IARLJ Asylum Procedures Working Party: “effective appeal remedy” in asylum claims, the power of the judge vis-à-vis new facts who happened after the examination of the asylum claim by the administrative authority, report from Belgium[1]

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1. Introduction

In the Belgian asylum procedure there are two legal dispositions relevant for the power of the judge vis-à-vis new facts who happened after the examination of the claim by the administrative authority. Art. 51/8 of the Aliens Law[2] concerns the admissibility of repeated asylum claims if they mention new facts. Article 39/60 and 39/76 concern the admissibility of new facts and arguments presented to the Council for Aliens Appeals (CAA) in asylum cases.

I will first give a short overview of the Belgian asylum procedure as it wasreformed by the law of 15 September 2006[3], then I will first examine the admissibility procedure on repeated asylum claims by Aliens Office, the secondly the admissibility of new facts and arguments by the CAA and finallythe relation between new facts at Aliens Office and the CAA.

2. The Belgian asylum procedure

Through the reform of the asylum procedure in 2006 Aliens Office lost most of its competence in asylumcases. They used tobe the first instance. They have kept the competence to examine the admissibility of repeated asylum claims on the base of new facts.

The commissioner-general for refugees and stateless (hereafter commissioner-general) became the first instance for asylum cases. It is the national authority competent to examine an asylum claim on its merits.

[1]This is not an official report and does not bind in any way the CAA but only its author, who is a judge at the CAA.
[2] Law of 15 December 1980 concerning the access to the territory, the sojourn, establishment and removals of foreigners.
[3]Law of 15 September 2006 reforming the Council of State and creating a Council for Aliens Appeals (amending the Aliens Law).

An administrative court the Council for Aliens Appeals (hereafter CAA) is competent for all appeals against the decisions of the commissioner-general.It replaces the former Permanent Appeals Commission for Refugees (PACR) and is also competent for all aliens appeals based on the Aliens Law for whom the Council of State had competence before. In the appeals against decisions of the commissioner-general the CAA has (in most cases) full competence (*vollerechtsmacht-pleincontentieux*). In other aliens appeals based on the Aliens Laws the CAA has the competence to annul the individual decisions of the administration (competent minister or secretary of state or Aliens Office)[4].

3. Admissibility of repeated asylum claims

The asylum claim can be refused by Aliens Office without suspensive right of appeal if the asylum seeker does not provide new facts that as far as the asylum seeker is concerned there are serious indications of well-founded fear of being persecutedor serious indications of a real risk of serious harm. The new facts must pertain to facts or situations that happened after the last stage of the procedure in which the foreigner could have invoked them[5].

The asylum seeker has to prove he could not present the new facts earlier. Aliens Office does not have to prove the asylum seeker could have invoked the facts earlier.

According to the Constitutional Court the repeated asylum claim can only be refused by Aliens Office if the asylum claim is identical to the previous one[6]. Aliens Office can only examine if the facts are new and has no competence to examine their content or scope[7]. This may sound simple but the distinction between the new character of the facts and the prohibition of examining their content, the distinction between the competence of Aliens Office deciding the admissibility of repeated asylum claims and the commissioner-general examining the merits of the asylum claim is not an easy one. The law states mentions serious indicationsand thus seems to request a prima facie examination by Aliens Office ofthe well-founded fear of being persecutedor real risk of serious harmand goes further than an examination of the new character of the new facts.

4. Admissibility of new facts at the CAA

The appeal in asylum cases is (in most cases)not an annulment appeal but a full appeal concerning facts and law. All factual and legal questions will be examined by the CAA within the limits of the file of the case. The CAA is the last instance that will examine and decide the facts of the asylum case. The CAA is not bound by the motives of the decision of the commissioner-general or the arguments of the parties against these motives[8].

[4] Art. 39/2, Aliens Law of 15 December 1980.
[5] Art. 51/8, Aliens Law of 15 December 1980.
[6] Constitutional Court , 1 December 1994, nr. 83/1994, confirmed byConstitutional Court, 27 May 2008, nr. 81/2008.
[7] CAA 25 March 2011, nr. 58.561.
[8] Law project reforming the Council of State and creating a Council for Aliens Appeals, *Parl. St*. Kamer 2005-2006, nr. 2479/001, 95, 96 en 133.

The procedure is in writing. The parties (asylum seeker or commissioner-general) may give oral comments at the court session. The may not invoke new arguments different from those invoked in the written appeal by the appellant or response document (*Nota*) from the commissioner-general[9].

The CAA may give refugee status or subsidiary protection or may confirm the appealed decision, eventually with different motives. It has no research competence, but may annul the decision of the commissioner-general if the case file lacks essential elements for the CAA to confirm or reform the decision without additional research measures[10]. In that case the commissioner-general will have to provide the missing information. The asylum seeker may ask annulment but the decision is part of the sovereign competence of the CAA as judge of the facts. The Council of State will not review such a refusal by the CAA.

Contrary to the former oral procedure at the PCAR where any new facts and arguments were admissible until the end of the court session this is not the case at the CAA. The asylum seeker will only be asked questions by the judge "*if this is necessary*"[11].It is for the judge to decide. New facts are only admissible under certain conditions as determined by the Aliens Law. New arguments that were not mentioned in the written appeal by the appellant or *Nota* from the commissioner-general are not admissible[12].

New facts may be invoked in the written appeal if the parties prove they could not invoke them during the administrative procedure[13].

The CAA may take into account any new fact even contrary to art. 39/60 of theAliens Law notified by the parties even at the court session if they are supported by the case file, prove with certainty the founded or unfounded character of the appeal and prove they could not invoke them earlier in the procedure[14].These conditions apply cumulatively.

New facts must pertain to facts or situations that happened after the last stage of the administrative procedure in which the foreigner could have invoked them and all new facts or proof or elements sustaining the facts or reasons mentioned during the administrative procedure[15].

The Constitutional Court gave a binding interpretation of the abovementioned article 39/76. They should be interpreted in the sense that they do not limit the full appeal competence of the CAA[16]. A full appeal competence of the CAA means that the CAA has the same competence of appreciation as the commissioner-general and must re-examine the case fully. This is an amendment to the fact that appeals in administrative law normally are limited by the arguments formulated in the written appeal[17]. The word "may" should be interpreted in the sense that it is not a faculty but an obligation for the CAA to take into account new facts that prove with certainty the founded or unfounded

[9] Art. 39/60, Aliens Law.
[10] Art. 39/2, §1, Aliens. A judgement of the CAA was annuled because the CAA had considered by its own initiative an UNHCR report concerning the actual situation (in Togo), Council of State 13 June 2008, nr. 184167.
[11] Art. 14, Procedure of the CAA, royal decree 21 December 2006.
[12] Art. 39/60, Aliens Law.
[13] Art. 39/76, §1, second section, Aliens Law.
[14] Art. 39/76, §1, third section, Aliens Law.
[15] Art. 39/76, §1, third section, Aliens Law.
[16] Constitutional Court, 27 May 2008, nr. 81/2008, B.30.
[17] Constitutional Court, 27 May 2008, nr. 81/2008, B.29.4.

character of the appeal[18], if the appellant proves that he could not present these new facts earlier in the procedure[19]. The mention that new facts should be supported by the case filemeans that new facts should not be taken into account if they do not relate to the asylum claim and the fear mentioned during the administrative examination[20].

The commissioner-general can actualize the information he has used to take his decision if the conditions of article 39/76 are met[21].A recent judgment of the CAA in general assembly allows new facts even without examination of the conditions of article 39/76 of the Aliens Law considering the defense rights if they are useful for the arguments developed in the written appeal or *Nota*by the commisioner-general answering the written appeal[22].This has broadened the possibility for the parties to present all kinds of documents to the CAA, for instance Country of Origin Information.

5. The relation between new facts at Aliens Office and the CAA

What is the relation between article 39/76 (new facts and the CAA) and 51/8 (new facts and Aliens Office) of the Aliens law?

If the CAA decides that the new facts presented by the parties are not new facts in the sense of article 39/76 those facts can be used by the asylum seeker to introduce a new asylum claim. Aliens Office will have to examine the new facts considering article 51/8 of the Aliens Law. This article has not the same meaning as article 39/76 and a refusal by the CAA will not bind Aliens Office in its examination based on article 51/8 (admissibility of a repeated asylum claim).

If the CAA decides that it will consider the new facts presented by the parties but that the asylum seeker is not a refugee and is not in need of subsidiary protection the asylum seeker may not use those facts again to introduce a new asylum claim. Taking into account the authority of the judgement by the CAA Aliens Office will have to reject such a repeatedasylum claim[23].

If the asylum seeker appeals against the decision of Aliens Office that the facts are not new and that the repeated asylum claim is not receivable the appeal may have suspensive effect if the CAA considers that contrary to Aliens Office the facts are new and should be examined on their merits by the commissioner-general.

The Belgian procedure concerning the suspension of administrative decisions (administrative urgent appeals)[24] was considered in violation of art, 13 combined with art. 2 or 3 of the European Convention for Human Rights by the European Court of Human Rights[25]. It was a case of Dublin II

[18]Constitutional Court, 27 May 2008, nr. 81/2008, B.29.5.
[19]Constitutional Court, 30 October 2008, nr. 148/2008, B.6.5.
[20]Constitutional Court, 27 May 2008, nr. 81/2008, B.29.6.
[21] Council of State (admissibility Cassation), 28 January 2011, nr. 6482.
[22]CAA, 24 June 2010, nr. 45.395, 45.396, 45.397.
[23]*Gedr.St.* Kamer, nr. 2478/001, pp. 97-98.
[24] Art. 39/82 – 39/85 Aliens Law.
[25] European Court for Human Rights (Grand Chamber), 21 January 2011, Case of M.S.S. v. Belgium and Greece (Application n° 30696/09),General Principles, nr. 286-293:
"(a) Recapitulation of generalprinciples
286. In cases concerning the expulsion of asylumseekers the Court has explainedthatitdoes not itself examine the actualasylum applications or verify how the States honourtheir obligations under the Geneva Convention. Its main concerniswhether effective guaranteesexistthatprotect the applicantagainstarbitrary refoulement, beit

expulsion by Belgium towards Greece and not about a repeatedasylum claim or new facts but the jurisprudence of the CAA concerning suspension was adapted after the abovementioned judgement to give appeals with an arguable claim based on art. 3 ECHR suspensive effect. Appeals against article 51/8 cases refused by Aliens Office can getsuspensive effect through a judgement of the CAA in urgency or extreme urgency[26]. There is a case by case approach of the competence of Aliens Office concerning new facts and the admissibility of repeated asylum claims based on article 51/8 Aliens Law[27]. If Aliens Office violates the competence of the commissioner-general by doing more than a prima facie examination of the character of serious indication of the new facts the CAA may suspend the effects of the refusal of the admissibility of the repeated asylum claim.

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direct or indirect, to the country fromwhichhe or she has fled (see, amongotherauthorities, T.I. v. the United Kingdom (dec. no. 43844/98, ECHR 2000-III), and Müslim, citedabove, §§ 72 to 76).

287. By virtue of Article 1 (whichprovides: "The High Contracting Parties shallsecure to everyonewithintheirjurisdiction the rights and freedomsdefined in Section I of this Convention"), the primaryresponsibility for implementing and enforcing the guaranteedrights and freedomsis laid on the national authorities. The machinery of complaint to the Court isthussubsidiary to national systemssafeguardinghumanrights. This subsidiarycharacterisarticulated in Articles 13 and 35 § 1 of the Convention (seeKudła v. Poland [GC], no. 30210/96, § 152, ECHR 2000-XI).

288. As the Court has held on many occasions, Article 13 of the Convention guarantees the availabilityat national level of a remedy to enforce the substance of the Convention rights and freedoms in whateverformtheymayhappen to besecured in the domesticlegalorder. The effect of Article 13 isthus to require the provision of a domesticremedy to deal with the substance of an "arguable complaint" under the Convention and to grantappropriate relief. The scope of the Contracting States' obligations under Article 13 variesdepending on the nature of the applicant's complaint; however, the remedyrequired by Article 13 must be "effective" in practice as well as in law (seeKudlacitedabove, § 157).

289. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourableoutcome for the applicant. Nordoes the "authority" referred to in that provision necessarily have to be a judicialauthority; but if itis not, itspowers and the guaranteeswhichitaffords are relevant in determiningwhether the remedybeforeitis effective. Also, even if a single remedydoes not by itselfentirelysatisfy the requirements of Article 13, the aggregate of remediesprovided for underdomesticlawmay do so (seeGebremedhin [Gaberamadhien] v. France, no. 25389/05, § 53, ECHR 2007-V § 53).

290. In order to be effective, the remedyrequired by Article 13 must beavailable in practice as well as in law, in particular in the sensethatitsexercise must not beunjustifiablyhindered by the actsor omissions of the authorities of the respondent State (seeÇakıcı v. Turkey [GC], no. 23657/94, § 112, ECHR 1999-IV).

291. Article 13 requires the provision of a domesticremedyallowing the competent national authorityboth to deal with the substance of the relevant Convention complaint and to grantappropriate relief, althoughContracting States are affordedsomediscretion as to the manner in whichtheyconform to their obligations underthis provision (seeJabari v. Turkey, no. 40035/98, § 48, ECHR 2000-VIII).

292. Particular attention shouldbepaid to the speediness of the remedial action itself, it not beingexcludedthat the adequate nature of the remedycanbeundermined by its excessive duration (seeDoran v. Ireland, no. 50389/99, § 57, ECHR 2003-X).

293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage whichmayresult if the risk of torture or ill-treatmentmaterialises, the effectiveness of a remedywithin the meaning of Article 13 imperativelyrequires close scrutiny by a national authority (seeShamayev and Others v. Georgia and Russia, no. 36378/02, § 448, ECHR 2005-III), independent and rigorousscrutiny of any claim thatthereexistsubstantial grounds for fearing a real risk of treatmentcontrary to Article 3 (seeJabari, citedabove, § 50), as well as a particularly prompt response (seeBatı and Others v. Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); italsorequiresthat the personconcernedshould have access to a remedywithautomatic suspensive effect (seeČonka v. Belgium, no. 51564/99, §§ 81-83, ECHR 2002-I, and Gebremedhin [Gaberamadhien], citedabove, § 66). »

[26]Forced execution of an expulsion cannot take place before five days or three working days against the agreement of the person concerned (Art. 39/84 Aliens Law).

[27]CAA 7 March 2011, nr. 57484; CAA 25 March 2011, nr. 58561 – 58.581 – 58583; 1 April 2011, nr. 59178.

6. Conclusion

Due to the fact that the appeal against asylum decisions of the commissioner-general introduced at the CAA is a full appeal in fact and law and not only an annulment appeal where the judge examines the decision of the administration ex tunc the asylum case can be actualized with new facts raising after the administrative procedure. As has been explained above this does not solve all the problems in asylum law requiring a thorough examination of an arguable claim (for asylum) taking into account the situation at the moment of the judgement by the CAA.