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COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

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Noot B.P. Vermeulen bij *JV* 2006/33

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 10154/04
by Teshome Goraga BONGER
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 15 September 2005 as a Chamber composed of:

Mr B.M. ZUPANCIC, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Ms R. JAEGER,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 19 March 2004,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Teshome Goraga Bonger, is an Ethiopian national, who was born in 1963 and currently lives in the Netherlands. He was represented before the Court by Ms I.J.M. Oomen, a lawyer practising in Amsterdam. The respondent Government were represented by their Agent, Mr R.A.A. Böcker, of the Netherlands Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. The proceedings on the applicant's first asylum request

On 21 January 1995 the applicant entered the Netherlands, where he applied for asylum. He stated that, during the former ("DERG") regime of Mengistu Haile Mariam in Ethiopia, he had been a member of the Workers' Party of Ethiopia

(WPE) and had been a pilot in the Ethiopian air force. He further stated that, between 1982 and 1985, he had stayed in Russia for military training purposes. After having returned to Ethiopia in 1985, he had participated between April 1987 and September 1988 in military operations in Asmara, Tigra and Gojan and had carried out bombings. Between September 1988 and July 1992, he had stayed for a second period in Russia for further military training. When the Mengistu regime had been overthrown in 1991, he had remained in Russia and had returned to Ethiopia in July 1992. Shortly after his return, he had reported to the new authorities in Ethiopia and had subsequently been sent to a political re-education camp. He had stayed in that camp from July 1992 until 15 or 16 January 1993, when he had been released with an obligation to report regularly to the authorities. He had complied with this obligation until March 1993 when – after having heard that pilots had been arrested on accusations of murder and plundering, and after members of the military had come to his aunt's house with whom he had then lived and who had asked for him – he had gone into hiding for fear of being arrested again. He had left Ethiopia for Sudan in April 1993. In the course of the same month, he had travelled from Sudan to Russia where, holding forged residence permits, he had stayed until 19 January 1995 when he had travelled on his own Ethiopian passport via Berlin to the Netherlands.

On 15 March 1995, the applicant's asylum request was rejected by the Deputy Minister of Justice (*Staatssecretaris van Justitie*), who did not find it established that the applicant had a well-founded fear of persecution.

On 20 March 1995, the applicant filed an objection (*bezwaar*) against this decision with the Deputy Minister. On the same day he filed a request with the President of the Regional Court (*arrondissementsrechtbank*) of The Hague for an interim measure to the effect that he would be allowed to remain in the Netherlands pending the proceedings on his objection.

On 1 June 1995, following a hearing held on 18 May 1995, the Acting President of the Regional Court rejected the applicant's request for an interim measure. The Acting President considered, *inter alia*, that there were no concrete indications that the applicant would be arrested if he returned to Ethiopia, that the applicant's claims were only based on assumptions and hearsay information, and that the fact that his passport had been prolonged on 22 November 1994 by the Ethiopian consular authorities in Moscow indicated that the applicant was not sought by the Ethiopian authorities. The Acting President concluded that it had not been established that the applicant had a well-founded fear of persecution or that his expulsion to Ethiopia would be contrary to the applicant's rights under Article 3 of the Convention. Further considering that the proceedings on the applicant's objection would not result in a different finding, the Acting President also rejected the applicant's objection, in accordance with Article 33b of the Aliens Act (*Vreemdelingenwet*) as in force at the material time.

No further appeal lay against this decision.

On 28 November 1995, the applicant requested the Regional Court of The Hague for a revision (*herziening*) of the ruling of 1 June 1995. In its decision of 1 March 1996, following a hearing held on 16 February 1996, the Regional Court rejected the revision request.

2. The proceedings on the applicant's second asylum request

On 7 January 1997 the applicant filed a second asylum request on the basis of new facts and circumstances, namely a copy of a letter of 24 June 1993 addressed to his aunt by the Ethiopian authorities, requesting information about the applicant's new address. The applicant further submitted that, in the proceedings on his first asylum request, he had omitted to say that, in his function as an air force pilot, he had participated in hundreds of flights over war zones.

The Deputy Minister of Justice rejected the applicant's second asylum request on 8 January 1997, holding that it did not appear from the letter of 24 June 1993 – from which it could only be concluded that the authorities wished to be informed of the applicant's new address – that the applicant had a well-founded fear of persecution. The Deputy Minister further held that this finding was supported by the applicant's statements that he had remained in contact with an aunt and his brother in Ethiopia, and that there was no evidence whatsoever of any interest being shown by the Ethiopian authorities in the applicant since June 1993. The Deputy Minister further held that the applicant's statement about his participation in numerous flights over war zones did not constitute a relevant legal *novum*, as this element had already been taken into account in the proceedings on his first asylum request.

The applicant filed an objection against this decision with the Deputy Minister and requested the President of the Regional Court of The Hague to issue an injunction to stay his expulsion pending the proceedings on his objection.

On 20 January 1997, the Acting President of the Regional Court of The Hague accepted the applicant's request for an injunction. On the basis of, *inter alia*, information obtained by the applicant from the Ethiopian Human Rights Council and Amnesty International, the Acting President considered that it was plausible that pilots of the former Ethiopian air force, like the applicant, who had been involved in bombings of the then freedom fighters, did in fact risk serious repercussions from the current Ethiopian authorities, and that a further investigation was required to assess whether the applicant had a well-founded fear of persecution in Ethiopia. The Acting President, having noted the applicant's statement that the rank last held by him was that of 1st lieutenant-pilot, considered that, to this end, it was necessary to obtain an individual official report (*individueel ambtsbericht*) on the applicant's personal situation from the Minister of Foreign Affairs and, after receipt of this official report, to hear the applicant before the Advisory Commission for Aliens' Affairs (*Adviescommissie voor vreemdelingenzaken*).

On 19 February 1998, the Ministry of Foreign Affairs transmitted the requested individual official report to the Deputy Minister of Justice, who sent a copy to the applicant's lawyer on 26 March 1998. It reads, in so far as relevant:

> "1.a. The statement of 16 January 1997 by the Ethiopian Human Rights Council submitted by the [applicant] has been issued by this organisation and the therein-cited ranks of the air force officers are correctly mentioned.
>
> 1.b. According to the Ethiopian Human Rights Council and the Special Prosecutor's Office, 25 air force officers from the former DERG-period are detained in the Kalti prison, which serves as a prison for authorities of the former DERG regime, on suspicion of genocide and crimes against humanity. There is no re-education regime in this prison. Some of these air force officers were arrested and detained in 1991 – after the fall of the DERG rule –, others later in 1994, [and] initially without any official charges having been brought. The[ir] detention was ordered by the Special Prosecutor, who deals with trial proceedings against members of the DERG regime who are accused of genocide and crimes against humanity.
>
> A general unofficial accusation against the air force during the DERG-regime is that it has caused many civilian casualties during bombings and firing from the air in the fight against the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the Ethiopian Liberation Front (ELF) and the Ethiopian Peoples' Liberation Front (EPLF).
>
> 2. The same rights and obligations as for any other Ethiopian [citizen] apply to former detainees of a re-education camp after their return to Ethiopian society.
>
> 3. The ... address in Debre Zeit cited by the [applicant] exists. A sister of the [applicant] and her children live there. According to the persons living at this address

> and neighbours, the [applicant] had been held in May 1991 in a re-education camp and, towards the end of 1992, had left Debre Zeit for reasons unknown. The [persons heard] did not know when the [applicant] had been released from the above-mentioned re-education camp. According to the same persons, the [applicant] was a lieutenant in the Ethiopian air force, but he would not have studied in Russia. Also according to information by these persons, local militia would have searched for the [applicant] after his departure, because his appointment as lieutenant in the Ethiopian air force would at the time have been a political appointment.
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> 4. In so far as could be verified, the [applicant] has been detained in the re-education camp Tolai.
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> 5. According to the archive of this office, the copy of a letter of 24 June 1993 of the Central Investigation Office, submitted by the [applicant], is not a copy of an authentic document.
>
> 6. It has not been possible to verify the authenticity of the identity card ..., submitted by the [applicant] ."

On 20 July 1998, the applicant was heard before the Advisory Commission for Aliens' Affairs.

On 18 October 1999, the Ministry of Foreign Affairs informed the Deputy Minister of Justice that a further investigation had been carried out in Ethiopia, and that the applicant's name was mentioned in the list of suspects of the DERG-tribunal in Addis Abeba.

On the basis of the information contained in the individual official report, the Deputy Minister decided to investigate whether the applicant's situation fell within the scope of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951 ("the 1951 Convention"), which provides as follows:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The applicant's lawyer, who learned about this development on 14 January 2000, informed the Minister of Justice on 29 January 2000 that he found this approach unacceptable.

On 19 July 2000, an immigration official conducted a further interview with the applicant about his membership of the WPE, his duties as an air force pilot, his career in the air force and whether he had been involved in the bombing of civilian targets.

On 29 January 2002, the Deputy Minister of Justice rejected the applicant's objection against the decision of 8 January 1997. The Deputy Minister found that the applicant's acts as an air force pilot during the Mengistu regime fell within the scope of Article 1 F of the 1951 Convention, that he could be held responsible for these acts, that consequently Article 1 F applied to his situation and that the applicant was therefore ineligible for asylum. Pursuant to Article 3.107 of the Aliens Ordinance (*Vreemdelingenbesluit*), he was also ineligible for a residence permit on any other grounds, including a residence permit for a limited duration based on Article 3 of the Convention.

On 21 February 2002, the applicant filed an appeal against this decision with the Regional Court of The Hague and, on the same day, requested the provisional

measures judge (*voorzieningenrechter*) of that same court to issue an injunction to stay his expulsion pending the proceedings on his appeal.

On 22 March 2002, the applicant filed his written grounds of appeal with the Regional Court of The Hague, in which he argued that Article 1 F of the 1951 Convention had been unjustly applied to his case, and that the decision of 29 January 2002 had been taken in violation of the general principles of proper administration (*algemene beginselen van behoorlijk bestuur*). In his appeal submissions to the Regional Court, the applicant mentioned Article 3 of the Convention without any further elaboration.

In its decision of 12 September 2003, following a hearing held on 27 August 2003, the Regional Court of The Hague rejected the applicant's appeal. It considered that, pursuant to Article 4:6 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), a person filing a repeat asylum request – i.e. after a negative decision had been taken on an original asylum request – should adduce newly emerged facts or altered circumstances (*nieuw gebleken feiten of veranderde omstandigheden*) that were not known when the initial negative decision was taken and of such a nature that it could lead to a different decision. It further noted that, under Article 4:6 § 2, such a repeat request could be rejected with reference to the initial negative decision if no such new facts or circumstances had been adduced. Referring to the case-law of the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), the Regional Court considered that it was for the courts to assess whether there was a *novum* within the meaning of Article 4:6 and that this included facts or circumstances that had occurred after the negative decision on the original request had been taken or facts or circumstances that could not have been adduced earlier, as well as evidence in support of already submitted facts or circumstances which evidence could not have been submitted prior to the negative decision on the original request. However, even in case these requirements were met, such new facts and circumstances could nevertheless be regarded as not amounting to a *novum* if it was clear beforehand that they would not affect the decision taken on an original request or the reasons on which this decision was based.

In the instant case, the Regional Court held *inter alia* that the differences in the respective statements given by the applicant in the two subsequent asylum proceedings about the scope of his involvement in war events did raise questions, but could not be regarded as a *novum* because it concerned information which the applicant already held when he had filed his first asylum request and his participation in flights over war zones had in fact already been addressed in the decision of 1 June 1995 on his first asylum request. It therefore concluded that the applicant's second asylum was not based on new facts or changed circumstances within the meaning of Article 4:6 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*). In accordance with Article 8:79 of the General Administrative Law Act, this decision was notified to the applicant on 26 September 2003. No further appeal lay against this decision.

On 15 September 2003, the provisional measures judge declared inadmissible the applicant's request of 21 February 2002 for an injunction staying his expulsion, as his appeal on the merits had been rejected by the Regional Court of The Hague in the meantime. This decision was also notified to the applicant on 26 September 2003.

B. Relevant domestic law and practice

1. Asylum proceedings

Until 1 April 2001, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1965 (*Vreemdelingenwet*; "the 1965 Aliens Act").

Further rules were set out in the Aliens Decree 1966 (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applied to proceedings under the 1965 Aliens Act, unless indicates otherwise in this Act.

On 1 April 2001, the 1965 Aliens Act and the pertaining regulations were replaced by the Aliens Act 2000, the Aliens Decree 2000, the Regulation on Aliens 2000 and the Aliens Act Implementation Guidelines 2000. Unless indicated otherwise in the Aliens Act 2000, the General Administrative Law Act continued to apply to proceedings on requests by aliens for admission and residence.

The applicant's first asylum request was examined under the 1965 Aliens Act. Although his second asylum request had been introduced under the 1965 Aliens Act, the applicant's objection against the decision of 8 January 1997 was determined on the basis of the Aliens Act 2000.

Under Article 15 § 1 of the 1965 Aliens Act 1965, aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political convictions, or of belonging to a particular race or a particular social group, could be admitted as refugees. The expression "refugee" in this provision was construed to have the same meaning as in Article 1 of the 1951 Convention, as amended by the Protocol of 31 January 1967 (decision of the Judicial Division of Council of State of 16 October 1980, *Rechtspraak Vreemdelingenrecht* [Immigration Law Reports] 1981, no. 1).

Under Article 29 § 1 of the Aliens Act 2000, an alien may be eligible for a residence permit for the purposes of asylum if *inter alia*:

- he or she is a refugee within the meaning of Article 1 of the 1951 Convention, or
- he or she has established well-founded reasons to assume that he/she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment if expelled to the country of origin.

However, if the exclusion clause under Article 1 F of the 1951 Convention applies, the alien concerned loses any protection which would have been available under the 1951 Convention and, consequently, becomes ineligible for a residence permit for asylum under Article 29 § 1 of the Aliens Act 2000. In such a situation and pursuant to Article 3.107 of the Aliens Decree 2000 and Chapter C1/4.6.4 of the Aliens Act Implementation Guidelines 2000, the alien concerned can neither be granted a residence permit on any of the other grounds referred to in Article 29 § 1 of the Aliens Act 2000.

However, a refusal to grant a residence permit on the basis of Article 1 F of the 1951 Convention does not necessarily imply that the alien concerned will be effectively removed to his or her country of origin if that would be in breach of Article 3 of the Convention. In two rulings handed down on, respectively, 2 and 9 June 2004 (nos. 200308871/1 and 200308511/1), the Administrative Jurisdiction Division of the Council of State noted that, according to Article 45 § 1 of the Aliens Act 2000, a refusal to grant asylum entailed that the person concerned should leave the Netherlands voluntarily, failing which he or she could be expelled. It accepted that an alien – who was denied entry pursuant to Article 1 F of the 1951 Convention but who could not be expelled to his or her country of origin on the basis of a risk of being subjected to treatment in breach of Article 3 – can be denied a residence permit. However, in order to limit the size of this group as much as possible, it should be examined first whether a person qualifies for asylum under Article 29 § 1 of the Aliens Act 2000 before determining the question whether the exclusion clause of Article 1 F of the 1951 Convention applies. Where an asylum seeker is able to demonstrate that there is a sustained obstacle on the basis of Article 3 of the Convention for his or her expulsion to the country of origin, it is for the immigration authorities to assess whether or not a permanent denial of a

residence title would be disproportionate in the particular circumstances of the case. In the two cases at issue, the immigration authorities had not dealt with the question whether the expulsion of the persons concerned would be in breach of Article 3, as they had first examined whether and concluded that the exclusion clause of Article 1 F applied. The Administrative Jurisdiction Division concluded that, therefore, the immigration authorities' examination of these cases had been incomplete.

These rulings resulted in an amendment to the relevant rules. Where it has been established that a person, for reasons based on Article 3 of the Convention, cannot be expelled to his or her country of origin but, pursuant to Article 1 F of the 1951 Convention, is ineligible for a residence permit, no expulsion order will be issued, at least for as long as these reasons exist. However, no residence title will be issued to the alien concerned who remains under the obligation to leave the Netherlands at his or her own motion. It further remains possible to issue an order for his or her expulsion as soon as his or her removal will no longer entail a risk of treatment contrary to Article 3 in the country of origin or an order for removal to a third State willing to accept the person concerned (Chapter C1/5.13.3.1 of the Aliens Act Implementation Guidelines 2000, as amended on 23 September 2004).

Article 4:6 of the General Administrative Law Act provides that a petitioner must adduce newly emerged facts or altered circumstances if a new request is filed following a decision in which the original request is, either totally or partially, rejected. When no such facts or altered circumstances have been adduced, the administrative authority may reject the new request with reference to the decision on the original request. Article 4:6 thus embodies the *ne bis in idem* principle for the administrative law.

Nevertheless, an exception has been made in this particular area of the law, in that an alien may adduce exceptional facts and circumstances relating to him or her personally, on the basis of which the new request may be assessed outside the framework of Article 4:6. In the case of a repeat asylum application which also invokes the risk of treatment contrary to Article 3 of the Convention, an assessment by the court outside the framework of Article 4:6 is therefore possible. The Administrative Jurisdiction Division of the Council of State has on one occasion quashed the dismissal of a repeat application for a residence permit for the purposes of asylum despite the absence of new facts or altered circumstances (judgment of 24 April 2003, no. 220300506/1, *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter on Asylum and Refugee law] 2003/160). It did so on the basis of the exceptional circumstance that there was no dispute between the parties, that on his return to his country of origin, the alien would run a real risk of being subjected to treatment or punishment proscribed by Article 3 of the Convention.

According to Article 72 § 3 of the Aliens Act 2000, any act of a public body in respect of an alien is to be equated with a formal decision within the meaning of the General Administrative Law Act, entailing that such an act may be challenged in administrative appeal proceedings. If the act concerns an act aimed at the expulsion of an alien who has been denied admission, the lawfulness of this act will already have been judicially determined in the ruling dismissing the appeal brought against a negative decision on an admission request. However, this is not the case when the situation at the time of expulsion differs from the situation at the time of the judgment rejecting the appeal in such a way that it can no longer be said that the lawfulness of the expulsion has been established (Parliamentary Papers, Lower House (*Tweede Kamer*) of Parliament, 1999/2000, 26,732, no.7, p. 206).

2. Netherlands policy on Ethiopian asylum seekers

Policy is based on official country reports (*ambtsberichten*), periodically drawn up by the Netherlands' Ministry of Foreign Affairs. At the material time, the Netherlands policy was based on the official country report on Ethiopia issued in July 2000. According to this report, the observance of civil and political rights in Ethiopia had, in comparison with earlier years, generally improved. However, despite statutory guarantees, there were in practice breaches of certain fundamental rights, including freedom of expression and freedom of assembly. The victims were journalists, union members and others who were highly critical of the Government, as well as members of the banned opposition parties. The situation was, however, not such that every asylum seeker from Ethiopia automatically qualified for asylum. Any asylum seeker from Ethiopia should demonstrate that his or her personal circumstances – viewed objectively – justified his or her fear of persecution as defined in refugee law or constituted grounds for granting a residence permit on grounds of compelling humanitarian reasons, e.g. because he or she would be subjected to treatment in violation of Article 3 of the Convention if he or she were to return.

The most recent official country report on Ethiopia was issued by the Ministry of Foreign Affairs on 14 February 2005. This report, in its relevant part, reads:

> "3.3.6. The situation in prisons in Ethiopia is wanting, in particular overcrowding is a problem. The food provided in prison is insufficient. Many detainees depend on food brought to them by family and friends. Access to medical facilities is not reliable. The prison conditions are considered to correspond to the general living conditions in Ethiopia. ... The International Red Cross has access to most places of detention. ... Unlike the situation in the past, diplomats were given access to prisons. In addition, they were given permission to visit prominent detainees who are suspected by the 'Special Prosecutor's Office' of war crimes and terrorist activities....
>
> 3.3.7. ... [despite statutory guarantees] ill-treatment and torture occur in Ethiopia in particular during the first weeks after arrest. It occurs more often in police stations, remands centres and military barracks than in federal prisons. ... The aim of torture is generally to obtain information and to deter. Torture occurs in particular in cases of detention for alleged political activities or acts of civil disobedience. ... Torture and ill-treatment occur more often in rural areas than in the city, and in general is applied more frequently on persons who probably will never come into contact with members of the international community. ...
>
> 3.3.10. The Constitution and criminal law allow the death penalty for a considerable number of crimes. Also the amended criminal law has retained the death penalty. Condition for execution of the death penalty is a ratification of the sentence by the President. The Government has for some time already been working on a revision of the criminal law. EHRCO [Ethiopian Human Rights Council; a legal non-governmental organisation] has exerted pressure on the authorities to remove the section relating to the death penalty from the criminal code in the revision process.
>
> Since the change of government in 1991, the death penalty has been carried out only once. It concerned the murderer of a popular general, in 1998. During the reporting period, several persons have been sentenced to death, exact numbers are unknown. A number of these cases form a part of the so-called 'DERG' court cases. .... It is not known whether these sentences will be carried out. ...
>
> 3.4.5. According to the Special Prosecutor's Office (SPO), the body dealing with the prosecuting of perpetrators of crimes under the Mengistu regime (1977-1991), at least 6,426 persons have been indicted for their role in this regime. Prosecution is brought on the basis of Article 281 (genocide) and Article 282 (war crimes) of the Ethiopian Criminal Code. These provisions have been in force since 1957 and thus applied during the DERG period. Charges brought by the SPO are determined by a specialised tribunal, the 'Sixth Criminal Bench' of the 'Federal High Court'. An appeal and appeal in cassation lies with the 'Supreme Court' and the 'Cassation Court',

> respectively. If an accused is found guilty of genocide or murder, the death penalty may be imposed. Whether such a sentence will be effectively carried out is not known. In any event, to date, no death sentence has been carried out (see also § 3.3.10 Death penalty).
>
> In particular, higher-ranked army officers and civil servants have been indicted. About half of them are being held, whereas the others are either free in Ethiopia or abroad, or are no longer alive. The first judgments were handed down in November 1999. The sentences that have been imposed to date vary from 10 to 20 years' imprisonment. The SPO does not give information about the progress of the court proceedings. For this reason, it is not known how many cases are still pending nor what sentences have been imposed during the reporting period."

In the absence of any reasons for change, the Netherlands policy on admitting Ethiopian nationals has remained the same as in 2000. Every asylum seeker from Ethiopia must still demonstrate that the personal facts and circumstances of his or her case – viewed objectively – justify a fear of persecution as defined in refugee law or might lead to the conclusion that he or she would be subjected to treatment contrary to Article 3 of the Convention if returned.

COMPLAINTS

The applicant complained that the outcome of the proceedings on his second asylum request, in which the Regional Court of The Hague and the provisional measures judge failed to examine his situation under Article 3 of the Convention, violated his rights under this provision. The applicant argued that – after his first request for asylum had been rejected on the basis of a finding that it had not been demonstrated that he had a well-founded fear of persecution in Ethiopia – in the proceedings on his second asylum request his fear of persecution was accepted as well-founded, but he was nevertheless denied protection as a refugee on the basis of a finding that Article 1 F of the 1951 Convention applied to his situation. The applicant considered that the fact that his asylum account was accepted as credible must be regarded as directly implying that, if expelled to Ethiopia, he will run a real risk of being subjected to treatment contrary to Article 3 of the Convention.

The applicant further complained that the Regional Court's refusal to examine his second asylum request on the basis of a finding that it did not disclose any new facts or circumstances, despite the fact that the Deputy Minister – in the proceedings on his second asylum request – had in fact attached credence to his asylum account, was in violation of his right to an effective remedy as guaranteed by Article 13 of the Convention.

THE LAW

The applicant complained that the Netherlands authorities' refusal to grant him asylum in application of the exclusion clause of Article 1 F of the 1951 Convention entailed that – although his asylum account was accepted as credible – he was eligible for expulsion to Ethiopia where he would be exposed to a real and personal risk of treatment in violation of Article 3 of the Convention. He further complained that, in this respect, he did not have an effective remedy within the meaning of Article 13 of the Convention.

Article 3 reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government acknowledged the absolute nature of Article 3 of the Convention and submitted that, therefore, even if an alien is refused a residence permit on the basis of Article 1 F of the 1951 Convention, the possibility that the expulsion of the person concerned will entail a breach of Article 3 must be investigated, and expulsion will not take place if there is a risk that doing so would constitute a violation of Article 3. However, no residence permit is granted to the alien concerned.

In the proceedings on the applicant's second asylum procedure, Article 3 of the Convention played a subordinate role in that this procedure mainly concerned the question whether Article 1 F of the 1951 was applicable and whether there were newly emerged facts and circumstances that justified a repeat asylum application. In any event, for the time being the Government had no intention to proceed effectively with the applicant's expulsion to Ethiopia and in the event of actual expulsion, the applicant could challenge his expulsion by taking administrative appeal proceedings in accordance with Article 72 § 3 of the Aliens Act 2000 in which proceedings he could argue that his expulsion would infringe his rights under Article 3.

The applicant submitted that, although not being at risk of being expelled to Ethiopia for the time being, by denying him a residence permit he is blamed and punished for crimes against humanity that he did not commit and for which he cannot be held responsible. He argued that this situation in itself constitutes a violation of human rights and dignity since it remains impossible for him to become a full member of the Netherlands society. Furthermore, the transmission by the Ministry of Justice of a copy of the Regional Court's judgment of 12 September 2003 to the aliens' police (*vreemdelingenpolitie*) already constituted in fact an order for his expulsion. He further submitted that the chances of success of challenging an act aimed at his effective expulsion by taking administrative appeal proceedings under Article 72 § 3 of the Aliens Act 2000, even assuming that he would have sufficient time and would be assisted by a lawyer, were rather questionable, as such an appeal should be accompanied by a request for an interim measure whereas the Regional Court will usually only check whether there are, in comparison with the previously conducted asylum procedure, any new facts or circumstances. If that is not the case, the Regional Court will follow the previous decision.

The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens, and that the Convention does not guarantee, as such, any right to enter, reside or remain in a State of which one is not a national (see *Javeed v. the Netherlands* (dec.), no. 47390/99, 3 July 2001). Moreover, neither Article 3 of the Convention nor any other provision of the Convention or its Protocols guarantees the right of political asylum. However, expulsion by a Contracting Party may give rise to an issue under Article 3 and thus engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see *Chahal v. United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 67-68, ECHR 2005-...).

Turning to the facts of the present case, the Court notes that the Government have indicated that for the time being they do not intend to proceed effectively with

the applicant's expulsion to Ethiopia. The Court considers that, in the absence of any realistic prospects for his expulsion to Ethiopia, the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention as regards his complaint that his expulsion to Ethiopia will be in breach of his rights under Article 3. To the extent that the applicant also complains that he is denied a residence permit for as long as he is not expelled, the Court considers that this complaint must be rejected for being incompatible *ratione materiae* as neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit.

It follows that this part of the application must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

As regards the applicant's complaint under Article 13, the Court notes that, according to the rulings given by the Administrative Jurisdiction Division of the Council of State on 2 and 9 June 2004 which have led to an amendment of the Aliens Act Implementation Guidelines 2000, the Netherlands authorities – in determining asylum requests – must determine first whether a petitioner qualifies for asylum under Article 29 § 1 of the Aliens Act 2000 before examining the question whether the exclusion clause of Article 1 F of the 1951 Convention applies. Given the fact that this has not taken place in the proceedings on the applicant's second asylum request, the Court notes that the applicant, in the eventuality of an act of the Netherlands authorities aimed at his effective expulsion, will – according to information submitted by the Government which has not been disputed by the applicant – be able to take administrative appeal proceedings in accordance with Article 72 § 3 of the Aliens Act 2000 in order to obtain a determination of the question whether his expulsion will be contrary to his rights under Article 3 of the Convention. The Court has found no reasons for holding that such administrative appeal proceedings cannot be regarded as an effective remedy for the purposes of Article 13 of the Convention in the instant case.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANCIC
President

Noot B.P. Vermeulen bij *JV* 2006/33

1. Het Europese Hof voor de Rechten van de Mens kon in deze zaak vermoedelijk op verschillende gronden concluderen tot niet-ontvankelijkheid van de klacht dat sprake was van dreigende uitzetting in strijd met artikel 3 EVRM.
(I) Zo kon het Hof hiertoe concluderen op de grond dat verzoeker had nagelaten alle nationale rechtsmiddelen uit te putten (artikel 35 lid 1 EVRM): deze had immers tegen de uitspraak van de rechtbank van 12 september 2003 in hoger beroep kunnen gaan bij de Afdeling bestuursrechtspraak, zo nodig onder gelijktijdig vragen van een voorlopige voorziening bij de Voorzitter van de Afdeling (of zou dat niet als een effectief nationaal rechtsmiddel aangemerkt worden nu de circulaire – Vc 2000, C4/18.2 - schorsende werking hangende de voorlopige voorzieningsprocedure bij de Voorzitter niet verplicht stelt bij herhaalde asielverzoeken?).
(II) Vervolgens was niet-ontvankelijkheid wegens niet-uitputting van nationale rechtsmiddelen mogelijk op de grond dat tegen een eventuele voorgenomen uitzetting alsdan nog nationale rechtsmiddelen open zouden staan. Tegen uitzetting staat immers ingevolge artikel 72 lid 3 Vw 2000 bezwaar en vervolgens beroep op de rechter open (vgl. ABRvS 21 juli 2003, *JV* 2003/372 en *AB* 2004, 9 m.nt. BPV).
(III) Ten slotte – en daar doet het Hof de zaak in casu mee af – kan tot niet-ontvankelijkheid besloten worden indien er nog geen sprake is van een reële uitzettingsdreiging, in welk geval betrokkene nog niet als (potentieel) slachtoffer in de zin van artikel 34 EVRM aangemerkt kan worden (zie voor een soortgelijke benadering EHRM 27 augustus 1992, *RV* 1992, 18 m.nt. BPV). Het Hof gaat daarbij uit van de mededeling van de Nederlandse staat dat hij voorshands niet tot verwijdering overgaat, vermoedelijk omdat het om een 1F-er gaat wiens verwijdering mogelijk met artikel 3 EVRM in strijd is.

2. Het Hof is verder ook snel klaar met de klacht dat onthouding van een verblijfstitel met artikel 3 EVRM in strijd is: noch artikel 3 EVRM nog enige andere EVRM-bepaling verleent op zichzelf een recht op zo een titel. Die vaststelling is natuurlijk juist, maar daar zou het hier volgens mij niet om moeten gaan. Aan de orde zou moeten zijn de vraag of een mogelijk permanent onthouden van een verblijfstitel aan een asielzoeker aan wie artikel 1F Vluchtelingenverdrag tegengeworpen wordt maar die vanwege een artikel 3 EVRM-risico niet uitgezet kan worden, en het dienovereenkomstig op grond van artikel 10 Vw 2000 blijvend onthouden van de meeste basale sociale uitkeringen en voorzieningen, wel met artikel 3 EVRM in overeenstemming is. Het lijkt er echter op dat die vraag niet in alle scherpte aan het Hof is voorgelegd. Zou dat wel het geval zijn, dan is het overigens nog zeer wel mogelijk dat het Hof geen artikel 3 EVRM-schending aanneemt. In EHRM 28 oktober 1999, zaak nr. 40772/98 (Pancenko v. Letland) besliste het immers ‘that the Convention does not guarantee, as such, socio-economic rights, including the right […] to claim financial assistance from a State to maintain a certain level of living’. Mede met een beroep op deze uitspraak kwam de Afdeling onlangs tot de slotsom dat het blijvend onthouden van voorzieningen in het voorliggende geval van een niet uitzetbare vreemdeling (Sison) geen schending van artikel 3 EVRM vormde (ABRvS 28 september 2005, *JV* 2005/454 m.nt. BPV).

3. Het Hof meent dat een op artikel 72 lid 3 Vw 2000 gebaseerde procedure tegen een voorgenomen verwijdering aangemerkt kan worden als een effectief rechtsmiddel in de zin van artikel 13 EVRM (en dus ook: als een voldoende effectief nationaal rechtsmiddel dat eerst aangewend moet zijn alvorens in Straatsburg ontvankelijk te kunnen zijn). De reden daarvoor is volgens het Hof, dat

de minister blijkens onder meer ABRvS 2 juni 2004, *JV* 2004/279 m.nt. PB en *RV* 2004, 8 m.nt. Reneman, eerst moet beoordelen of de asielzoeker voor een asielvergunning als bedoeld in artikel 29 lid 1 Vw 2000 in aanmerking komt, alvorens onderzocht wordt of artikel 1F Vluchtelingenverdrag tegengeworpen kan worden. Dat is een nogal slordige uitleg van de Afdelingsuitspraken ter zake. Deze laten het zeer wel toe dat *eerst* onderzocht wordt of 1F toegepast kan worden; ook de naar aanleiding van genoemde uitspraken aangepaste circulairetekst gaat daar van uit (Vc 2000, C 1/5.13.3.1). Niettemin heeft het Hof in zoverre gelijk, dat als blijkt dat 1F tegengeworpen kan worden, vervolgens nog wel beoordeeld dient te worden of artikel 3 EVRM zich tegen verwijdering verzet. Blijkbaar vooronderstelt het Hof dat het 3 EVRM-argument alsnog inhoudelijk in de procedure ex artikel 72 lid 3 Vw 2000 aan de orde gesteld kan worden – in weerwil van het *ne bis in idem* beginsel dat mogelijk ook in die procedure zal doorwerken. Bovendien vooronderstelt het Hof blijkbaar dat in deze procedure voldoende mogelijkheden zijn om de uitzetting op te schorten (NB: een verzoek om een voorlopige voorziening heeft op grond van het beleid behoudens nova geen schorsende werking als het gaat om een herhaald verzoek, Vc 2000, C4/17.3.2). In het arrest-Conka eiste het Hof immers dat rechtens verplichte opschortende werking van een rechtsmiddel vereist was om een rechtsmiddel als effectief in de zin van artikel 13 EVRM aan te merken (EHRM 5 februari 2002, *JV* 2002/117 m.nt. BPV, *RV* 1974-2003, 41 m.nt. BPV).

BPV