Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 11 February 2021 [1]

Case C-921/19

LH
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling from the Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands))

(Reference for a preliminary ruling – Border controls, asylum and immigration – Asylum policy – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Grounds of inadmissibility – Article 40 – Subsequent application – New elements or findings – Standard of assessment – Burden of proof – Article 19(2) of the Charter of Fundamental Rights of the European Union – Protection against deportation)

I. Introduction

1. In The Stockholm Programme, the European Council stated that 'it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome'. [2] This noble sentiment forms the backdrop to the present request for a preliminary ruling because the questions posed go to the heart of equal treatment for asylum seekers, regardless of the Member State in which they make their application for asylum.

2. Specifically, the core issue which arises in this case – namely, the circumstances in which an asylum seeker can rely on 'new elements or findings' for the purposes of making a fresh asylum application in the manner provided for in Article 40(2) of the Procedures Directive – is one which has been the subject of divergent interpretations in various Member States. A High Commission of the United Nations for Refugees (UNHCR) research project published in 2010 found – albeit with respect to Directive 2005/85 – that, in respect of that phrase, 'research findings reveal a wide divergence in interpretation in practice. It appears that this phrase is subject to differing interpretations across

1 Original language: English.

2 Point 6.2 of The Stockholm Programme – an open and secure Europe serving and protecting citizens (OJ 2010 C 115, p. 1). This attempt at coming to a common standard is already palpable from the change in title of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ 2013 L 180, p. 60; 'the Procedures Directive'), as compared to its predecessor, 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, p. 13). It is clear though from recital 13 of the Procedures Directive, which only speaks about an 'approximation of rules on the procedures for granting and withdrawing international protection', and Article 5 of that directive, which allows Member States to introduce or retain more favourable standards, that the Procedures Directive does not attempt to achieve complete harmonisation in the matters that it regulates.

Member States and within Member States'.[3] The Netherlands, the country from where this request for a preliminary ruling emanates, was cited as one of three States that have adopted a restrictive interpretation.[4] The UNHCR went on to 'suggest a clear need for greater clarity and consistency through the development of more detailed legislative provisions or other guidance to decision-makers'.[5]

3. The Procedures Directive[6] does not provide for any such more detailed legislative provision in respect of this issue. There is, accordingly, probably no reason to believe that the interpretation of the criterion 'new elements or findings' has become more uniform in the different Member States.

4. The EU legislature was plainly aware that its aim of creating a common procedure leading to a situation where similar cases will be treated alike and result in the same outcome in the different Member States would depend on the uniform application of the Procedures Directive by the Member States. It accordingly stipulated in recital 10 of that directive that, when implementing it, Member States should take into account relevant guidelines developed by the European Asylum Support Office (EASO). So far, the EASO has issued practical tools and guidance in a number of areas. Its input with regard to subsequent applications has, however, been limited.[7] It now falls to the Court to give some guidance in this respect.

5. I will presently seek to explain how this issue arises by reference to the facts of the present case. It is, however, first necessary to set out the relevant legal provisions.

II. Legal framework

A. EU law

1. The Qualification Directive

6. Article 4(1), (2) and (3) of Directive 2011/95/EU[8] deals with the assessment of facts and circumstances in relation to applications for international protection. It provides:

'1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

3 UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, p. 401 (the section dealing with subsequent applications starts at p. 361).

4 Ibid.

5 Ibid., p. 407.

6 Due to a number of substantive changes, Directive 2005/85 was recast.

7 See, for example EASO Guidance on asylum procedure: operational standards and indicators, EASO Practical Guides Series, September 2019, Standards 61 to 63, in particular, indicator 62.1, which merely asks whether internal guidelines are in place on what can be considered as new elements or findings as a means of measurement whether a procedure for preliminary examination has been established.

8 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ 2011 L 337, p. 9; 'the Qualification Directive').

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.'

7. Article 4(5) of the Qualification Directive stipulates that, where Member States apply the principle that it is the duty of the applicant to substantiate his or her application for international protection and where aspects of his or her statements are not supported by documentary or other evidence, those aspects shall not need confirmation if certain criteria as to the applicant's efforts and general credibility have been fulfilled.

8. Article 14(3)(b) of the Qualification Directive further provides:

'3. Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

…

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.'

2. The Procedures Directive

9. Recitals 21 and 36 of the Procedures Directive provide as follows:

'(21) As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not *per se* entail an automatic recourse to border or accelerated procedures.

…

(36) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.'

10. Article 31 of the Procedures Directive sets out certain rules for the examination procedure in relation to applications for international protection. Article 31(1) deals with the general rule, whereas Article 31(8)(e) and (f) contains exceptions:

'1. Member States shall process applications for international protection in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

…

8. Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:

…

(e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU; or

(f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); …'

11. Article 33(2)(d) of the Procedures Directive, dealing with the inadmissibility of applications, provides:

'2. Member States may consider an application for international protection as inadmissible only if:

…

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; …'

12. Article 40 of the Procedures Directive is entitled 'Subsequent application'. Paragraphs 1 to 5 thereof are central to any consideration of the present case and they provide:

'1. Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU.

3. If the preliminary examination referred to in paragraph 2 concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95/EU, the application shall be further examined in conformity with Chapter II. Member States may also provide for other reasons for a subsequent application to be further examined.

4. Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.

5. When a subsequent application is not further examined pursuant to this Article, it shall be considered inadmissible, in accordance with Article 33(2)(d).'

13. Article 42(2) of the Procedures Directive provides that Member States may lay down in national law rules on the preliminary examination, including that it may be conducted without a personal interview.

B. Netherlands law

14. Article 30a, in force since 20 July 2015, of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000) provides:

'1. An application for the issue of a residence permit [on grounds of asylum] for a fixed period may be declared inadmissible within the meaning of Article 33 of the Procedures Directive, if:

…

d. the foreign national has lodged a subsequent asylum application which he or she has not based on any new elements or findings or in which no new elements or findings have been indicated which could be relevant for the assessment of the application; …

…'

III. The facts of the main proceedings and the reference for a preliminary ruling

15. LH is an Afghan national, who had been working for around three years as a driver for the director of a reconstruction and development agency of a rural region of a particular province in Afghanistan ('the former employer'). Following his departure from Afghanistan and his arrival in the Netherlands, he sought asylum on the basis that in the course of that employment he had been ambushed by the Taliban on a number of occasions. LH further claimed that he was personally threatened with decapitation if he did not surrender to the Taliban the official that he had been driving.

16. Only the claims regarding the ambushes were considered credible by the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary'), the competent determining authority[9] in this case. The latter allegations regarding the personal threats were not, however, considered credible by the State Secretary when LH sought asylum in the Netherlands.

9 Article 2(f) of the Procedures Directive.

17. LH had lodged what transpired to be his first asylum application with the Dutch authorities on 8 December 2015. In order to support his application, he had, among other things, produced a statement by his former employer together with a statement by the local fire brigade of his home town, both received by email/Internet. The statement from the fire brigade confirmed that LH's house had been burned down after his flight from Afghanistan. That statement included a description of what had occurred. This was accompanied by photographs of the destroyed house. Although it is not known who set the house on fire, LH maintains that it is likely that the act was perpetrated by the Taliban.

18. As his claim that he was personally threatened by the Taliban was not considered credible, his asylum application was rejected by the State Secretary on 8 June 2017. The appeal against that decision to the referring court, the Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands), was dismissed as unfounded. This decision was in turn confirmed on 23 March 2018 by the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State, Netherlands). As the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) is the highest administrative court for immigration matters in the Netherlands, that decision had thus become final.

19. A few months later, on 26 September 2018, LH made a second application for asylum to the State Secretary. It is accepted that this was a 'subsequent application' for asylum within the meaning of Article 2(q) of the Procedures Directive. In that second application, LH sought to bolster the credibility of his claim that he had been threatened individually by the Taliban. For that purpose, he submitted certain further documents, including the originals of the statement from the fire brigade together with fingerprints of witnesses. LH also submitted the original of the statement of his former employer and a copy of his work contract. He also set out why he had not been able to supply those documents in the course of the previous application.

20. The State Secretary considered that the subsequent application was inadmissible. According to the State Secretary, those documents could only have been considered to be 'new elements or findings' for the purposes of a subsequent application if the newly submitted documents had been demonstrated to be authentic. As the relevant government service that examined the documents did not have any reference material at its disposal, it was not able to determine whether the documents had been drawn up by a competent authority, nor was it able to judge their authenticity and substantive accuracy. With this formal approach to the assessment of whether documents were considered to be 'new elements and findings', the State Secretary followed the settled case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State).

21. LH appealed that decision and applied for interim relief to the referring court on 4 September 2019. LH objects to his appeal having been dismissed automatically as inadmissible without the State Secretary even assessing the probative value of the original documents which were submitted by him. LH takes the view that it is impossible for him to prove the authenticity of the original documents because he has neither the financial resources nor the practical means to do so. Given that most of the documents originate from Afghan authorities, LH contends that the State Secretary is in a far better position to carry out further investigation by contacting those Afghan authorities directly. Therefore, he considers it unreasonable to place the burden of proof solely on him by automatically rejecting these original documents.

22. The referring court notes that the State Secretary's examination did not reveal any indication that the documents were not authentic or that they did not originate from a competent authority, or that their content was inaccurate. Indeed, the State Secretary did not even raise any concrete doubts as to the authenticity of the documents. It was merely unable to assess whether the documents fulfilled these criteria. It might be observed that, in accordance with its rules and practice, the State Secretary had not granted LH a hearing prior to rejecting his appeal.

23. The referring court has doubts whether the settled case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) described above is in line with EU law. In particular, it points to the judgment of the European Court of Human Rights (ECtHR) in *M.D. and M.A. v. Belgium*, where the ECtHR held that a rejection of documents without assessing their authenticity, relevance and probative value constitutes too formalistic an approach, even in a subsequent application. [10]

24. The referring court fears that if original documents are not substantively assessed solely because their authenticity cannot be established, this might be contrary to the right to asylum, the prohibition of refoulement and the right to an effective remedy as laid down in Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), especially when interpreted in accordance with Articles 3 and 13 of the European Convention on Human Rights (ECHR). This is particularly so as the practice of discarding original documents the authenticity of which cannot be established ('non-authenticated documents') in subsequent proceedings means that a decision can be taken without granting the applicant a hearing.

25. The referring court further asserts that it is only in subsequent proceedings that non-authenticated documents are not assessed while they are taken into consideration in the original proceedings. It explains that the settled case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) underlines the fact that the applicant's reasoning has already been judged not to be credible and that this can be taken into consideration by the Secretary of State in its assessment of non-authenticated documents. As the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) in its settled case-law only pronounced itself on the burden of proof, the referring court further wants to know whether copies are to be dealt with differently in this respect than documents originating from a non-objectively verifiable source. It also has doubts whether the burden of proof for the authenticity of the documents can lie solely with the applicant for international protection in a subsequent application.

26. In those circumstances, the referring court decided to stay the proceedings, to grant interim relief until the appeal has been decided and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the determination by a determining authority of a Member State that original documents can never constitute new elements or findings if the authenticity of those documents cannot be established compatible with Article 40(2) of the Procedures Directive, read in conjunction with Article 4(2) of the Qualification Directive and Articles 47 and 52 of the Charter of Fundamental Rights of the European Union? If not, does it make any difference if, in a subsequent application, copies of documents or documents originating from a non-objectively verifiable source are submitted by the applicant?

(2) Must Article 40 of the Procedures Directive, read in conjunction with Article 4(2) of the Qualification Directive, be interpreted as allowing the determining authority of a Member State, when assessing documents and assigning probative value to documents, to distinguish between documents submitted in an initial application and those submitted in a subsequent application? Is it permissible for a Member State upon the production of documents in a subsequent application, no longer to comply with the obligation to cooperate if the authenticity of those documents cannot be established?'

27. Written observations were submitted by LH, by the Netherlands Government and by the European Commission.

10 ECtHR, 19 January 2016 (CE:ECHR:2016:0119JUD005868912, §§ 55 and 64).

IV. Analysis

28. Both questions concern the interpretation of Article 40 of the Procedures Directive when read in conjunction with Article 4(2) of the Qualification Directive. By its first question, the referring court wants to know whether an interpretation of the national law implementing Article 40(2) of the Procedures Directive according to which non-authenticated documents can never constitute 'new elements or findings' is contrary to that provision and Articles 47 and 52 of the Charter. Thus, the question focuses on what might be considered 'new elements or findings' for the purposes of that provision. If the Court were to find that an automatic refusal of non-authenticated documents is prohibited by that provision, the referring court wants to know in the second part of the first question whether this assessment changes in case of copies rather than non-authenticated original documents. By its second question, the referring court inquires whether a determining authority can in its assessment of documents distinguish between documents submitted in an initial application and those submitted in a subsequent application and whether, in the latter case, a Member State can decide no longer to comply with the obligation to cooperate if the authenticity of those documents cannot be established.

29. These questions are in fact so closely interlinked that I propose to examine those questions together.

A. Preliminary remarks

30. First, it should be pointed out that even though the Procedures Directive aspires to a situation where similar cases are treated alike and result in the same outcome, its approach is based on the concept of a single procedure and minimum common rules.[11] The directive nevertheless contains a number of provisions that specifically allow Member States to provide for differing or additional rules – beyond the general authority to introduce or retain more favourable standards set out in Article 5 of the Procedures Directive. Such discretion must, however, be exercised in conformity with the underlying objectives of the directive as well as the Charter.[12]

31. With respect to subsequent applications, Member States may provide for further reasons to examine a subsequent application.[13] They may also provide that a further examination of a subsequent application requires that an applicant be incapable of asserting the evidence on which he or she based his or her application in the previous procedure through no fault of his or her own.[14] The Member States further have discretion to make exceptions from the right to remain[15] and with regard to procedural rules.[16] I shall return presently to the second of these provisions.

11 See, to that effect, judgment of 25 July 2018, *A* (C-404/17, EU:C:2018:588, paragraph 30), as well as my Opinion in *Addis* (C-517/17, EU:C:2020:225, point 74).

12 See, with respect to other directives belonging to the Common European Asylum System, judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 68); of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 53); and of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 62 and 64).

13 According to the second sentence of Article 40(3) of the Procedures Directive.

14 Article 40(4) of the Procedures Directive. The procedure described in Article 40 may also be applied in the cases set out in paragraph 6 of that article. These cases are, however, not at issue here.

15 Article 41 of the Procedures Directive. This is, however, not at issue here.

16 Article 42(2) of the Procedures Directive.

B. Structure of the procedure for subsequent applications

32. Article 40(2) and (3) of the Procedures Directive provides for a preliminary procedure [17] when deciding on the admissibility of a fresh application for international protection following the rejection of an earlier application for this purpose. It sets out two criteria. First, 'new elements or findings' must have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies for international protection. Second, those new elements or findings must significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of the Qualification Directive. The second step is dependent on the first being fulfilled. If both of those criteria have been fulfilled, Article 40(3) of the Procedures Directive then provides that the application must be further examined in accordance with Chapter II of the Procedures Directive. Chapter II lists the basic principles and guarantees underlying the procedures for granting and withdrawing international protection. During the preliminary examination, on the other hand, applicants (only) enjoy the guarantees provided for in Article 12(1) of the Procedures Directive as per Article 42(1) thereof. [18]

33. While Article 42(2) of the Procedures Directive allows Member States to lay down rules in national law with respect to the conduct of the preliminary examination, there is no discretion for the Member States with respect to the criteria for the preliminary examination. [19] If there are 'new elements or findings' and if they significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, [20] this fresh asylum application must be further examined. Article 42(2) of the Procedures Directive also allows Member States to enact rules which oblige applicants in subsequent proceedings to indicate facts and substantiate evidence which justify a new procedure as well as to conduct the preliminary examination on the sole basis of written submissions. [21] This provision, however, provides that those rules 'shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access'. [22]

34. For my part, however, I consider that the practice of the State Secretary – which, according to the referring court, has been upheld by the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) – *never* to consider non-authenticated documents as 'new elements or findings' for the purposes of a subsequent application does not fall

17 This preliminary procedure has been specifically provided for in Article 40(2) of the Procedures Directive in relation to subsequent applications and must be distinguished from the initial application.

18 While there is only a reference to Article 12 of the Procedures Directive and one can infer from Article 40(3) of that directive that not all of the provisions of the second chapter are applicable to the preliminary examination, this does not mean that the Member States have unlimited discretion as to how they conduct that procedure. See, for example, judgment of 9 February 2017, *M* (C-560/14, EU:C:2017:101, paragraph 25), where the Court set out that the right to be heard forms an integral part of the rights of the defence, the observance of which constitutes a general principle of EU law, and thus applies when the authorities of the Member States take measures which fall within the scope of EU law, even if the applicable legislation did not expressly provide for such a procedural requirement. The mere mention in Article 42(1) of the Procedures Directive that it must be ensured that applicants enjoy the guarantees provided for in Article 12(1) thereof in a preliminary examination does therefore certainly not mean that the requirements for the examination of applications set out in Article 10 of that directive, which contains a number of fundamental rules (for example, that applications have to be examined and decisions taken objectively and impartially according to paragraph 3(a)), do not apply in the case of a preliminary examination.

19 Except that the Member States may provide for other reasons for a subsequent application to be further examined according to the second sentence of Article 40(3) of the Procedures Directive, and in line with the principle that Member States should have the power to introduce or maintain more favourable provisions (see Article 5 and recital 14 of the Procedures Directive).

20 This criterion certainly allows for a margin of appreciation by the determining authority. Margins of appreciation must, however, not be used to defeat the purpose of the directive (see Opinion of Advocate General Wahl in *E.*, C-635/17, EU:C:2018:973, point 51, with respect to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12)).

21 With the exception of cases as per Article 40(6) of the Procedures Directive, which are not at issue here. The Netherlands has adopted respective rules in Article 3.118b of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000) and point C1/2.9 of the Vreemdelingencirculaire 2000 (Circular on Foreign Nationals 2000) dealing with the possibility of taking a decision without conducting a personal interview. The practice of never accepting non-authenticated documents as 'new elements and findings' is, however, based on practice and the settled case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State).

22 According to the referring court, the Netherlands has availed of these possibilities. The questions of the referring court, however, do not relate directly to them but rather to the interpretation given by the case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) to Article 30a(1)(d) of the Law on Foreign Nationals 2000 that implements the rules on subsequent applications into Netherlands law.

within the exception provided by Article 42(2) of the Procedures Directive. I take this view because that practice does not concern the subject matters covered by that exception, nor does there appear to be such a positive rule of national law in the Netherlands [23] which specifically seeks to give effect to this practice.

35. As the referring court has explained, non-authenticated documents supplied by an asylum seeker in a subsequent application are simply not considered by the State Secretary because they are not regarded as 'new elements or findings'. This means that they are already disregarded under the first criterion contained in Article 40(2) rather than the second criterion contained in Article 40(3) of the Procedures Directive. As I will explain below, I take the view that an *ex ante* rule or practice of this kind is simply inconsistent with Article 40(2) and (3) of that directive. There may, of course, be many instances where non-authenticated documents are worthless in terms of their probative value, not least where even a casual perusal demonstrates that they have been fabricated for this purposes. But all such non-authenticated documents cannot simply be dismissed out of hand: much will depend on questions of context, relevance, feasibility of authentication and perhaps even in some instances the burden which any endeavour to authenticate the documents would impose on the deciding authority.

C. Case-law of the European Court of Human Rights

36. At this point, it may be convenient to examine two recent decisions of the ECtHR dealing with the issue of the authentication of documents in asylum cases, to which the referring court made specific reference. The first of these is *Singh v. Belgium*. [24] That was a case where the applicants had originally arrived in Brussels Airport on a flight from Moscow. They objected to their deportation to Russia because they feared in turn repatriation to Afghanistan in breach of Article 3 ECHR. The applicants maintained that they were Sikhs who had originally fled from Afghanistan.

37. Their claim for refugee status was, however, rejected by the Belgian asylum authorities because they had failed to prove their Afghan nationality. In the course of an appeal, the applicants provided new documents, namely, emails between their legal representatives and a representative of the Belgian Committee for the Support of Refugees (a partner of the UNHCR) and the UNHCR in New Delhi. The UNHCR representative in New Delhi had furnished, by way of attachments to the emails, 'certificates' which indicated that the applicants had been recorded as refugees under the UNHCR mandate. Despite the emergence of this new documentation, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) nonetheless ruled adversely to the claim of Afghan nationality. It determined that the new documents were to be treated as having no convincing value on the basis that they were of a type that was easy to falsify, finding that the applicants had failed to provide the originals of the relevant documents.

38. In its judgment, the ECtHR found a breach of Article 13 ECHR (the effective remedy provisions) coupled with Article 3 ECHR. Pointing to the otherwise potentially serious consequences for the applicants, the ECtHR concluded [25] that the obligation of the State authorities was to show that they had been as rigorous as possible and that they had carried out a careful review ('*un examen attentif*') of the claims based on Article 3 ECHR. This means that the national authorities must rule out any doubt, however legitimate, as to whether an application for protection is ill-founded, whatever the

23 See, by analogy, judgment of 25 July 2018, *A* (C-404/17, EU:C:2018:588, paragraph 31).

24 ECtHR, 2 October 2012, *Singh and others v. Belgium* (CE:ECHR:2012:1002JUD003321011).

25 Ibid., § 103.

scope of the authority's competence.[26] The Court observed that since the documents were at the heart of the request for protection, the rejection of them without 'checking their authenticity' fell short of the careful and rigorous review expected of national authorities by the effective remedy requirements of Article 13 ECHR in order to protect the individuals concerned from torture or inhuman or degrading treatment under Article 3 ECHR in circumstances where a (relatively) simple process of enquiry of the UNHCR would have resolved conclusively whether they were authentic and reliable.[27]

39. The second decision is *M.D. and M.A. v. Belgium*.[28] That case concerned two Russian nationals of Chechen origin who lived in Belgium and whose removal to Russia was sought. M.D. claimed that his father had been murdered by supporters of the man who would later become head of the Chechen Republic. It was said that in order to avenge that murder, M.D.'s elder brother had in turn killed a member of that leader's family. Two months later, M.D. and his wife M.A. were attacked during a birthday party, whereupon they fled to Ingushetia. They said that they had been informed by M.D.'s mother and sister that some men were looking for him whereupon the couple left Russia. They further contended that M.D.'s brother-in-law, who had remained in Chechnya, was murdered after their departure.

40. On their arrival in Belgium, M.D. and M.A. lodged their first asylum application. The Office des étrangers (Immigration Office, Belgium) declared the application inadmissible on the ground, among other things, that a personal vendetta did not constitute a reason for granting asylum. The Commissaire général aux réfugiés et aux apatrides (Commissioner-General for Refugees and Stateless Persons, Belgium) upheld the refusal, finding that M.D.'s and M.A.'s account of events lacked credibility. The Conseil d'État (Council of State, Belgium) subsequently dismissed their application for judicial review as both M.D. and M.A. had failed to attend a hearing. They were then served with an order to leave the country.

41. M.D. and M.A. subsequently submitted three further applications. In these fresh asylum applications, they exhibited various notices published in the local Chechen press in which a reward for information on the whereabouts of M.D. had been offered. They also produced the brother-in-law's death certificate and a summons from the Grozny police department for M.D. to appear on suspicion of bearing illegal arms and belonging to an unlawful armed organisation. These fresh applications were dismissed for lack of 'new elements' having been presented. Reasons for this assessment were that the determining authority considered that the elements submitted did not emanate from an objective source or from a document drawn up by an authority,[29] that the date of the document provided as new evidence preceded the previous application and should therefore have been presented at that stage, and that (only) originals of documents they had already submitted

26 Ibid. The ECtHR has held on various occasions that the combined application of Articles 3 and 13 ECHR requires that an effective remedy be available to applicants for international protection if there is substantial ground to believe that the applicant, if deported, faces an individual and real risk of being subjected to treatment contrary to Article 3 ECHR. In such a case, Article 3 ECHR implies an obligation not to deport the person in question to that country. Due to the importance of Article 3 ECHR and the irreversible nature of the harm that may be caused by its infringement, Article 13 ECHR requires a careful review and an independent and rigorous examination of any claim that points at a risk that the applicant might be subject to a treatment contrary to Article 3 ECHR if he or she were to be deported (ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, §§ 293 and 387 and the case-law cited therein). See also ECtHR, 12 December 2012, *F.N. and others v. Sweden* (CE:ECHR:2012:1218JUD002877409, § 66), and ECtHR, 18 November 2013, *M.A. v. Switzerland* (CE:ECHR:2014:1118JUD005258913, §§ 52 and 53), as well as the analysis of the ECtHR's case-law in Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, points 68 and 69) with regard to Article 46(3) of the Procedures Directive. It should also be pointed out that Article 3 ECHR does not only cover torture or inhuman or degrading treatment by public officials but also applies where the danger, as in the present case, emanates from persons or groups of persons who are not public officials if it can be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection. See, to that effect, ECtHR, 17 December 1996, *Ahmed v. Austria* (CE:ECHR:1996:1217JUD002596494), and ECtHR, 4 June 2015, *J.K. and Others v. Sweden* (CE:ECHR:2015:0604JUD005916612, § 50).

27 ECtHR, 2 October 2012, *Singh and others v. Belgium* (CE:ECHR:2012:1002JUD003321011, § 104).

28 ECtHR, 19 January 2016 (CE:ECHR:2016:0119JUD005868912).

29 The documents submitted were newspaper articles that the determining authority considered might have been published upon the applicant's instigation. Other reasons why the determining authority did not consider the elements presented to be new were that an examination report regarding his brother-in-law's death did not mention the applicant and that there was no link between another document relating to the death of his parents and brothers and the applicant's flight.

previously were presented. The reasons that the applicants gave as to why they had not been in a position to present those documents earlier did not make any difference to this assessment.[30] Those subsequent applications were therefore likewise dismissed in turn and they were served with an order to leave the country, together with an order for their detention at a designated place pending their removal.

42. Following an application to the ECtHR, that Court held that, in the particular circumstances of those applicants, the threatened removal of the applicants to Russia without the Belgian authorities having first re-examined the risk they faced in the light of the documents submitted in support of their fourth asylum request would constitute a breach of Article 3 ECHR.

43. The ECtHR, after having referred to its case-law regarding Article 3 ECHR, nonetheless recognised the States' legitimate interest in reducing repeated and manifestly abusive asylum applications and thus to provide for specific rules when dealing with such demands. It found that the treatment of a subsequent application in an accelerated procedure in itself does not lead to the finding that the examination does not fulfil the criteria required under Article 3 ECHR.[31]

44. The ECtHR then considered, however, that the fact that the documents presented were not considered to be new elements meant, de facto, that there was no examination whatsoever into the alleged risk that the applicants would be facing if they were expelled.[32] The Court held that to disregard these documents, which were at the heart of the applicants' request for protection, did not fulfil the required standards of a careful and rigorous independent examination that is to be expected from the national authorities in order to provide for an effective protection against a violation of Article 3 ECHR. The ECtHR also criticised the unreasonable burden of proof placed on applicants if documents that they provide are simply rejected because they predate the time of their last application, irrespective of their efforts to show that they were not in a position to present them previously.

45. As it happens, the ECtHR based its findings entirely on Article 3 ECHR. Under those circumstances, it did not consider it necessary to consider the same facts from the angle of a combined application of Articles 3 and 13 ECHR.[33]

46. While this case clearly does not concern a State's obligation to authenticate documents but rather concerns the admissibility of non-authenticated documents in a subsequent application, for my part, I do not read either *Singh v. Belgium*[34] or *M.D. and M.A. v. Belgium*[35] as laying down a universal, *ex ante* obligation on all Contracting States to conduct their own review of the authenticity of every foreign document supplied by an asylum claimant. It is clear, of course, that there may be special cases with particular facts where it would be simply remiss of the Member State in question not to conduct such an inquiry of its own volition. But not every case will be potentially as straightforward as those two cases: issues of relevance, feasibility and perhaps even cost are also relevant considerations. There may also be many instances where the claimant is in a position to make his or her own inquiries and supply further documentation or other information to the authorities.[36]

30 ECtHR, 19 January 2016, *M.D. and M.A. v. Belgium* (CE:ECHR:2016:0119JUD005868912, §§ 19 to 31).

31 Ibid., §§ 55 and 56.

32 This was particularly evident in that Belgian case because the competence for the assessment whether new elements had been presented and for the assessment of the content of those documents was split between the Immigration Office and the Commissioner-General for Refugees and Stateless Persons. Only once the elements have been considered to be new by the former, will the file be handed on to the latter body.

33 ECtHR, 19 January 2016, *M.D. and M.A. v. Belgium* (CE:ECHR:2016:0119JUD005868912, § 70).

34 ECtHR, 2 October 2012, *Singh and others v. Belgium* (CE:ECHR:2012:1002JUD003321011).

35 Judgment of 19 January 2016 (CE:ECHR:2016:0119JUD005868912).

36 Documents are, however, not the only means of showing that an applicant is entitled to international protection and the fact that documents are not authenticated does not necessarily mean that they are without probative value; see points 51 and 59 et seq. of the present Opinion. See also ECtHR, 23 August 2016, *J.K. and Others v. Sweden* (CE:ECHR:2016:0823JUD005916612, §§ 91 to 98), dealing with the respective obligations of the applicant and the State.

47. It is also important to recall that, for example, in *Singh v. Belgium*,[37] the documents which had been supplied in that case were rejected by the Council for asylum and immigration proceedings on the basis that documents of that kind were easy to falsify and no originals had been supplied. Critically, however, that tribunal had never concluded, following its own review of the documents, that they were not authentic: it simply said that they were of a kind that was easily falsified. Something similar appears to have occurred in *M.D. and M.A. v. Belgium*,[38] where the Belgian authorities seemed unwilling to countenance an examination of these additional documents in the context of a fresh asylum application, even if these documents would appear to have been highly relevant to any credibility assessment in respect of the claims made by M.D. and M.A. in relation to the risks that they faced if they were returned to Russia.

48. Under Article 52(3) of the Charter, the rights affirmed by the Charter, where they correspond to rights guaranteed by the ECHR, have the same meaning and scope as those laid down by that convention. Accordingly, inasmuch as the prohibition provided for in Article 3 ECHR is equivalent to the prohibition guaranteed by Article 4 but also Article 19(2) of the Charter,[39] the case-law of the ECtHR described above is also relevant within the context of the application of the Charter.[40]

49. What, then, is the relevance of these decisions of the European Court of Human Rights to the present proceedings? As the referring court has explained, non-authenticated documents are not considered in any subsequent asylum application by the State Secretary because they are not regarded as 'new elements or findings'. This means that they are already disregarded under the first criterion contained in Article 40(2) rather than the second criterion contained in Article 40(3) of the Procedures Directive. These decisions serve to reinforce the view I have already expressed that an *ex ante* practice where such non-authenticated documents are automatically disregarded in fresh asylum applications is simply not consistent with either the requirements of Article 40(2) and (3) of the Procedures Directive or, for that matter, the basic standards imposed when facing an asylum application presenting serious and weighty issues under Article 3 ECHR and Article 4 of the Charter.

D. 'New elements or findings'

50. As the referring court has set out correctly, the Procedures Directive does not contain any definition of the term 'new elements or findings' or even just 'elements'.

51. Article 4(2) of the Qualification Directive defines the 'elements needed to substantiate the application for international protection' referred to in Article 4(1) thereof. That definition is very broad and encompasses the applicant's statements and all the documentation at the applicant's disposal regarding, inter alia, the applicant's background, place(s) of previous residence and the reasons for applying for international protection. The wording of this definition clearly does not limit the quality of the documents to be considered to documents the authenticity of which can be established.

52. It should be pointed out, however, that Article 4(5) of the Qualification Directive deals specifically with the case where aspects of an applicant's statement are not supported by documentary or other evidence at all. It sets out five criteria that have to be met in order for those aspects to be considered without confirmation. All of those criteria relate to either the applicant's efforts at providing those

37 ECtHR, 2 October 2012, *Singh and others v. Belgium* (CE:ECHR:2012:1002JUD003321011).

38 ECtHR, 19 January 2016 (CE:ECHR:2016:0119JUD005868912).

39 With Article 19(2) of the Charter being the more specific provision which, according to the Explanations relating to the Charter of Fundamental Rights, incorporates the relevant case-law from the ECtHR regarding Article 3 ECHR. See also judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 94).

40 The Procedures Directive and the Qualification Directive both state specifically that they respect the fundamental rights and observe the principles recognised by the Charter, according to recital 60 of the Procedures Directive and recital 16 of the Qualification Directive.

documents or to his or her credibility – with both of those being linked. If it is thus possible to consider aspects of an asylum application without any documentary or other evidence, it must also be possible to consider documents the authenticity of which is not confirmed in support of aspects of an asylum application.

53. In assessing the term 'new elements and findings', it should also be kept in mind that the Procedures Directive is divided into different chapters, of which the second sets out the basic procedural principles and guarantees. Chapter III deals with the procedures at first instance to which the subsequent application procedure belongs. The first provision of this third chapter, Article 31, provides that Member States shall process applications for international protection in an examination procedure in accordance with the basic principles and guarantees of Chapter II. Thus, a full examination in accordance with these principles is the rule. In Article 33 of the Procedures Directive, the cases in which an application may be considered inadmissible are set out. Article 33(2)(d) of that directive provides that a subsequent application may be considered inadmissible by Member States where no new elements or findings relating to the examination by virtue of the Qualification Directive have arisen or have been presented by the applicant.

54. Even in cases of inadmissibility, a specific procedural rule, namely that an admissibility interview must be conducted, is provided for in Article 34 of the Procedures Directive. Once again, however, an exception may be made by the Member States in the case of a subsequent application,[41] if a Member State avails of the possibility of laying down in national law rules on the preliminary examination pursuant to Article 42 of the Procedures Directive. As mentioned above, Article 42(2)(b) of that directive permits the preliminary examination to be conducted on the sole basis of written submissions. Thus, in accordance with the second chapter of the Procedures Directive, a full examination can be omitted in exceptional cases and, in even more exceptional cases, it can be omitted without the applicant being granted a personal interview prior to such a decision being taken. This means that Article 33(2)(d) of the Procedures Directive sets out grounds for exclusion from further examination. As this constitutes an exception to the general rule stipulated by Article 31(1) of the Procedures Directive, it therefore calls for strict interpretation.[42]

55. The objective of the Procedures Directive is to establish a common system of safeguards serving to ensure full compliance with the Geneva Convention and with fundamental rights.[43] One of the main features of this is that every applicant for asylum should have access to effective procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure.[44]

56. A subsequent application is one of the rare cases in which an applicant's rights to put his or her case in accordance with *all* the basic principles and guarantees set out in Chapter II of the Procedures Directive is restricted. As can be discerned from recital 36 of that directive, a balance is struck in those cases between the efforts to be made at ensuring a correct recognition of persons in need of protection and the interests of Member States in swift and effective decision-making. According to that recital, it would be disproportionate to oblige Member States to carry out a new full examination procedure where an applicant makes a subsequent application *without presenting new evidence or arguments*. Therefore, Article 42 of the Procedures Directive provides for a preliminary examination that has the purpose of relieving Member States from having to deal with the same facts and evidence in various procedures that are unlikely to have different outcomes. The balance in favour of such swift

41 Third sentence of the first subparagraph of Article 34(1) of the Procedures Directive.

42 This principle is further confirmed by recital 43 of the Procedures Directive. See also Opinion of Advocate General Bobek in *LH (Tompa)* (C-564/18, EU:C:2019:1056, point 51) with regard to the concept of 'safe country' (exception according to Article 33(2)(c) of the Procedures Directive).

43 See Opinion of Advocate General Bot in *X and X and Y* (C-175/17 and C-180/17, EU:C:2018:34, point 31) with respect to the predecessor to the Procedures Directive. This assessment remains applicable to the Procedures Directive as is made clear by recitals 3, 25 and 60 thereof.

44 See recital 25 of the Procedures Directive.

decision-making hinges entirely and critically on whether 'new elements or findings' – as the criterion is described in both Article 33(2)(d) and Article 40(2) of the Procedures Directive – have arisen or have been presented. Only if that is not the case does the balance tip and the competent administrative body can loosen its rigour in trying to ensure the correct recognition of a person deserving international protection.[45]

57. The thinking behind this provision is clearly that the examination of elements other than new elements has already taken place in accordance with Chapter II in the initial proceedings. If no new elements or findings are presented, a different outcome of the procedure cannot be expected, thus rendering a renewed examination superfluous. The second criterion in that preliminary examination, which is contained in Article 40(3) of the Procedures Directive, narrows down the new elements and findings to those which *significantly add to the likelihood* of an applicant qualifying for international protection. Only this second criterion looks at the quality of the new evidence. Under the first criterion, it is sufficient that the new evidence relates to the examination of whether the applicant qualifies for international protection.

58. The Netherlands Government argues that if documents, copies of which have already been submitted in the previous application, are resubmitted in their original, they can only further enlighten the situation if the authenticity of these documents can be established. If this is not the case, they cannot be considered to be 'new elements and findings'. This invites two comments. First, the Netherlands Government seems to conflate the two relevant criteria, namely (i) whether 'new elements or findings' have been presented and (ii) whether they 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection'. From what it considers to be the absence of the second criterion, it infers that the first is missing. Second, the Netherlands Government approves a course of action whereby those non-authenticated documents are not even assessed on an individual basis as provided by Article 4(3) of the Qualification Directive. Rather, the applicant is obliged to provide a certain quality of document, namely authenticated ones, otherwise his subsequent application will be automatically dismissed.

59. As we have seen, neither a literal nor a systematic interpretation of Article 40 of the Procedures Directive and Article 4 of the Qualification Directive provide a basis for this approach.

E. Significance of the authenticity of a document

60. The reason why the authenticity of documents is an element to be taken into account in the procedure for international protection is in order to ensure that the determining authority's decisions are not based on false, in particular counterfeit, documents. In many circumstances, moreover, the fact that a particular document has been demonstrated to be authentic may tend to reinforce the credibility of an applicant's case.

61. The treatment of false documents is dealt with in Article 14(3)(b) of the Qualification Directive. It provides that Member States shall revoke, end or refuse to renew the refugee status of a person if it is established by that Member State that the use of false documents was decisive for the granting of refugee status. There is, on the other hand, no provision that says that such a situation has to be avoided (at all costs) by not considering any non-authenticated documents at all in the procedure.

45 As described above, if there are new elements or findings, and they significantly add to the likelihood of the applicant qualifying under the Qualification Directive, there will be a further examination in accordance with Chapter II of the Procedures Directive (Article 40(3) of the Procedures Directive).

62. On the procedural side, Article 31(8)(e) of the Procedures Directive permits Member States to provide that if an applicant makes 'clearly false' representations, the examination procedure can be accelerated and/or conducted at the border or in transit zones. It is significant that in such a case, even though 'clearly false' representations have been made, the examination procedure still has to be carried out in accordance with the basic principles and guarantees of Chapter II of that directive.[46] It appears contradictory not to grant the benefit of such an examination procedure to a holder of documents that are not false but only unauthenticated merely because they are produced in a subsequent application. In the present case, there is even no indication that they might not be authentic.[47]

63. Recital 21 of the Procedures Directive sheds further light on the treatment of false documents. It provides that even the use of forged documents should not per se entail an automatic recourse to border or accelerated procedures as long as an applicant can show good cause.[48]

64. It appears therefore that even the use of clearly false documents does not automatically lead to an application for international protection being considered as inadmissible (or unfounded). This constitutes a further argument against the narrow interpretation given by the Secretary of State and the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) to the term 'new elements and findings'.

F. Standard of examination of an application for international protection

65. Article 4(1) of the Qualification Directive states that it is the duty of the Member State to assess the relevant elements of the application.[49] According to Article 4(3) of that directive, such an assessment has to be carried out on an individual basis. As set out above, Article 4(2) of the Qualification Directive contains an extensive list of elements that have to be considered. The Court has itself pronounced in respect of the examination to be carried out by the competent national authorities in its judgment of 13 March 2019, *E.*[50] In that case it held that 'as regards the examination by the competent national authorities of the probative value or plausibility of the evidence, statements or explanations … the necessary case-by-case assessment requires those authorities to take account of all the relevant aspects …'.[51] It had previously said in its judgment of 7 November 2013, *X and Others*,[52] that 'the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution'. It further stated that that assessment of the extent of the risk, has, in all cases, to be carried out with vigilance and care.[53]

66. The preliminary procedure in the case of a subsequent application limits the criteria that have to be assessed to those set out in Article 40(2) and (3) of the Procedures Directive. It does not provide that the standard of assessment of these criteria is any different from that in a first application for international protection.[54]

46 Subsequent applications can be dealt with in the same way according to Article 31(8)(f) of the Procedures Directive if they are not already found to be inadmissible.

47 Although it must also be accepted that their authenticity has not yet been positively established.

48 The same applies to the lack of documents.

49 This duty to assess is to be carried out in cooperation with the applicant. I will return to this later.

50 C-635/17, EU:C:2019:192, paragraphs 63 to 69; albeit with regard to Article 5(2) and Article 11(2) of Directive 2003/86. As that directive also forms part of the Common European Asylum System and as both Article 4(5) of the Qualification Directive and Article 11(2) of Directive 2003/86 deal in a similar way with cases where the necessary (official) documentary evidence is lacking, there is no reason why this should not apply to the Qualification Directive as well.

51 In paragraph 63.

52 C-199/12 to C-201/12, EU:C:2013:720, paragraphs 72 and 73, with regard to two 'elements' contained in Article 10(1) of Directive 2004/83.

53 Ibid.

54 See also footnote 18 of the present Opinion.

67. Those considerations – together with those articulated by the ECtHR in *Singh v. Belgium*[55] and *M.D. and M.A. v. Belgium*[56] can be applied to the practice of the State Secretary in the present case. The fact that non-authenticated documents are not taken into account because they are not considered 'new elements or findings' means that no case-by-case assessment taking account of all the relevant aspects takes place. The interpretation that is given to the term 'new elements and findings' by the State Secretary and the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) has not only no basis in the wording, the structure and the objective of the Procedures Directive and the Qualification Directive, it is also contrary to the guarantees provided by the Charter, namely those according to Article 19(2) of the Charter.

68. It follows that Article 19(2) of the Charter is thereby infringed in so far as the State Secretary's practice prevents the determining authority from assessing individually if the applicant runs the risk of being expelled to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. This is a narrower concept than the one referred to in Article 40(2) and (3) of the Procedures Directive, which questions whether the applicant qualifies for international protection on any of the cases set out in the Qualification Directive, irrespective of whether that threatens the applicant's life or bodily integrity.[57]

69. It also appears from the ECtHR's findings in *M.D. and M.A. v. Belgium*[58] that the assessment of the 'new elements or findings' in the preliminary examination according to Article 40(2) and (3) of the Procedures Directive has to be carried out with the same care and rigour as that of all the evidence in the initial proceedings in order to assure that no deportation contrary to Article 19(2) of the Charter takes place.

70. The adherence to this standard in the preliminary examination procedure is particularly important because Article 42(b) of the Procedures Directive allows Member States to establish in national rules that these can be conducted on the sole basis of written submissions. In the present case, the applicant's entitlement to explain his position in a personal interview according to Article 14 of the Procedures Directive depends on the positive outcome of the preliminary examination.

G. Problems in obtaining evidence, burden of proof and obligation to cooperate

71. It follows from the above that every rule or practice in a Member State that tends to lead to a situation where a careful and rigorous independent (individual) assessment of the (new) elements and findings in a subsequent procedure by the determining authority does not take place is contrary to Article 40(2) of the Procedures Directive. In so far as those elements or findings concern evidence regarding an applicant's risk to be expelled to a State where he or she might face torture or other inhuman or degrading treatment or punishment, this is also contrary to Article 19(2) of the Charter. It cannot, therefore, make any difference whether authenticated originals, non-authenticated originals or copies are provided within that procedure. They all have to be examined to the standard provided in Article 40(2) and (3) of the Procedures Directive, read in conjunction with Article 4(2) of the Qualification Directive.

72. It is not open to the determining authority to draw any conclusions from the assessment that has been made in the previous application for international protection. This would entirely defeat the purpose of the preliminary examination which is specific to the subsequent application procedure. This is particularly obvious in the present case. According to the reasoning underlying the settled case-law of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of

55 ECtHR, 2 October 2012, *Singh and Others v. Belgium* (CE:ECHR:2012:1002JUD003321011).

56 ECtHR, 19 January 2016 (CE:ECHR:2016:0119JUD005868912).

57 See Articles 9 and 15(c) of the Qualification Directive.

58 ECtHR, 19 January 2016 (CE:ECHR:2016:0119JUD005868912).

the Council of State), only authenticated documents will be considered in the subsequent application because it has already been established in the earlier asylum procedure that the asylum claim is not credible. This is taken into account when considering the newly produced elements. In the present case, however, the fact that a large part of the evidence was considered credible must not be overlooked.

73. Nor can the general rules on the burden of proof or the Member States' obligation to cooperate, which have been established with regard to initial applications for international protection, be different when it comes to the assessment in the preliminary examination in a subsequent application. I will just briefly recapitulate these and their rationale.

74. As I have stated above, Article 4 of the Qualification Directive lists a wide variety of elements that may be taken into account as well as rules on how these elements might be assessed as evidence. I have also already referred to recital 21 of the Procedures Directive. This, as it happens, is a further recognition by the EU legislature of the fact that it might not be open to a refugee to take the most straightforward course in order to leave the country from where he or she has to flee as well as that an applicant for international protection might not always have been able to take all the documents and pieces of evidence that might be useful to prove his or her entitlement to international protection. [59]

75. These difficulties have also been recognised by the Court. It has developed rules that describe the respective obligations of the applicant and the Member State with regard to the gathering of the evidence. The Court has held that it is generally for the applicant to submit all elements needed to substantiate the application. But it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application. As the Court has observed: 'This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents'. [60] This shows that it is a joint obligation of the applicant and the Member State to look for evidence.

76. Article 42 of the Procedures Directive provides for a preliminary examination. A positive result in that examination is the entry key to a further full examination. While the ambit of what has to be examined is limited – namely, whether new elements and findings have arisen or have been presented and whether they significantly add to the likelihood of the applicant qualifying for international protection – there is, however, no indication that that examination can be carried out to different, that is, lower standards than the initial procedure. As set out above, Article 19(2) of the Charter clearly precludes a practice which increases the risk of expelling a person to a country where he or she is subjected to the death penalty, torture or other inhuman or degrading treatment or punishment for lack of a thorough examination of new evidence presented by the applicant.

77. It is important to be clear on this: a Member State may not *automatically* reject a subsequent asylum application as inadmissible *simply* by reason of the fact that the documentation which has been supplied in support of that application has not been authenticated on the basis that such non-authenticated documents do not constitute 'new elements or findings'. This would be inconsistent with Article 40(2) of the Procedures Directive.

59 See also ECtHR, 18 November 2014, *M.A. v. Switzerland* (CE:ECHR:2014:1118JUD005258913, §§ 55 and 62).

60 Judgment of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraphs 65 and 66). The EASO Practical Guide: Evidence Assessment of March 2015, which the Member States have to take into account according to recital 10 of the Procedures Directive, confirms this. Point 1.2.2.5, for example, states that, in order to assess the case, the case officer may also have to obtain other pieces of evidence *ex officio*.

78. That, however, does not preclude a Member State from rejecting the application as inadmissible under the second criterion contained in Article 40(3) of the Procedures Directive because an individual assessment of the 'new elements and findings', taking account of all the relevant aspects, reveals that these non-authenticated documents do not significantly increase the likelihood of the applicant qualifying for international protection. This might be the case if it is found that the non-authenticated documents have been fabricated or that they are not relevant or that they add little to the case advanced in the earlier unsuccessful asylum application. This assessment will automatically encompass an individual assessment, including, for example, whether an applicant faces the risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, as this would constitute a reason for subsidiary protection according to Article 15(b) of the Qualification Directive. The application might, obviously, also be rejected at the end of a further examination in conformity with Chapter II of the Procedures Directive, despite the criteria of Article 40(2) and (3) of that directive being fulfilled.

V. Conclusion

79. In light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands) as follows:

1. The maintenance by a determining authority of a Member State of a practice whereby original documents can never constitute new elements or findings for the purposes of a subsequent asylum application if the authenticity of those documents cannot be established is incompatible with Article 40(2) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in conjunction with Article 4(2) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. There is no difference between copies of documents or documents originating from a non-objectively verifiable source submitted by an applicant in a subsequent application in so far as all documents have to be considered carefully and rigorously on an individual basis in order to ascertain whether they significantly add to the likelihood that the applicant qualifies as a beneficiary of international protection and in order to prevent a person from being expelled if he or she faces an individual and real risk of being subjected to treatment contrary to Article 19(2) of the Charter of Fundamental Rights of the European Union.

2. Article 40 of Directive 2013/32, read in conjunction with Article 4(2) of Directive 2011/95, cannot be interpreted as permitting a determining authority of a Member State, when assessing documents and assigning probative value to such documents, to distinguish between documents submitted in an initial application and those submitted in a subsequent application. A Member State, when assessing documents in a subsequent application, is obliged to cooperate with the applicant to the same extent as in the initial procedure.