its Conclusion No. 30 (XXXIV), which urged that an appeal procedure be

[29] For an example, see: Council of State, 10 July 2003, 200301823/1. In this case, the argument of the IND that statements of the asylum-seeker were contradictory was factually wrong, as becomes apparent in the judgement of the Council of State.
[30] Council of State, 21 July 2003, JV 2003/468, Council of State, 20 January 2004, JV 2004/98, Council of State, 15 March 2005, 200500388/1.
[31] Council of State, 24 December 2004, 200408056/1, JV 2005/118.
[32] Global Consultations on international protection, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 of 31 May 2001, para. 41ff.
[33] ExCom Conclusion No. 8 (XXVIII) of 1977, § (e)(vi). The Committee against Torture has also repeatedly underlined the importance of an effective remedy in cases of allegations of violations of Article 3 of the 1984 Convention against Torture, requiring an effective, independent and impartial review of the decision. See for example, decision on communication No. 233/2003, CAT/C/34/D/233/2003.

maintained, even in the context of accelerated procedures designed to handle manifestly unfounded or abusive claims.[34]

39. The Executive Committee's recommendations contained in Conclusion No. 8 are viewed by UNHCR as an important set of substantive and procedural guarantees designed to ensure international protection for persons in need of it. The credibility assessment is, in UNHCR's view, a substantial part of the process of establishing the facts. Assessing the credibility of the applicant's statements is the most difficult part in the examination of many asylum requests, and errors may occur. A review offers the possibility to correct such mistakes. Especially in asylum cases, where it is often impossible to produce corroborative evidence to substantiate oral statements, credibility may be the primary basis for the decision. If the scope of judicial review is in effect limited to questions of law, it cannot be examined whether the first-instance authority has correctly established the material facts of the case. This means that in cases where the rejection of the claim in first instance was based on a negative credibility finding, the appeal is in effect rendered meaningless.

40. The importance of the right to appeal on facts and law, including on credibility questions, is demonstrated in the practice of similarly-situated States Parties, including Austria, Belgium, Germany, Luxembourg and the United Kingdom. In fact, research has shown that many refugees in Europe are granted protection only upon appeal of an initial negative decision taken by an administrative authority.[35] This includes cases where the first instance decision was overturned because mistakes in establishing the facts were found. There is therefore support for UNHCR's position within European law and practice.

b) Late submission of evidence

41. It is the duty of the applicant to submit all available evidence supporting his or her claim as early as possible. However, failure to fulfil this obligation may have a variety of reasons. The applicant may for example not have been aware of the evidence, or it may not have been available to the applicant. To avoid any erroneous decision, the appeal authorities should have an opportunity either to take evidence into consideration which was not submitted earlier, or to refer the case back to the first instance authority for such a review. No case should be rejected solely on the basis that the relevant information was not presented or documents were not submitted earlier. To ignore evidence which supports the essence of the claim would be in breach of the 1951 Convention and may, depending on the specific circumstances of the case, lead to a violation of the *non-refoulement* principle.

Conclusion

42. The limited judicial review practised in the Netherlands is not in line with the recommendations outlined above. UNHCR is therefore concerned that the appeal in the Netherlands cannot be considered an adequate mechanism for the review of first instance decisions, with a view to minimizing the risk of *refoulement* contrary to Article 33(1) of the 1951 Convention. Refusing evidence solely because it has been submitted late is not in keeping with the 1951 Convention, and may result in a violation of the *non-refoulement* principle.

D. SUMMARY CONCLUSIONS

43. In UNHCR's view, several provisions of the Dutch asylum procedure compound the risk that a person's well founded fear of persecution or other need for international protection is never properly assessed. As a consequence, a refugee may not be identified as such, and may therefore risk being

[34] ExCom Conclusion No. 30 (XXXIV), § (e)(iii).
[35] See for instance *Statistical Yearbook 2002*, tables C.15 and C.16, UNHCR 2004.

refouled in contravention of Article 33 of the 1951 Convention. The following are the main areas of concern:

- Dutch jurisprudence on the allocation of responsibilities between asylum-seeker and interviewer for the establishment of the facts places on the applicant an onerous burden of proof, which is extremely difficult to discharge, with no consideration for the sharing of the burden by the adjudicator.
- The Dutch asylum process places a higher standard of proof on asylum-seekers who do not submit sufficient documentary evidence in respect of their identity, nationality, travel route and their fear of being persecuted or being subjected to torture or to inhuman or degrading treatment or punishment. The strict jurisprudence on the accountability of the asylum-seeker for the lack of corroborative evidence and the high standard of proof for credibility assessment in these cases make it extremely difficult for asylum-seekers to meet the threshold of proof.
- Judicial review of the first instance decision, as regards the key issues for the application of the higher standard of proof and credibility assessment, is restricted to the assessment of whether the IND could reasonably have come to its conclusion. In practice this appears to render the review ineffective, where rejection at first instance is based on lack of credibility.
- Evidence submitted after the first instance decision is regularly not taken into consideration. This may lead to material evidence being excluded from consideration and therefore a wrong decision on credibility may be reached.
- There are insufficient safeguards to guarantee the appropriate application of the provisions for vulnerable groups such as traumatized persons or minors, hence in effect disregarding the humanitarian dimensions of the asylum process.

UNHCR Geneva, May 2005

List of Attachments

1. Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998.

2. ExCom Conclusion No. 8 (XXVIII) of 1977.

3. Global Consultations on International Protection, 2nd meeting – Asylum Processes (Fair and Efficient Asylum Procedures) EC/GC/01/12 of 31 May 2001.

4. Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations, July 2003.

5. Comments by the Office of the United Nations High Commissioner for Refugees to the draft text of the Aliens Decree, 13 September 2000.

6. Comments by the Office of the United Nations High Commissioner for Refugees to the draft text of the Aliens Law adopted by the Second Chamber of Parliament, 12 July 2000.