The consequences of the case law of the Council of State for the AC procedure

Summary

1. Introduction
Since 1994 Dutch asylum law has provided for two types of asylum review: a full determination procedure and an accelerated procedure (AC procedure). The AC procedure was initially conceived as a procedure to weed out “manifestly unfounded asylum claims”. Prior to the introduction of the AC procedure, the State secretary of Justice had reached a compromise with the representatives of Legal Aid Organisations as to which applications would be suitable for the accelerated procedure and which minimal guarantees should be built in the procedure in order to safeguard careful proceedings. This compromise was laid down in letters, policy documents and in the Aliens Circular in the form of instructions. Since the new Aliens Act entered into force on 1 April 2001, a growing percentage of asylum applications have been treated using the accelerated procedure. As a consequence of this Act, the rules governing the accelerated procedure were partly laid down in a General Administrative Measure (“Algemene maatregel van bestuur”), a form of legislation that is higher in rank than the instructions in the Aliens Circular. However, most rules intending to secure the providing of careful legal aid were, as before, laid down in the Aliens Circular. Still, the legislature apparently did not expect or intend that these changes would have a great impact on the nature of the AC procedure. With the same Act, the possibility to lodge higher appeal against decisions of the Courts of first instance with the Division for Administrative Jurisdiction of the Council of State (“Afdeling bestuursrechtspraak van de Raad van State”) was introduced. Both the asylum seeker and the Minister may lodge an appeal. It turned out that the Council of State, acting as the highest court, assessed the meaning of the agreements made under the previous law differently. According to the Council of State, the safeguards laid down in the Circular (or in letters or policy documents) cannot prevail over the hard law contained in the General Administrative Measure called Aliens Decree (Vreemdelingenbesluit).

2. Purpose of the study, research questions and method of research
The purpose of this study was to obtain a better understanding of the consequences of the case law of the Council of State for the functioning of the AC procedure in practice and to find a (legal) solution for any bottlenecks emerging from this survey for the different parties involved in the AC procedure.

For this purpose, three research questions were formulated:
1. To what extent has the case law of the Council of State modified the AC procedure?
2. What are the practical effects of the case law?
3. How can any bottlenecks found be removed?

The aim of the study was to investigate the consequences of the Council of State case law for both the Immigration and Naturalisation Department (IND) and the providers of legal assistance. The IND, however, decided not to participate in this study. Therefore, the research was limited to investigating the consequences of the Council of State case law for the providers of legal assistance. The providers of legal aid have been questioned in a written survey. The first part of the questionnaire consisted of open questions regarding the parameters defining whether an asylum request should be dealt with under the AC procedure or not, and questions regarding the time schedule for the AC procedure. The second part consisted of quantitative questions. The questionnaire was returned by 20 persons: the four co-ordinators of the Foundations for Legal Assistance in the four processing centres (AC centres), seventeen individual lawyers and three supervisors of refugee aid in the AC centres.

3. Results regarding the first two research questions
The first question: To what extent has the case law of the Council of State modified the AC procedure?

As regards the parameters defining who should enter the AC procedure (AC criterion or selection criterion) the case law of the Council of State has put an end to the divergent case law which had evolved under the previous legislation. In the vision of the Council of State, the legislator formulated a strictly time based selection criterion:
If it is possible to reject an application within 48 "processing hours" (hours between 22.00 o'clock p.m. and 8.00 o'clock a.m. are not counted) in a careful manner, this application is suitable to be dealt with in the AC procedure. According to the Council of State, the law offers no ground for the view that certain categories of cases are unsuitable for the AC procedure. So, in principle all cases can be dealt with (which means: rejected) in the accelerated procedure, unless it is clear that asylum should be granted.

The safeguards for a careful procedure laid down in the Aliens Circular have for a great deal been put aside. This applies in particular for the rule according to which the counting of processing hours was temporarily interrupted ("stopping the clock") if the legal counsellor needed more time to give legal assistance than foreseen in the rules.

For identifying the influence of the case law on the AC procedure, the scope of the review should not remain limited to the case law on the accelerated procedure in the strict sense. As a consequence of the general asylum case law of the Council of State relating to the burden of proof and the obligation to provide all relevant information and documents in the very beginning of the application proceedings, an enormous emphasis has been laid on the first stage of the asylum procedure. In the AC procedure this first stage has been reduced to 48 (processing) hours, of which only a few hours are available for the asylum seeker and his legal counsellor.

The second question: What are the practical effects of the case law?

The AC criterion
The large majority of the respondents believe that the actual interpretation of the selection criterion by the Council of State has resulted in the rejection of a higher percentage of cases in the accelerated procedure. A large majority also thinks that more complex cases are dealt with in the short procedure than before. However, they also indicate that other factors may account for the rejection of a higher percentages of asylum application in the AC procedure, such as: political developments, the reduced number of asylum applications and the case law of the Council of State on other issues.

The AC selection and the influence of the providers of legal assistance
Most of the respondents believe that the selection for the AC procedure primarily depends on the capacity of the IND and the time available, not on grounds regarding the merits of the case. In their view they have little influence on the decision of the IND. The quantitative findings confirm this view held by the providers of legal assistance.

The safeguards for a careful procedure
A large majority of the respondents are of the opinion that the case law of the Council of State is accountable for the fact that the time for effective legal assistance is too short. The shortage of time is in their view caused by four factors:

1. The time limit for the providers of legal assistance to do their job already starts running at the moment a file is delivered at the desk of the Foundation for Legal Aid. However, it often happens that a counsellor is not immediately available.
2. The possibility to stop the clock if more time is needed has been put aside by the Council of State.
3. The IND is less inclined to grant delay if the counsellor needs more time.
4. Since the introduction of the new Aliens Act, more complex cases are dealt with in the AC procedure. The agreements made between the IND and the legal aid organisations in order to guarantee sufficient time for assisting the asylum seekers are deemed not effective. This is particularly so when the caseload of applications is not in balance with the capacity of the organisations of legal assistance. Furthermore, the case law of the Council of State has shown that agreements, which are not based on the law, have little relevance.

Case law regarding new facts, the burden of proof and the undocumented asylum applicants
The case law of the Council of State on these issues was mentioned as one of the causes for the high percentage of rejections in the accelerated procedure. Three respondents believed that this case law is an import impediment for the AC procedure in general. Eleven respondents mentioned this case law as a bottleneck for the AC-
procedure when specific problems concerning traumatised asylum seekers and undocumented asylum seekers are at stake.

4. Conclusions
According to the Council of State, in principle all applications can be dealt with in the accelerated procedure. The target of Dutch policy is to process and reject the highest possible number of asylum applications in the AC procedure. The accelerated procedure is no longer an exception in relation to the full procedure. It has become the normal procedure. The justification for the short terms for legal assistance in the AC procedure, which was based on the presumption that only a limited range of cases would be suitable for the accelerated procedure, has lost its foundation.

The decline of the influence of the providers of legal assistance at the AC selection and the widely held opinion that the selection is mainly based on capacity of the IND seem to be a logical consequence of the Council of State’s interpretation of the AC criterion together with the IND’s target policy to process as many cases as possible in the accelerated procedure.

The time limits are too short for careful legal counselling. Moreover, as a result of the case law of the Council of State, the first stage of the asylum procedure has become of vital importance. Agreements between the IND and Legal Assistance organisations or representatives aimed at solving the problem of shortage of time are not effective. As a direct consequence of the case law of the Council of State, only a regulation given by “hard” law can provide sufficient guarantees that the counsellor is granted more time.

5. Recommendations
The conclusions regarding the expanded use of the accelerated procedure and the importance of the first stage of the asylum procedure would justify a serious reflection on the question as to whether the accelerated procedure should be maintained in its present form. Also some respondents suggested that the AC procedure should be abolished entirely. However, in the limited context of this research, it is no appropriate to formulate concrete recommendations in this direction.

The recommendations that can be made on the basis of this study regard in the first place the time limits available for legal assistance. In the second place recommendations can be formulated to enlarge the influence of the providers of legal assistance on the selection for the accelerated procedure, in particular in cases of possibly traumatised or ill asylum seekers.

Regulating the time limits for legal counselling
Longer time limits for legal assistance must be accomplished by adjusting some articles of the Aliens Decree. To ensure more effective time for legal counselling several aspects must be taken into account:
1. the time during which no legal counsellor is available;
2. the time limits available for legal assistance, and
3. the loss of time for effective legal assistance (because in practise it happens quite often that two different lawyers follow each other up in one case).

Influence of the providers of legal assistance
If the lawyer believes that an asylum application is not suitable for the accelerated procedure because of medical reasons (mental as well as physical), the AC procedure must be suspended until an independent expert has determined whether the continuation of the accelerated procedure is possible.