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| **Title** | **Rigorous scrutiny or marginal review? An inquiry into the question whether and how international law affects the national judicial review process in asylum cases** |
| **Research Period** | **January 2008 – January 2014** |
| **Promotores** | **prof. dr . Elspeth Guild and prof. dr. Kees Groenendijk, Centre of Migration Law, Radboud University Nijmegen, the Netherlands** |
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In my dissertation research I make an inquiry into the question whether and how international law and EC law affect the national judicial review process in asylum expulsion appeal cases. The idea to embark upon this project was born in 2007, after the judgments of the European Court of Human Rights (the Court) in the cases of Said v. the Netherlands (2005) and Salah Sheekh v. the Netherlands (2007) in which the Court established a violation of Article 3 of the European Convention on Human rights. A comparison of the way in which the Court conducts its review in asylum expulsion cases and the Dutch procedure of judicial review revealed great (procedural) differences and the national review appeared to be much narrower than the one performed by the Court in Strasbourg. The question came up whether these two "systems" of review could continue to co-exist, or whether, instead, congruence should be strived at. At the same time (2007), the first EU-legislation on asylum (procedures) had just entered into force or was about to enter into force, which development brought into play a second international court, the Court of Justice of the European Communities (ECJ). In the past, this international court has issued a number of rather critical judgements on immigration rules in the Netherlands, and also, in relation to other EU countries, judgements containing criticism over aspects of the national judicial review procedure. It was in this period that I started working as a judge in the migration law department of the Court of Amsterdam. In quite a number of (particularly) asylum cases, I found myself wrestling with the question which "system" of review to follow: the narrower domestic system or the broader international system, and for what reasons?

In my research significant differences between judicial review at the national level and review by international courts (committees) are perceived as problematic for a number of reasons, one being the threat emanating from this to the subsidiary character of international human rights enforcement systems. The central research question is, therefore, how the domestic judiciary in the countries of the EU can conduct judicial review in asylum expulsion cases in such a manner that it is in conformity with the requirements flowing from international law and EC law. This question is broken down into sub-questions:

1) Which sources of international law and community law are relevant for the review by national judges in the EU in asylum expulsion cases? 2) What are the relevant provisions in these sources? 3) What is the exact content and meaning of these provisions? What concrete obligations for the national judicial review process follow from these provisions? 4) Which judgements, decisions and views of courts or treaty monitoring bodies are relevant for the national judicial review procedure in asylum cases, and what is their meaning? 5) How do the different international and community norms, and the obligations flowing from them, interrelate and work with each other? 6) What is the relationship between the national judiciary and the international courts and treaty monitoring bodies? 7a) Is the national judiciary obliged, by international and EC norms, to follow examples set by the different international treaty monitoring courts and bodies as far as the manner of review is concerned? 8b) Is the national judiciary obliged, by national norms, to follow such examples?

In the first (international) part of the dissertation research project, answers are sought in international law instruments at three different levels in force in the EU. These are:

1. At United Nations level: the Refugee Convention (RC), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture (CAT);
2. At Council of Europe level: the European Convention of Human Rights (ECHR);
3. At European Communities / European Union level: the new EC asylum measures such as the Procedures Directive.

Three types of provisions are studied in particular, namely a) effective remedy provisions, b) (other) provisions pertaining to procedures (such as fair trial provisions) and c) (the procedural limb of) *refoulement*-prohibiting provisions. This is done by investigating the text and context of the relevant provisions, the preparatory works (travaux préparatoires), judgements and views of the treaty monitoring courts/bodies, and academic literature.

At this very moment in time, 1 September 2009, I am working on an investigation into the meaning of the Articles 3, 13, 35 and 6 of the ECHR.

The international and community law norms are studied with the help of a number of 'elements' of the judicial review process. The inquiry into the exact content and meaning of the international norms therefore comes down to an investigation into the question whether the norms contain any meaningful information on one or more of the mentioned 'elements' of judicial review. The elements are the following:
A. Treatment of evidence
A1. The burden of proof and the role of the judge in relation to the burden of proof.
A2. Admission or exclusion of certain types of evidence.
A3. Time limits for presenting statements and evidence.
B. Intensity of judicial review:
B1. Integral or marginal judicial review.
B2. Use of investigative powers *proprio motu.*
B3. *Ex tunc* or ex *nunc review.*
C. Impartiality
C1. Equality of arms
C2. Adversarial proceedings

In the second (national) part of the research I will look at the judicial review procedures in asylum expulsion appeals in three or two countries: the UK and the Netherlands (and possibly France or Germany) by "following" a highly similar concrete asylum expulsion case. The national judicial review procedures will be tested on compliance with the found international norms and the found compatibility will be compared.

During the **Wine and Discussion Meeting of 8 September 2009**, I will share some of the results of my research so far. For purposes of time and manageability, I will focus in particular on my findings with respect to the United Nations Convention against Torture (CAT) and the European Convention on Human Rights (ECHR). I would also very much appreciate some academic "brainstorming", hopefully also with researchers from other countries, over the question whether or not the domestic judiciary should follow, as far as the type of review is concerned, examples set by the Strasbourg Court, the ECJ, the Human Rights Committee and the Committee against Torture.