

## PROVIDING LEGAL AID IN ASYLUM PROCEDURES IN THE NETHERLANDS: A CHALLENGING BUSINESS?

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### 1. Introduction

Asylum seekers are persons who have crossed an international frontier into a country in which they apply for protection. In the asylum procedure it is determined whether someone is eligible for protection and will be qualified as what is generally called a 'refugee'.<sup>1</sup> During the asylum procedure the provision of legal assistance and representation is of great importance to asylum seekers. It has often been argued that due to the growing complexity of asylum procedures, professional legal advice and assistance has become almost indispensable for ensuring that all aspects of the asylum seeker's case are taken into account by the determining authorities.<sup>2</sup> Involving a legal expert would not only benefit the asylum seeker, but also the authorities in that it results in better prepared and documented applications and should thus make it easier for the administration and the judge to make sound decisions.<sup>3</sup> Therefore, legal aid is considered required for ensuring fair and efficient asylum procedures.<sup>4</sup> The first international legally binding instrument that explicitly laid down the right to legal assistance and representation in Europe was the Asylum Procedures Directive.<sup>5</sup> Within the European Union framework on asylum law, the 2005

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<sup>1</sup> Article 29 Aliens Act 2000 (*Vreemdelingenwet 2000*) provides for the grounds on which an asylum seeker will be granted protection in the Netherlands. At the time of writing, a proposal to amend the article is pending (*Parliamentary Papers II*, 2012-2013, 33293 no. A). In a nutshell, an asylum seeker is eligible for protection under the amended article, when the person meets the conditions of the 1951 Refugee Convention, i.e. has a well-founded fear of persecution because of religion, race, nationality, political opinion or membership of a social group or when the person is eligible for subsidiary protection, that is, when there is a real risk that upon return to the country of origin the asylum seeker will be subjected to inhuman or degrading treatment.

<sup>2</sup> ECRE 2005, p. 44.

<sup>3</sup> See Guild 2011 and Matas 1991. Conversely, of course, there is also the concern with the authorities that lawyers might instruct asylum seekers to tell the 'right' story.

<sup>4</sup> UNHCR 2001, para. 50 (g); CoE, Parliamentary Assembly 1997, para. 26.

<sup>5</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ 2005 L 326/1.

Directive provides for a – albeit restricted – right to legal aid for asylum seekers in the EU.<sup>6</sup>

In this contribution I will discuss the provision of legal aid in Dutch asylum procedures from the perspective of the legal aid providers.<sup>7</sup> What is the institutional context in which they work and what are the issues arising therefrom they have to deal with when assisting and representing their asylum seeking clients? The main topics I will focus on in this contribution are 1) the short time limits of the asylum procedure and 2) the payment for legal aid providers which is based on fixed fees. What kind of issues do these aspects raise for legal aid providers? What are the options they have in dealing with these matters and what are the considerations that play a role in this respect?

This contribution is based on a larger research into the provision of legal aid in asylum procedures.<sup>8</sup> The fieldwork conducted for this study consists of interviews with twelve lawyers, four Dutch Legal Aid Board officials, an immigration officer of the immigration authority (IND), a district court judge in asylum cases, an employee of the Dutch Refugee Council and attendance of several meetings of asylum lawyers.<sup>9</sup>

In the following, I will first set out the characteristics of the practice area of asylum law in order to provide some background for understanding the work asylum lawyers do. Second, the institutional context, consisting of the legal aid system and the asylum procedure, in which the providers operate will be described. Third, I will turn to the two key issues presented, followed by a conclusion.

<sup>6</sup> Article 15(1) provides that asylum seekers have a right to consult a legal adviser throughout the asylum procedure, but at their own cost. It is only after a negative decision that a right to free legal assistance and/or representation arises. This right may be limited to procedures at first instance that are likely to succeed, to those applicants who lack sufficient resources and to legal advisers specifically designated by national law. In addition, time and monetary limits may be imposed, provided that such limits do not arbitrarily restrict access. Article 16 elaborates on the scope of the assistance and/or representation.

<sup>7</sup> This contribution looks at publicly funded legal representation by a lawyer and the term ‘legal aid’ is used in this respect. By ‘asylum procedure’ I understand the regular first instance asylum procedure, appeal and onward appeal procedures including repeated applications in which the asylum application is treated, thereby excluding detention- and border procedures (Schiphol airport). In this piece I will focus on the so-called general asylum procedure.

<sup>8</sup> This contribution is based on the research conducted for my PhD-project, which concerns a comparative case study into the provision of legal in asylum procedures in the Netherlands, England and France. Fieldwork in the Netherlands is conducted in the period January to May 2012 and February to May 2013. The results presented here are preliminary since the fieldwork is not yet completed.

<sup>9</sup> I interviewed lawyers working at different in-land applications centres across the Netherlands (Ter Apel, Zevenaar and Den Bosch) and with various backgrounds in respect of firm size, experience, membership of specialised asylum associations and gender. Two of the twelve interviews were test interviews and conducted in January and March 2012, the remaining between March and May 2013. Meetings attended include the Refugee Legal Aid Working Group of Dutch Refugee Council and a meeting on quality of asylum lawyers organised by Dutch Bar Association.

## 2. The Practice Area of Asylum Law in the Netherlands

The practice area of asylum law is characterised by several elements. First, the asylum process is typified by an inequality of the parties involved, i.e. the state being a 'repeat player' versus the asylum seeker as a 'one-shotter'.<sup>10</sup> This typology illustrates the position of asylum seekers and the immigration authorities of a state in the asylum procedure – not only at the appeal stage but also during the procedure at first instance – very well. The immigration authority routinely processes asylum applications, whereas the interviews and possible subsequent appeals are one-off events for asylum seekers. Repeat players have strategic advantages in the procedure in several ways.<sup>11</sup> The lawyer is introduced, as a repeat player, in an attempt to help compensate for this inequality of arms.<sup>12</sup> Assistance from a lawyer may help to overcome any possible fear of authorities, prepare the asylum seeker for scepticism of immigration authorities and assist in eliciting the applicant's full account.<sup>13</sup>

Second, apart from being one-shotters, asylum seekers as a clientele have other particulars. Asylum seekers may arrive traumatised or with medical problems in a foreign country of which they often do not speak the language. They are unfamiliar with the legal system and do, generally, not know what to expect of the procedure. There is thus a great dependency on the lawyer. In addition, there is often a lot at stake for asylum applicants. This may entail that they try everything to obtain asylum; sometimes even hold back information or not tell the truth because they believe, or are told by others, that this would increase their chances. Furthermore, in the Netherlands, asylum seekers do not have to contribute financially to the legal aid they receive. This fact, in combination with the high stakes for asylum seekers, makes it likely that the applicant may want to try every possibility (appeal and onward appeals) to get their claim accepted and will thus ask the provider to take these further steps. These are all elements with which the legal aid provider is confronted and has to deal.

Third, legal aid providers in asylum procedures operate in a challenging legal context. The area of law is complex, subject to constant changes, and requires not only legal skills but also specific factual knowledge about foreign

<sup>10</sup> Typology introduced by Galanter 1974. Typically, one-shotters are characterised as claimants, often individuals, who have only occasional recourse to the courts and the stakes represented by the outcome of a case may be high relative to the total worth. Repeat players, on the other hand, are larger units, e.g. government agencies, engaged in many similar litigations or procedures over time and the stakes in any given case are smaller.

<sup>11</sup> E.g. they develop expertise, have ready access to specialists, the opportunity to develop facilitative informal relations with institutions involved overtime and they can adopt strategies in order to maximise gain in the long term. And, since the stakes in one particular case may be not that high – contrary to the stakes of one-shotters, which can be in the case of asylum seekers a matter of life or death – they can afford to play for the rules.

<sup>12</sup> It must be noted that legal services is only one of the elements influencing possible equalisation. The other elements are the institutional facilities, the rules, and the organisation of the parties (Galanter 1974, p. 125 - Figure 3).

<sup>13</sup> See Matas 1991.

countries. The particular substantive area of law is also challenging in another respect: asylum rules are restrictive and the chances of obtaining success, in particular on appeal, are relatively low.<sup>14</sup> The administrative courts, and the Council of State to an even greater degree, only review the decision of the immigration authority (IND) marginally.<sup>15</sup> As one lawyer stated with regard to this practice and the fact that cases are judged very legalistically:

*'I once jokingly said that it seems somewhat autistic. As if the reality of the client is completely irrelevant. E.g. reasons why someone cannot declare clearly and coherently immediately or comes later with a statement, these can be diverse and numerous... and that is often fatal. If you do not come up with the whole story at once, then you are at a disadvantage. No account whatsoever is taken of the personal circumstances that affect the way in which someone can tell his story.'*<sup>16</sup>

Fourth, there is the organisational context of the asylum procedure in which asylum law is practised as will be set out in more detail below. Asylum procedures can be very rapid and, consequently, time limits within which the practitioner must act are short. Moreover, the provider is confined to the institutional setting in which he operates.<sup>17</sup> In the fixed process of the asylum procedure, it is to a great extent determined by the national authorities where, when and also to a large degree how long he can see his client and what must more or less be discussed.

The fifth element is a legal aid aspect. Lawyers have to work within the national legal aid system, as will be described below. This entails a certain dependency on the legal aid authority as regards access to the scheme, appointment to clients and payment. Also, the situation in the Netherlands at the time of writing is that the number of asylum lawyers registered with the Legal Aid Board relative to the influx of asylum seekers in the general asylum procedure is high. This means there is not much work and, as a result, much competition between lawyers and less financial security.

These are the general characteristics of the practice area of asylum law in the Netherlands. I will now turn in more detail to the institutional context, made up of the legal aid system and the asylum procedure.

<sup>14</sup> In 2011, 56.8% of the first instance asylum applications were rejected. See [http://www.vluchtelingenwerk.nl/pdf-bibliotheek/VLUCHTELINGEN\\_IN\\_GETALLEN\\_2012\\_def\\_OO.pdf](http://www.vluchtelingenwerk.nl/pdf-bibliotheek/VLUCHTELINGEN_IN_GETALLEN_2012_def_OO.pdf), p. 9 (based on data from UNHCR, INDIAC and Eurostat). In 2012, 86% of the IND decisions in asylum cases were upheld by the courts. IND year results 2012, p. 19 available at: [http://www.ind.nl/Nieuws/Documents/A6\\_NL\\_WEB.pdf](http://www.ind.nl/Nieuws/Documents/A6_NL_WEB.pdf).

<sup>15</sup> See in this regard Baldinger 2013.

<sup>16</sup> Interview nl8-s-+10-y-m (translation TB).

<sup>17</sup> Compare Doornbos 2006, p. 237.

### 3. Institutional Context

#### 3.1 Legal Aid System

The Legal Aid Board (*Raad voor Rechtsbijstand*) is the public body entrusted with the organisation and administration of legal aid in the Netherlands. This includes matching the availability of legal experts with the demand for legal aid, as well as the supervision and quality control of the actual services provided.<sup>18</sup> Eligibility for legal aid is officially subject to a sufficient means test.<sup>19</sup> Yet, in respect of asylum applicants the test is not applied in practice. Merits of claim testing is also provided for by law, but not strictly applied in practice.<sup>20</sup> The legal aid is provided by lawyers who are members of the Dutch Bar Association and registered with the Legal Aid Board.

#### 3.2 Requirements for Legal Aid Providers under the Legal Aid Scheme

In order to represent asylum seekers under the legal aid scheme, lawyers need to be registered with the Legal Aid Board to this particular end. They have to comply with the Board's general registration conditions as well as meet additional requirements pertaining to asylum law.<sup>21</sup> The latter obligate lawyers representing asylum seekers to have successfully completed the professional education of the Bar and specialised courses on asylum and immigration law, to be a member of the Legal Aid to Refugees Working Group of the Dutch Refugee Council and to act in accordance with the minimum standards laid down in the Best Practice Guide on Asylum Law.<sup>22</sup> Before being allowed to independently assist asylum seekers, lawyers must work under the supervision of an experienced lawyer. In order to prolong the entitlement, one must have at least ten asylum cases a year and attend a course on the topic at least once a year. Again additional requirements apply for lawyers who want to participate in the schedule for assisting asylum applicants in the application centre, where asylum applications in the general asylum procedure are processed (hereafter: AC

<sup>18</sup> Article 7 Legal Aid Act (*Wet op de Rechtsbijstand*).

<sup>19</sup> Article 12(1) Legal Aid Act.

<sup>20</sup> Article 12(2)(a) Legal Aid Act in conjunction with Article 3 Decree on the Criteria for Granting Legal Aid (*Besluit rechtsbijstand- en toevoegcriteria*). Only in case of subsequent asylum applications, it is verified whether there are new facts or circumstances which merit the granting of legal aid.

<sup>21</sup> Articles 13-15 Legal Aid Act in conjunction with Articles 1 to 6, 6e and appendix 2 Registration Conditions Lawyers 2013 (*Inschrijvingsvoorwaarden advocatuur 2013*) *Stcrt.* 2013, 860. The general registration conditions include, *inter alia*, keeping a reliable registration of time spent on cases, compliance with quality standards and be prepared to be submitted to peer review mechanisms. There is a maximum (250) to the number of allowances a lawyer may receive per year.

<sup>22</sup> Appendix 2 of the Registration Conditions Lawyers 2013. The Best Practice Guide provides for the minimum norms legal aid providers in asylum cases must observe and against which their conduct is examined when they are being subjected to monitoring (Doornbos et al. 2012).

rota).<sup>23</sup> Lawyers must deal with at least 30 asylum cases a year, submit files to the Peer Review Committee (*Commissie Intercollegiale Toetsing*) on request and lawyers new to the AC rota are subjected to additional supervision conditions.

Before going into the process of how lawyers are appointed to clients I will first explain briefly how the Dutch asylum procedure is set up, how it functions in practice and what the lawyer's role in the procedure is.

### 3.3 *Asylum Procedure*

#### *Main Actors and Institutions in the Asylum Procedure*

The body responsible for processing asylum applications is the Immigration and Naturalisation Service (*Immigratie en Naturalisatiedienst*, hereafter: IND). During (and after) the procedure, reception and accommodation for the asylum seekers is arranged for by the Central Agency for the Reception of Asylum Seekers (*Centraal Orgaan opvang Asielzoekers*). The Dutch Refugee Council (*Vereniging Vluchtelingenwerk Nederland*)<sup>24</sup> provides information about the procedure and informs the applicant about his rights and duties, for example, the right to a lawyer paid for by the state. It is possible to appeal the decision of the IND before the regional administrative courts. Onward appeals can be lodged with the Administrative Jurisdiction Division of the Council of State (*Raad van State*).

#### *The Asylum Procedure*

As from July 2010 the so called 'general asylum procedure' entered into force. This is a standard procedure of eight days, which can, in certain circumstances, be prolonged to fourteen days.<sup>25</sup> If it is not possible for the IND to take a decision within this period because further investigation is required, the application will be dealt with in the extended asylum procedure. In that case, a decision has to be taken within six months from the official application.<sup>26</sup> Generally, asylum applicants are granted a rest- and preparation period before the asylum procedure officially starts, which lasts at least six days.<sup>27</sup>

<sup>23</sup> Appendix 2 (3) and 2A (7) Registration Conditions Lawyers 2013.

<sup>24</sup> The Dutch Refugee Council is a foundation, which receives, in addition to funding from the national lottery and financial support from donors, subsidies from the government for their role in the asylum procedure.

<sup>25</sup> Article 3.110 (2) Aliens Decree. See Article 3.115 (1) Aliens Decree for circumstances under which the period can be prolonged.

<sup>26</sup> Article 42 Aliens Act 2000.

<sup>27</sup> See Article 3.109 (6) and (7) Aliens Decree for the exceptions. The asylum seeker - who is not stopped at the border - must report himself the central reception location in Ter Apel to ask for asylum. This is only a notification, after which an intake will take place. Subsequently, the applicant will be placed in the (non-detained) asylum procedure, which takes place at the in-land application centres in Ter Apel, Zevenaar and Den Bosch.

*The General Asylum Procedure and the Lawyer's Role*

During the rest and preparation period (in theory six days, but in practice this period is often several weeks) preceding the official start of the general asylum procedure, asylum seekers are informed by the Dutch Refugee Council about the procedure, the possibility of receiving legal aid, a lawyer is appointed and they are offered a medical examination.<sup>28</sup> The lawyer first meets the asylum seeker during the rest- and preparation period, which is usually at least six days before the official start of the asylum procedure. The asylum seeker travels to the lawyer's office to prepare the first asylum interview and the rest of the procedure. During the rest of the general asylum procedure the meetings take place, in principle, at the application centre (see below).

The general asylum procedure takes eight days and is set up as follows.<sup>29</sup>

-6 days	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6	Day 7/8
<i>Meeting with lawyer during rest and preparation period</i>	<i>First interview</i>	<i>Discussion first interview &amp; preparation second interview</i>	<i>Second interview</i>	<i>Submission of corrections and additions</i>	<i>Intention to reject or application is granted</i>	<i>Submission of response to intention</i>	<i>Decision</i>

On the first day, the official asylum application is lodged and the first interview on the applicant's identity and travel route takes place.<sup>30</sup> On the second day, the applicant discusses the first interview and prepares for the second interview with the lawyer. This second interview, concerning the reasons for applying for asylum, takes place on the third day. On day four, this interview is discussed with the lawyer and corrections and additions to the report of the second interview can be submitted. On the fifth day, the IND will inform the asylum seeker of whether it accepts or intends to reject the application. If the IND decides to grant asylum, the procedure has come to an end. If it intends to reject the application, the procedure continues. If the procedure continues with an intention to reject, on the sixth day the asylum seeker and his lawyer draw up a written opinion in response to the IND's intention to reject the asylum application. On day seven or eight, the IND will make the decision to either reject or accept the asylum claim. The decision to either accept or reject the asylum claim will normally be communicated to the lawyer, who must then communicate the deci-

<sup>28</sup> Article 3.109 (1) and (5) Aliens Decree.

<sup>29</sup> Article 3.111 to 3.114 Aliens Decree.

<sup>30</sup> The lawyer is allowed to be present during the interviews but in practice this rarely happens. The lawyer can ask someone of the Dutch Refugee Council to attend the interview if the asylum seeker is a minor or vulnerable.

sion to the client and discuss any possible further steps.<sup>31</sup> The IND can decide at any point in the procedure that further investigation is required and redirect the applicant to the extended asylum procedure.

So in short, and according to the Best Practice Guide Asylum,<sup>32</sup> the lawyer, in principle, has (face-to-face) contact with his client at his office at some point during the rest and preparation period before the procedure officially starts, at the application centre on day 2, day 4, day 6 and day 8.

#### *Appeal Procedures and Time Limits*

An appeal against a negative decision on the asylum application in the general asylum procedure must be lodged within one week after the decision.<sup>33</sup> The appeal does not have suspensive effect.<sup>34</sup> In order to ensure that the applicant has a right to remain until the court decided, the appeal must be accompanied by a request for an interim measure which must be issued within 24 hours after the decision of the IND is made known to the lawyer.<sup>35</sup>

After a negative decision by the administrative court, an onward appeal can be issued with the Administrative Jurisdiction Division Department of the Council of State within one week after the court's judgment when the decision is taken in the general asylum procedure.<sup>36</sup>

#### **3.4 Process of Appointment**

In the general asylum procedure the Legal Aid Board appoints lawyers to asylum seekers before the procedure actually starts, that is during the rest- and preparation period. The Board is present in the application centres, where it coordinates the appointment of lawyers who participate in the legal aid schedule for the application centres (AC rota) to clients and arranges interpreters for the meetings between the lawyers and the client. The Board sets up the schedule for the distribution of cases and the lawyer is allowed to indicate in which application centre he wants to work and the number of cases he wants in his 'set', i.e. a bundle of two or maximum three cases to which he is assigned in the eight-day procedure.<sup>37</sup> The cases in a set run parallel during the eight day procedure. In principle, lawyers must accept all kinds of cases and cannot refuse

<sup>31</sup> There are some exceptions to this rule, e.g. a rejection of a repeated application is communicated by the IND to the applicant in person. See para. C16/3.1 Aliens Circular 2000.

<sup>32</sup> Doornbos et al. 2012, p. 63 ff.

<sup>33</sup> Article 69(2) Aliens Act 2000. In case the application is rejected in the extended procedure, the applicant must lodge an appeal within four weeks after the decision (Article 69(1) Aliens Act 2000).

<sup>34</sup> Article 82(2)(a) Aliens Act 2000. In the extended procedure, the appeal does have suspensive effect and the asylum seeker may remain in the reception centre (Article 82(1) Aliens Act 2000; C22/5.1 Aliens Circular).

<sup>35</sup> The request must have been submitted in time (C22/ 5.1 and C22/5.3 Aliens Circular).

<sup>36</sup> In the extended procedure this is four weeks. The appeal does not have suspensive effect.

<sup>37</sup> See appendix 2a Registration Conditions Lawyers 2013 on the distribution of cases.



asylum seekers with certain nationalities, members of groups or families.<sup>38</sup> The lawyer is informed about the cases he is appointed to in advance. Currently, there is not much work and many lawyers on the AC rota, which means that lawyers are often not given the amount of cases they signed up for. In principle, the asylum seeker must have the possibility to be represented by a lawyer of his choice. In practice, however, the principle of free choice of lawyer is very difficult to realise.<sup>39</sup> This is due to the strict planning and regime of the general asylum procedure; the planning of the IND and the Legal Aid Board must match and the requested lawyer also has to be available on short notice.

### 3.5 Remuneration of Legal Aid Providers

The remuneration of legal aid providers is provided through a system of fixed fees.<sup>40</sup> The fixed fee is granted for an individual or, in a case of a family with close family ties, for the entire family.<sup>41</sup> The system is based on the granting of a fixed amount of 'points' for providing legal aid in a certain stage in the procedure. One point equals € 106.99<sup>42</sup> and reflects approximately one hour of work. In addition to the fees they receive for the provision of legal aid, lawyers are also compensated for expenses such as travel costs and travel time.<sup>43</sup> Assistance during the general asylum procedure is divided in three modules, each of which merits four points.<sup>44</sup> So if a lawyer assists the asylum applicant during the entire procedure this will amount to a compensation of twelve points. In case the general procedure is prolonged up to fourteen days, this does not affect the number of points granted. When the IND decides that the application will be dealt with in the extended procedure, two additional points are granted.<sup>45</sup> In very complicated and thus time-consuming cases, a lawyer can ask for reimbursement of extra hours spent on the case on top of the compensation granted

<sup>38</sup> Condition 2 (a) Appendix 2a Registration Conditions Lawyers 2013. One case can be an individual, a couple or a family.

<sup>39</sup> Compare Doornbos et al. 2012, p. 25. Once the asylum seeker arrives and knows a lawyer by whom he wants to be represented, the asylum seeker can make this known to the Legal Aid Board which must then do its best to accommodate the request.

<sup>40</sup> Remuneration Legal Aid Decree 2000 (*Besluit vergoedingen rechtsbijstand 2000*), last amended 14 December 2012, *Stcrt.* 26952.

<sup>41</sup> The IND distinguishes procedures for separate family members, the Legal Aid Board distinguishes cases: one case can contain procedures of several family members.

<sup>42</sup> This is the amount for 2013. It is determined every year on the 1<sup>st</sup> of January. See Article 3 Remuneration Legal Aid Decree 2000.

<sup>43</sup> Articles 2(2)(b), 24 and 25 Remuneration Legal Aid Decree 2000. Per 60 km 0.5 point is granted for travel time.

<sup>44</sup> Article 5a (1) Remuneration Legal Aid Decree 2000.

<sup>45</sup> Article 5a (2) Remuneration Legal Aid Decree 2000. Yet, it should be noted that if the IND takes this decision before the end of the general procedure, the lawyer will receive only points for the stages (or modules) in which he assisted the applicant. For example, if the decision to move the application to the extended procedure is taken on day five, the lawyer will receive eight points for the first two stages (2 × 4 per module) and an additional two points for assistance in the extended procedure, so a total of 10 points.

by the fixed fee system.<sup>46</sup> The Board can accept the request when there is substantial factual complexity which is legally relevant or when the case is legally complex.<sup>47</sup>

#### 4. Key Issues Arising from the Institutional Context

In the interviews I asked lawyers about the issues they come across in the course of their work. The responses were diverse. In this section I will not cover all topics raised, but rather focus on two key matters arising from the institutional context in which legal aid providers in asylum procedures operate and which shape and are likely to determine how legal aid providers do their work. First, I will turn to the issue of time pressure arising from the short time limits, which was brought forward by almost all respondents in some way.<sup>48</sup>

##### 4.1 Short Time Limits

Respondents expressed concerns about the short time limits in the asylum procedure.<sup>49</sup> This plays a role on several moments in the procedure, in particular during the eight-day general asylum procedure, but also in the period leading up to the appeal. I will discuss these stages and the possible consequences of the time pressure for both the lawyer and the asylum seeker and the options lawyers have in dealing with the time pressure.

The eight-day general asylum procedure was described by lawyers as a ‘*carousel*’, which may be best translated as a roller coaster. Respondents question and expressed concerns about the thoroughness and fairness of the procedure in *some* cases, in particular in cases concerning the more vulnerable clients. One respondent even expressed the feeling that following the strict eight-day regime is a goal in itself for the IND, which makes it difficult for the lawyer to arrange what is necessary for the client.<sup>50</sup> The short and strict time limits were deemed problematic for several reasons. First, respondents consider the strict regime a problem in case additional documents need to be collected to substantiate the claim, documents need to be researched or the client has mental or physical

<sup>46</sup> In case the amount of time spent on a case in the general or extended procedure exceeds 24 hours, every additional hour is compensated with one point, that is, if the request (including budget estimating the hours needed) is authorised by the Legal Aid Board in advance (Article 5a (6) Remuneration Legal Aid Decree 2000).

<sup>47</sup> Legal Aid Board: Manual Extra Hours (*Leidraad Extra Uren December 2008*) Available at: [www.rvr.org/nl/subhome\\_rbv/bibliotheek/handboeken/index.html](http://www.rvr.org/nl/subhome_rbv/bibliotheek/handboeken/index.html).

<sup>48</sup> One respondent did not really see this as an issue but more as given. A frame within which the lawyer must operate and do what is possible within the given time.

<sup>49</sup> Compare on the issue of time pressure in the general asylum procedure Terlouw 2011b.

<sup>50</sup> ‘*The regime seems to be a priority, to go through with it.*’ Interview nl2-s-+10-n-f (translation TB).

problems and a statement from a doctor must be obtained. There is no time to arrange such an appointment or to organise a counter-inquiry.<sup>51</sup>

The second problem is connected directly to the time lawyers have to provide legal assistance. As set out above, there is one day for every action in the procedure and lawyers stated that this leads, in certain circumstances, to severe time pressure or does just not allow the lawyer to do what he considers necessary. This can occur in situations where the provider has been assigned three cases in a set which are substantively complex or include a couple or even a family (which are, in principle, both counted as one case). This may entail that, for example, on day 4 the lawyer has to travel to the application centre, to discuss interview reports of these three cases with the clients and write and submit corrections and additions to all reports within that one day. This is considered not possible, that is, in a thorough manner. Also, in case clients are emotional, traumatised or in shock, it might take longer before the lawyer is able to gain trust and before the client is able to tell the asylum account in a clear and coherent way. Given that only one day is granted, the possibility of a time out or to resume the discussion of an interview report at a later moment is not there. As one respondent states:

*'What actually really bothers me is that you are in a carousel with these people and it goes fast. You would want to take the time for people to follow their emotions. So if there is someone who gets highly emotional during our conversation, then it should be possible to say: we leave it here, drink something, take some rest and I'll see you in a week.[...] It just has to be discussed within two hours on that one day.'*<sup>52</sup>

It should be noted here, that of course not every case is complex, and such a situation does not occur all the time. Yet, when lawyers are confronted with a set of complex cases, some feel they do not have the time to deal with these cases in the way they deem appropriate.

A third concern related to the short limits, is connected to the applicant's free choice of lawyer. Due to the strict planning of both the IND and the Legal Aid Board in order to make sure the eight-day procedure can proceed as scheduled, it is in reality often not possible for the asylum seeker to have this free choice. Lawyers experienced that, in general, it is only feasible if the applicant indicated this at first arrival when presenting himself to apply for asylum. This is before the client is officially informed of the right to be represented by a law-

<sup>51</sup> This even apart from the fact that costs relating to expert consultations and medical examinations are in principle not reimbursed. So in case the authorities have established that the documents submitted by the applicant are false and the client contests this, the costs for a counter-inquiry are not covered. Counter-inquiries for language analyses are in principle also not covered, unless the Central Agency for the Reception of Asylum Seekers covers the costs, which is not the case in the general asylum procedure (Article 17(7) Regulation Allowances Asylum Seekers 2005 (*Regeling verstrekkingen asielzoekers 2005*)).

<sup>52</sup> Interview nl6-so-+10-n-m (translation TB).

yer, which is during the rest- and preparation period that follows after. How would the asylum seeker know at this point in time which lawyer he would prefer? And, even if he would know, he must be aware of the option of asking for the preferred lawyer at this stage. Even though the Legal Aid Board does its best to accommodate the request if issued later, it is not heeded when this would disrupt the planning. This is not only a concern for the client, but also for the lawyer. As stated above, there is currently not much work and a lawyer may miss out on a new client because the applicant did not select him as the preferred lawyer in time. Moreover, since the lawyer cannot indicate to the Board the kind of cases he would like to be appointed to because of his specialisation in a particular area (e.g. nationality), and the client can often not opt for the specialised lawyer, the lawyer's autonomy is affected. If the lawyer would be able to assist groups in which he is specialised, he would be able to work more efficiently.<sup>53</sup>

A fourth point that came up during the interviews, was that, due to the short time scales, lawyers felt they did not have the room to decide not to continue with a client, for example, when they consider the case prospectless. Given the fact that after the IND issued an intention to reject a case on day 6, a new lawyer would have only one day to become familiar with the file, discuss the intention to reject with the client and submit a response to the IND. On top of possible other cases the lawyer has to deal with on that day. Most lawyers do not consider this the correct circumstances for handing over a case in a responsible manner. For some lawyers the same tension exists when deciding whether or not to proceed with a case on appeal.<sup>54</sup> In the general asylum procedure, the time limit for lodging an interim measure is 24 hours. The interim measure must be lodged simultaneously with the appeal and both thus have to be lodged within 24 hours. Even though the appeal can be lodged *pro forma* after which the grounds of appeal can be supplemented at a later date – which can still be within one week – lawyers provided this as a reason for proceeding with cases which they considered having no or very little chance of success.

#### *Options for Controlling Time Pressure in the General Asylum Procedure*

What are the options lawyers have in trying to control the time pressure? In respect of the first two concerns discussed, the lawyer can ask the IND to either prolong the general asylum procedure (this is possible up to fourteen days) or to place the applicant in the extended procedure. Yet, it is entirely up to the

<sup>53</sup> The option does exist in case of subsequent applications where lawyers can select cases themselves. As one respondent states who accepts for subsequent applications only certain groups: 'I have done many of those cases and I am really into the matter. I know all the country reports. Then it becomes a lot easier, also for overseeing the matter. You shouldn't do 30 countries at the same time.' Interview nl4-s-+10-y-f (translation TB).

<sup>54</sup> In this respect, it must be noted that a lawyer loses income when he decides not to continue with a case, which might be also a consideration for continuing apart from the reason presented here (see below on the payment system).

IND to decide on this and what if it decides not to accept the request? According to the respondents, this does happen and then the time pressure remains a problem. As explained in relation to the third concern, lawyers do *not* have the option to be appointed only to groups in which they are specialised in order to work more efficiently and thus save time. If time pressure is a structural problem for the lawyer, he can decide to sign up for less than three cases in a set in order to have more time. Also, in case the lawyer sees it coming beforehand in a particular case, i.e. when he is informed by the Legal Aid Board about the kind of cases assigned to him, he can ask, promptly after being informed, to drop one case. Yet, these two options have of course implications for the lawyer's income. This leads me to the second issue: the remuneration lawyers receive and the possible tension that exists when the fixed fee granted does not cover the hours of work.

#### 4.2 *Payment System Based on Fixed Fees*

The topic of the remuneration of legal aid providers in asylum procedures is a topic of continuous debate between providers and policy makers.<sup>55</sup> The payment system is based on a fixed fee per stage of the procedure and the idea behind this is that the more complex and time consuming cases can be compensated with the less complex cases requiring less work. During the interviews many different points were raised in relation to the payment system, but two key problems emerged. First, the (perceived) difficulties in obtaining an additional fee for complex cases as described above. The request is viewed by the lawyers as very complex and time consuming and there is the perception, supported by rejections from lawyers who tried to obtain the additional fee, that it is hardly ever granted. Even those lawyers who have never asked for the extra fee, said that the negative stories from other lawyers stopped them from even requesting. Second, the fact that, in principle, couples and families with close family ties are counted as one case (so one fee) is considered unfair by many lawyers.

<sup>55</sup> See for lawyers' perspectives e.g. Bogaers 2009. The government considers fees can and must be cut in certain cases. At the time of writing the State Secretary for Security and Justice introduced several legal aid cuts. First, in respect of subsequent applications a 'no cure les fee' policy to discourage the unnecessary prolongation of application procedures by the so-called 'accumulation' of cases entered into force in Januari 2014. This entails that in cases in which a subsequent application is denied by the IND and in situations which the appeal and onward appeal are rejected, the lawyer will receive significantly lower remuneration for his services during that part of the procedure (draft decision of 4 January 2013, *Stcrt.* 2013, no. 246; Letter from State Secretary, *Parliamentary Papers II*, 2012-2013, 19637 no. 1654, p. 3). Second, cases which are ruled manifestly inadmissible, manifestly unfounded, the authority which is applied to is manifestly not competent to deal with the application/appeal or the case is manifestly founded, will only be remunerated 2 points. This measure entered into force in October 2013 (Decision of 28 November 2012, *Stcrt.* 2013, no. 24322), but has been repealed in February 2014 in part due to protests of lawyers and the Dutch Bar Association (Letter from State Secretary, *Parliamentary Papers II*, 2013-2014, 33750-VI no. F).

A final, more general, point in respect of the payment system that was raised by respondents during the interviews, was a feeling of dissatisfaction with the way in which the system works. Namely, that it incites doing a bad job, since it is financially more profitable to deliver poor work than to do a good job. As one respondent explained:

*'If I prepare him [the client] well and he then gives a good statement and therefore immediately gets asylum, I get less points than if I would lean back and mistakes are made and an intention to reject is issued [...] It does kind of incite, well... that when you do your work less well and as a result get a negative outcome in a case, you can 1) proceed with a case and apply for a fee to that end and 2) you get your money easier.'*<sup>56</sup>

While lawyers who raised this matter of course stated that it does not affect their way of working, the fact that it was brought up during the interviews already indicates that it is a topic.<sup>57</sup> The issue raises, in the words of De Groot-van Leeuwen, a 'morality vs market' dilemma for lawyers.<sup>58</sup> It may generate a tension between the lawyers' wish and professional obligation to provide high quality legal work and the wish or need to earn (a sufficiently high) income.

#### *Is the Fixed Fee an Issue?*

When asking lawyers whether the fee they receive, covers the time they spend on a case during the different stages of the entire asylum procedure, I received very mixed responses. The general answer was that it depends on the case: Some nationalities require more time than others, some individual clients require more time than others, and of course a couple or a family takes more time than one person. Overall, some lawyers consider that they are structurally underpaid at certain stages of the procedure, others find that, in general, it is possible to compensate for the more complex cases with the less complex cases, and others do not have problems with the remuneration. Whether the payment they receive is considered sufficient, clearly depends, and this also follows from the interviews, on many factors, such as the individual lawyer's work method (e.g. run through entire asylum account before first interview, discuss every word of interview reports or not), the hourly wage a lawyer personally considers sufficient for the work he does (which may be lower than the hourly fee calculated

<sup>56</sup> Interview nl9-s--2-n-f (translation TB). The last point this respondent raises refers to the fact that when a case on appeal is won, one must obtain the fee from the IND via the court, which can take a long time. Whereas when the case is lost, the lawyer obtains his fee from the Board, which is easier and quicker.

<sup>57</sup> Even though these respondents would not go as far saying that they see their colleagues purposefully doing a bad job, they do point out that they are sometimes shocked by their colleagues' meagre work.

<sup>58</sup> De Groot-van Leeuwen 1998, p. 241.

by the fixed fee scheme) and the way in which a practice is run (low office costs or not).

Nevertheless, the fact that the fixed fee system is an element of the institutional context with which the providers have to deal, is evident. The element is closely related to the issue of time pressure discussed earlier: The lawyer may experience time pressure because of the short time limits in the asylum procedure, but also because the fixed fee covers a certain number of hours and this does not cover the time the lawyer considers necessary for providing adequate legal aid. In the previous section, I already discussed the options lawyers have for dealing with time pressure arising from the short time limits of the asylum procedure. If the time pressure is not caused by the procedure, but by the time granted by the fixed fee, another option arises. That is, to spend more time than hours paid for. This is an option many lawyers who felt restrained by the time limits of the asylum procedure have already opted for. Yet, this clearly has financial implications, just like the option of taking on fewer cases in a set. What are the considerations that play a role in this respect?

#### *Two or Three Cases in a Set?*

Lawyers who state that they have experienced time pressure in the general asylum procedure but still sign up for three cases, provide the following reasons. First, the lawyer is not always granted the number of cases signed up for. It does happen that he is granted one or two cases instead of three or that a case or all cases are cancelled at the last moment. Second, one or more of the cases in a set may become a so-called 'Dublin case'. This entails that another European Union member state is considered responsible for processing the asylum application.<sup>59</sup> Generally, these are more straightforward and thus 'easier' cases. Moreover, for a Dublin case the lawyer is only granted four points for the entire general asylum procedure instead of twelve. Third, the risk of time pressure generally only arises when there are three complex cases in one set. Therefore, some take the risk of opting for three cases. Fourth, there is also the last resort of dropping a case when the set is assigned.<sup>60</sup> These considerations play a role in deciding to sign up for two or three cases and these show that the fact that the lawyer has no real influence on the cases he gets, complicates the choice. Again, the lawyer is placed in a morality vs. market dilemma: does the risk of time pressure outweigh the need to have enough cases to keep the practice running?

<sup>59</sup> The procedures give the applicant an opportunity to contest the intention to send him back to that other country.

<sup>60</sup> Yet, it should be noted here that the Legal Aid Board does take note of the cases cancelled by a lawyer. This may be taken into account when distributing new cases among the lawyers, where the Board aims for an equal distribution.

## 5. Coping Strategies in the General Asylum Procedure

In the previous sections, I discussed the options lawyers have for controlling the time pressure they may experience and the considerations that play a role in that respect. Yet, when the time pressure remains – either because of the time limits of the eight-day procedure or because of financial considerations – lawyers have developed several concrete coping strategies in the general asylum procedure. In the following, I will discuss the range of approaches the respondents have adopted.

A strategy for coping with time pressure which is used is not to go to the application centre to see the client on day 6 to discuss the IND's intention to reject. This is especially time saving for lawyers who have their office far from the application centre. There is much discussion on this topic.<sup>61</sup> Some lawyers consider it absolutely essential to meet with the client and discuss the intention with the client, whereas others find they need to put all the time they have in that one day in writing a response to intention. In this regard, the option of using modern technology, i.e. skype, for communicating with the clients, which is in certain circumstances facilitated by the Legal Aid Board,<sup>62</sup> is also resorted to by some lawyers. Another alternative for saving travel time is to receive clients at the lawyer's office not only at the first meeting during the rest- and preparation period, but also during the general asylum procedure.<sup>63</sup> While it is common practice to meet with the client at the application centre during the eight-day procedure – and this has always been expected from the lawyer – it is not an *obligation*. In principle, it is thus possible to meet with the client at the lawyer's office, even though this is not encouraged. It also has disadvantages for the lawyer since he misses out on the services offered by the Legal Aid Board at the application centre (e.g. interpretation) and it complicates the direct communication with the IND and other actors.

As regards the non-logistical approaches, the most obvious strategy lawyers adopt is to spend less time on cases where i) the lawyer is pretty certain that the applicant will be granted asylum; ii) the lawyer believes there is no chance of success, e.g. Dublin cases. Also, not fully discussing the asylum account before the interviews and not running through the interview reports word-for-word with the clients, but focusing on the most important aspects are options. Even

<sup>61</sup> The Best Practice Guide Asylum States that a lawyer should in principle discuss the intention to reject with the applicant (Doornbos et al. 2012, p. 81). Compare Toemen 2012.

<sup>62</sup> In case of brief conversations or when the lawyer knows the client well. Legal Aid Board officials expressed concerns about the risk that, since conversations may be highly emotional, the client may become unwell or upset, in which case there is no one in the room to physically assist the client. Therefore, some officials may be reticent in supporting this practice.

<sup>63</sup> This was not considered an option until mid 2012 when a lawyer challenged the decision of the Central Agency for the Reception of Asylum Seekers not to reimburse travel costs when the client travelled to the lawyer on day 2 and 4 and the appeal was granted. Rotterdam District Court, Judgement of 16 August 2012, case no. AWB 11/35065.



though, if there had been enough time, this might not have been the method lawyers prefer. The next quote illustrates this. The lawyer stated that he sometimes used to, prior to the applicant's first interview with the IND, not only ask about and discuss the client's asylum account, but also note down the entire story in order to make sure that the whole story would come to the fore and not let it be pushed into a certain direction by a possibly biased IND official. When I asked whether he always works that way, he continued:

*R: Well, then I would have to transform my whole business. We have just a legal aid practice and we believe that with the time we spend we can serve our clients sufficiently. But maybe...*

*I: Sufficiently or good enough?*

*R: Look... [silent for a moment] The real refugee maybe not... sufficiently. But at the same time, a large part of our clients do not have a right to a status but you help them to make sure that a well-founded decision can be made and their side of the story is heard.<sup>64</sup>*

Furthermore, it not always clear whether lawyers have developed a certain way of working because they actually consider it the right way to go about the matter or because the approach saves time. For example, one respondent who explicitly chooses not to ask about and discuss with the applicant his asylum account prior to the applicant's interviews with the IND (which is time saving) provided as a reason for this approach that he did not want to guide or influence the applicant's account. This is something the respondent once did and felt bad about afterwards. The respondent explains:

*R: In the preparation for the interviews, I only give general information about the things they should be aware of and pay attention to. I do not ask them what they are going to tell.*

*I: No?*

*R: No, I can read about that in the second interview report. I don't want to put words in people's mouth. They should tell their own story. They are here to apply for asylum. I don't feel responsible for that and won't invent the story; that's their thing.<sup>65</sup>*

Yet, the question remains: Do lawyers actually consider the way in which they go about assisting their clients the most appropriate way or have they, led by the time pressure they experience, developed certain strategies and come up with justifications for their way of working afterwards?

<sup>64</sup> Interview n18-s-+10-y-m (translation TB).

<sup>65</sup> Interview n15-so-2-10-n-f (translation TB).

## 6. Conclusion

The aim of this contribution was to give insight in the context in which legal aid providers in Dutch asylum procedures have to operate, the kind of issues that arise from the short time limits in the asylum procedure and the payment system, the options lawyers have for dealing with these matters and the considerations that play a role in this respect.

I showed that lawyers may experience time pressure from either the short time limits in the general asylum procedure or from the fixed fee, which covers a certain number of hours of work. One option lawyers have for dealing with the time pressure they experience from the eight-day regime, is to ask the IND for prolongation or placement of the client in the extended procedure. Yet, if the request is not accepted, providers will have to make sure they make it in the available time and some have developed coping strategies which to other lawyers are unacceptable, such as, not meeting with the client at the application centre to discuss the IND's intention to reject a case. The other obvious option lawyers have is to take on fewer cases. Yet, this has financial implications which, especially in current times when there is less work and much competition, may be hard to bear. The lawyer thus has to constantly weigh the possibility of arriving at a situation in which he will experience time pressure against taking on enough cases to ensure a sufficient income.

Overall, it is clear that the institutional context – in particular the short time limits of the asylum procedure and payment through fixed fees – makes it difficult for lawyers wanting to provide high-quality legal aid to reach that aim. In addition, many of those lawyers constantly face a morality vs. market dilemma; they have to stand firm so as not to succumb to the temptations of the system. In both respects, providing legal aid in asylum procedures can be considered a challenging business.