UNHCR Comments on the plans of the Government of the Netherlands for 'a more careful and faster' asylum procedure

as set out in the Letter of the Ministry of Justice to the Second Chamber of the States General dated 24 June 2008

The Statute of the Office of the United Nations High Commissioner for Refugees[1] assigns to UNHCR the responsibility to supervise the application of international instruments for the protection of refugees. Article 35 of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) and Article II of its 1967 Protocol specifically refer to UNHCR's duty to supervise the application of the provisions of that Convention, to which the Netherlands is Party. Within the European Union, Declaration 17 to the Amsterdam Treaty stipulates that there shall be consultations with UNHCR on matters concerning asylum.

UNHCR works to ensure respect for international legal norms applicable to refugees and attaches particular importance to promoting fair and efficient procedures for refugee status determination. In that context, UNHCR is pleased to provide comments on the Ministry of Justice's plans as contained in the letter of 24 June 2008 addressed to the Second Chamber. For ease of reference, these comments follow the general structure of that letter.

Shortening the asylum procedure and increasing the 'carefulness' of the procedure undertaken in the initial reception centres

UNHCR agrees that asylum procedures should not be excessively long, although due to wide divergences among States as well as to the complexity of asylum applications, it is difficult to recommend a specific time limit. An indication for a desired time-span in the European Union context can be found in Article 23(2) of the EU Procedures Directive[2], where it is stipulated that if an asylum procedure lasts beyond six months, the applicant shall be informed of the delay and/or of the time frame in which a decision can be expected.[3]

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[1] *UN General Assembly Resolution 428 (V).*
[2] *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (hereinafter the 'Procedures Directive').*
[3] *Another time indicator can be found in Article 35 of the Procedures Directive.*

In UNHCR's view, the proposed "general" procedure of eight days suggested by the Netherlands authorities retains important characteristics of an "accelerated" procedure. It is based on the existing "48-hour" accelerated procedure, which in reality involves five working days. The proposed extension is thus of three days. The time available to legal aid providers to work with asylum-seekers increases from five hours to three working days. This is without doubt an improvement, but does not fundamentally change what remains an accelerated approach to processing asylum claims.

UNHCR reiterates its long-standing recommendation that acceleration or prioritization of asylum applications be limited to manifestly *unfounded* or clearly abusive claims, and to clearly *well-founded* claims where protection needs are evident.[4] UNHCR recommends that claims lodged by traumatized or otherwise vulnerable asylum-seekers be channeled into what is termed the "prolonged" procedure in the new proposal.

UNHCR's concerns in relation to accelerated procedures centre on the need for the asylum authorities to establish the facts of a case and for the asylum-seeker to discharge the burden of proof placed on him/her within a very short time, and on the fact that it is difficult in such procedures to ensure optimal conditions of trust between asylum-seekers and the deciding authorities.[5]

The proposed extension of the time period from 48 hours to eight days does not remedy the long-standing problem of rotation of legal aid providers handling a single case. UNHCR questions whether this extension of time in itself will suffice to ensure the level of care recommended by the Evaluation Commission.[6] UNHCR regrets that the Government's proposal does not guarantee that asylum-seekers will have a single legal aid provider during both the rest period and the actual procedure, as this would be beneficial to the creation of an atmosphere of trust and to the quality of the procedure.

UNHCR welcomes the idea of introducing a 'rest and preparation period' at the start of the procedure. According to the Government proposal, this period can be used for registration and for the provision of information to applicants by VluchtelingenWerk Nederland (Dutch Refugee Council), as well as for preparatory activities by legal aid providers. The Government's plans further propose that the rest and preparation period also be used by the authorities to take fingerprints and perform a range of investigations into the identity of the asylum-seeker, including fingerprint and document investigations, and possibly also language investigations.

Moreover, this period is to be used for medical examinations and assessments. UNHCR welcomes the inclusion of a medical check during this introductory rest period, as this would, *inter alia*, help in identifying vulnerable persons for whom appropriate care is to be provided as per Article 20 of the EU Reception Conditions Directive.[7]

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[4] *UNHCR, Executive Committee Conclusion 30 (XXXIV – 1983), The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.*
See also: UNHCR, Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, available at: http:/www.unhcr.org/refworld/docid/42492b302.html, comment to Article 23(2) to (4).
See also: UNHCR's paper of July 2003, "Implementation of the Aliens Act 2000: UNHCR's observations and recommendations", available at [http://www.unhcr.org/refworld/docid/410f83f44.html.](http://www.unhcr.org/refworld/docid/410f83f44.html)
[5] *UNHCR Handbook on Procedures and Criteria, paras. 198 – 200.*
[6] *Evaluatie van de Vreemdelingenwet 2000 met betrekking tot de asielprocedure, WODC, 2006.*
[7] *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers,* OJ L 31/03.

On the other hand, UNHCR cautions against starting certain investigations before a sufficient degree of trust has been established between the asylum-seeker and his/her legal aid provider(s) as well as the authorities. The initial rest and preparation period should help to establish this trust. It is therefore important that key investigations not be launched until the legal aid provider has been able to begin his or her work with the applicant, in particular in view of the negative consequences which the use of a false identity or false documents may have under Article 31 of the Aliens Act 2000 (as well under general criminal law), if not disclosed in a timely manner by the asylum-seeker. In this respect, UNHCR would also welcome the introduction of a rest and preparation period in the application center at Schiphol airport, but this should not result in a prolongation of detention there under the current difficult conditions.

UNHCR wonders whether the strictly regulated use of time in the proposed eight-day procedure will allow sufficient time for the State Secretary to establish the facts of a case and for the asylum-seeker to discharge the burden of proof, i.e. provide (documentary) evidence for his/her claim. It is recalled that under Article 4 of the EU Qualification Directive[8], establishing and assessing the facts is the joint responsibility of the asylum-seeker and the authorities. UNHCR would encourage the Government to allow more time to the asylum-seeker and his/her legal representative to provide evidence and discharge the burden of proof. The Advisory Committee on Aliens Affairs (ACVZ) in its report "Secuur en Snel" of February 2007 suggests a six-day "hearing phase" and an 11-day "decision phase", which in UNHCR's view would allow for more care in decision-making.

In this context, some aspects of the eight-day procedure proposed by the Government would in fact weaken safeguards contained in the present law. This concerns the time limits for submitting corrections and additions to the second interview ("nader gehoor"), and for submitting a reaction to a notice of intent to reject an application. In the current regular procedure, Article 3.111 of the Aliens Decree provides that the minimum period for submitting corrections and additions to the second interview is two days, while the Aliens Circular (paragraph C13/3.3) stipulates that this period should normally be two weeks. In Article 3.115 of the Aliens Decree, an asylum-seeker is given four weeks to react to an intention to reject. A reduction of these two periods to one day each, as proposed by the Government, namely the fourth and sixth days of the proposed eight day procedure, is too short in UNHCR's view.

UNHCR urges the Government to consider introducing a way for the asylum-seeker to contest a decision to decide an application in the eight day procedure, rather than in the prolonged procedure, or otherwise to allow the asylum-seeker to influence a channeling of his/her request into the prolonged procedure. If the asylum-seeker cooperates in the joint establishment of the facts of the case (as per Article 4 of the EU Qualification Directive), and makes a credible offer or attempt to produce or adduce evidence in order to assist in the establishment of the facts and to discharge the burden of proof incumbent on him/her, this in UNHCR's view should lead to a referral to the prolonged procedure. This would allow asylum-seekers the opportunity to adduce all relevant evidence and proof, and could help to reduce the number of repeat applications.

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[8] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/04.

UNHCR regrets that the Government does not intend to provide automatic suspensive effect to appeals against negative decisions in the proposed eight-day procedure. UNHCR has consistently taken the position that the suspensive effect of asylum appeals is a critical safeguard to ensure respect for the principle of *non-refoulement.*[9] Automatic suspensive effect against negative decisions should, in UNHCR's view, be the rule, save in precisely defined cases where there is clearly abusive behaviour on the part of an applicant or where the unfoundedness of the claim is manifest. In Europe, many refugees are recognized as such only during the appeal stages of asylum procedures.[10]

UNHCR recommends:

- To lengthen time frames in the proposed eight-day procedure, so as to provide sufficient time and facilities to establish the facts of the case. The proposals of the Advisory Committee on Aliens Affairs in its advice "Secuur and Snel" would appear to be better suited to ensure sufficient care in an otherwise fast procedure;
- Accelerated procedures, including the proposed eight-day procedure, should apply only in cases of manifestly well-founded or manifestly unfounded or clearly abusive asylum applications;
- The proposed rest period should not be used for investigations by the IND until asylum-seekers have benefited from legal advice in this respect;
- A single legal aid provider should be able to follow a case during the rest period and the ensuing eight-day procedure;
- The introduction of a possibility for an applicant to contest or influence a decision to channel his/her claim into the eight-day procedure, or as a minimum, the drawing up of policy guidelines determining the choice of procedures;
- That appeals against negative decisions in the eight-day procedure automatically have suspensive effect, with the possible exception of manifestly unfounded or abusive cases.

Prolonged procedure, appeals, (scope of) judicial review

The Ministry's letter is silent on the time frame of the so-called 'prolonged' procedure, as well as on the system of appeals for both procedures and the scope of judicial review. UNHCR urges the Government to convey its thinking about these matters.

In its 2003 observations on the implementation of the Aliens Act 2000, UNHCR expressed concern about the limited scope of judicial review.[11] UNHCR regrets that the present opportunity has not been used to address this issue. UNHCR is strongly in favour of an appeal procedure which may review both facts and law. This is currently not the case in the Netherlands, as the courts are bound by the facts as found by the State Secretary, in particular as concerns the credibility assessment of the applicant.

[9] *Relevant case law from the ECHR includes: Jabary v. Turkey, Judgment of 11 July 2000; Conka v. Belgium, Judgment of 5 February 2002; Gebremedhin v. France, Judgment of 26 April 2007.*

[10] EXCOM Conclusions No. 8 (XXVIII – 1977), Determination of Refugee Status, and No. 30 (XXXIV – 1983), The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.

[11] UNHCR's paper of July 2003, "Implementation of the Aliens Act 2000: UNHCR's observations and recommendations", available at http://www.unhcr.org/refworld/docid/410f83f44.html

UNHCR recommends:

- To introduce an appeal procedure that may review first instance decisions in both law and fact, and that may address issues relating to credibility.

Reduce repeat applications

UNHCR in principle welcomes the intention on the part of the Government to modify the scope of judicial review under Article 83 Aliens Act 2000. However, it urges the Government to clarify whether the intention is to allow evidence or proof into the procedure which theoretically *could* have been brought forward in an earlier stage, and which under current case law of the Council of State on Article 83 Aliens Act 2000 in connection with Art. 4:6 General Administrative Law Act, is excluded from consideration. The limited possibility to introduce further evidence after a first instance decision has been taken was criticized by UNHCR in 2003[12], and has undoubtedly contributed to the relatively high number of repeat applications in the Netherlands.

UNHCR recommends:

- To introduce legislation to give the District Courts the competence to take into account all facts and circumstances relevant for the assessment of the asylum claim and to judge the case in light of the obligations resulting from international treaties, meaning a full and *ex nunc* review. [13]

Detention

UNHCR notes that the Government intends to continue to use detention measures to prevent asylum-seekers from entering the Schengen area.

Freedom from arbitrary detention is a fundamental human right. As a general principle, asylum-seekers should not be detained. Article 18(1) of the Asylum Procedures Directive reiterates this general principle. Detention of asylum-seekers should be resorted to only where necessary to achieve a legitimate purpose and where provided for by law.[14] What constitutes a 'legitimate purpose' should be rigorously interpreted; for example, a marginal risk of absconding should not suffice to justify systematic detention, and detention should not automatically be used in all Dublin II cases. Proportionality is a general principle of law and detention measures must be proportionate to the objectives to be achieved, applied in a non-discriminatory manner and for a minimal period. The need for detention should be established clearly and precisely in each individual case, after consideration of alternative options.

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[12] *Idem.*

[13] *This would be in line with the judgment of the European Court of Human Rights in the case of Salah Sheekh v. the Netherlands, January 11, 2007, para. 136.*

[14] *UNHCR Executive Committee Conclusion No. 44 (XXXVII – 1986), Detention of Refugees and Asylum-Seekers.*

UNHCR urges the Government to reconsider the use of detention in favour of other measures. Whereas Article 13 of the Schengen Borders Code[15] stipulates that third-country nationals who do not fulfill all the entry conditions shall be refused entry to the territories of the Member States, it also makes the proviso that this "shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection". In any case, UNHCR recommends explicit exceptions to detention measures in relation to children, survivors of torture or sexual violence, and traumatized persons. UNHCR also urges the Government to review the detention of asylum-seekers affected by the "Dublin II" procedure, and to find alternatives to secure their presence for the purposes of that procedure.

UNHCR further recommends that the proposed new procedure put an end to what is currently known as the "closed reception centre" procedure. This refers to the situation whereby even if no decision is taken within the current limit of 48 hours, the applicant remains detained pending further investigations by the asylum authorities.

<u>UNHCR recommends:</u>

- That every effort be made to avoid detention of asylum-seekers unless necessary to achieve a legitimate purpose provided for by law;
- That children, survivors of torture or sexual violence, and other traumatized persons not be detained;
- That detention should not automatically be used in Dublin II cases;
- That an end be put to the current "closed reception centre" procedure.

Asylum-seekers without access to reception facilities

UNHCR welcomes the stated objective of avoiding a situation whereby asylum-seekers with a right to be present in the Netherlands nonetheless remain without reception facilities. The Office also welcomes the intention to continue to provide reception to asylum seekers whose claims are rejected in the eight-day procedure for the expected duration of their appeal. However, UNHCR questions why reception would be limited to four weeks in such cases. Many refugees are recognized as such only during the appeal stages of asylum procedures, which may take longer than four weeks. UNHCR believes reception facilities should continue until the moment a rejection has become final following a decision in either appeal, or higher appeal.

<u>UNHCR recommends:</u>

- That reception facilities be made available at least until a final decision on an application has been reached.

[15] *Council regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, 13.4.2006, p.1.*

Departure of more rejected asylum-seekers from the Netherlands

UNHCR supports the Government's view that the return of persons who are not in need of international protection is important to ensure the integrity of the asylum system.[16] This presupposes that persons have been found, through a fair procedure, not to qualify for refugee status on the basis of the 1951 Convention, nor to be in need of subsidiary protection or protection on other grounds, and that they are not authorized to stay in the country concerned for other reasons.

Many countries in the EU and beyond face challenges arising from the difficulty to ensure the return of persons not in need of international protection. To date, the EU's approach to this issue has focused heavily on conclusion of readmission agreements with countries of origin and transit, and the establishment of the Return Fund. Experience shows that intensified and more collaborative international efforts are needed to facilitate the return to countries of origin, in safe and humane conditions, of persons who have taken significant risks to reach Europe. UNHCR therefore welcomes the Government's plans, financial and otherwise, to promote the voluntary return of persons not in need of international protection. UNHCR urges that efforts focus on sustainable return to countries of origin, and not on removal to countries of transit.

Nevertheless, UNHCR notes the statement in the Ministry of Justice's letter that it will not be possible to reach a situation in which all persons either obtain a residence permit, or return to their countries of origin. This risks resulting in a situation whereby persons remain in the country without legal title to do so, and without the necessary social and other rights, and brings with it many problems associated with destitution and illegality. UNHCR urges the authorities to resolve the situation of persons who through no fault of their own, cannot return to their countries of origin.

UNHCR recommends:

- That additional measures be developed to prevent destitution of foreigners without title to remain, such as continued reception facilities and a lenient use of the criterion for issuing residence permits to persons who through no fault of their own cannot return to their countries.

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UNHCR Regional Representation
Brussels

[16] *See e.g., UNHCR Executive Committee Conclusion No. 96 of 2003, on the return of persons found not to be in need of international protection.*