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La Corte Edu sulle procedure di asilo "last minute"
(CEDU, sez. III, sent. del 24 ottobre 2023, ric. n. 23048/19)

Il caso sottoposto al giudizio della Corte Edu riguarda la procedura di espulsione "last minute" del ricorrente verso il suo Paese di origine e, in particolare, la correttezza della valutazione finale dei rischi operata dalle autorità competenti prima del rimpatrio; una procedura nell'ambito della quale il ricorrente lamenta altresì di non aver avuto a disposizione mezzi di ricorso efficaci per contestare la predetta valutazione.
In proposito, la Corte ribadisce che gli Stati contraenti hanno il diritto, in base al diritto internazionale consolidato e fatti salvi gli obblighi derivanti dai trattati, compresa la Convenzione, di controllare l'ingresso, il soggiorno, l'allontanamento e il rimpatrio degli stranieri. Tuttavia, l'allontanamento o l'espulsione di uno straniero da parte di uno Stato contraente può dar luogo ad una responsabilità dello Stato ai sensi dell'art. 3 della Convezione qualora sussistano fondati motivi per ritenere che la persona in questione, se allontanata o deportata, potrebbe incorrere nel rischio, reale e concreto, di essere sottoposta a trattamenti contrari all'articolo 3 della Convenzione nel Paese di destinazione; per questo motivo, la valutazione dell'esistenza di un rischio reale da parte delle autorità nazionali deve essere necessariamente rigorosa, prendendosi in considerazione non solo le prove presentate dal ricorrente, ma anche tutti gli altri fatti rilevanti per il caso in esame.
Nel merito, il ricorrente aveva affermato di temere persecuzioni da parte delle autorità del Bahrein poiché, peraltro, era stato politicamente attivo nel suo Paese di origine; le autorità, pur non respingendo tali affermazioni, hanno tuttavia ritenuto poco plausibile il resoconto degli eventi fornito dal ricorrente e che la domanda di asilo fosse stata presentata unicamente per ritardare o impedire la sua espulsione.
A giudizio della Corte, le autorità competenti avrebbero adottato un approccio troppo ristretto, inidoneo a garantire un esame attento e rigoroso; lo Stato convenuto, dunque, non avrebbe adempiuto al proprio obbligo procedurale ai sensi dell'articolo 3 della Convenzione, violando la predetta disposizione.

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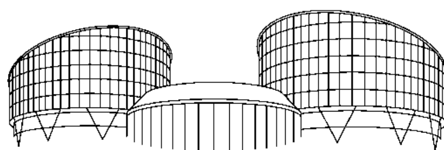

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF XXX v. THE NETHERLANDS

(Application no. 23048/19)

JUDGMENT

STRASBOURG

24 October 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXX v. the Netherlands,

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

Pere Pastor Vilanova, *President*,
Jolien Schukking,
Yonko Grozev,
Georgios A. Serghides,
Peeter Roosma,
Andreas Zünd,
Oddný Mjöll Arnardóttir, *judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 23048/19) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bahraini national, Mr A.M.A. ("the applicant"), on 19 April 2019;

the decision to give notice to the Government of the Kingdom of the Netherlands ("the Government") of the complaints concerning Articles 3 and 13 of the Convention and to declare inadmissible the remainder of the application;

the decision not to have the applicant's name disclosed;

the parties' observations;

the decision of 18 August 2023 to give priority treatment to the application in accordance with Rule 41 of the Rules of Court;

Having deliberated in private on 3 October 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the authorities' final risk assessment prior to the applicant's expulsion to his country-of-origin, Bahrain. This assessment was made in the context of "last-minute" proceedings, which deal with subsequent asylum applications that are submitted shortly before removal. The applicant complained that the risk of being subjected to treatment contrary to Article 3 of the Convention if expelled, which risk had indeed materialised, had not been sufficiently assessed by

the Dutch authorities, and that he had had no effective remedies available to him to challenge that assessment.

THE FACTS

2. The applicant was born in XXX and is currently detained in Bahrain. He was represented by Mr P.J. Schüller, a lawyer practising in Amsterdam.

3. The Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

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

I. THE APPLICANT'S FIRST ASYLUM PROCEEDINGS

5. The applicant applied for asylum in the Netherlands on 10 August 2017.

6. On 16 August 2017 the applicant had an initial interview (*eerste gehoor*) with officers of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*, "IND") about his identity, nationality and travel itinerary. He stated, among other things, that he was a Shiite Muslim from Bahrain who had travelled legally to Iran, where he had eventually bought a plane ticket for Ecuador with a layover in Amsterdam. During the layover he applied for asylum in the Netherlands.

7. On 18 August 2017 the applicant had a further interview (*nader gehoor*) with officers of the IND about his reasons for seeking asylum. A report was drawn up of this interview, which was conducted in Arabic with the assistance of an interpreter. The applicant was given the opportunity to make written substantive changes and/or corrections to the report, which his lawyer did on his behalf on 19 August 2017. On that occasion he also submitted a letter from the Dutch Refugee Council (*Vluchtelingenwerk Nederland*) containing general information on the human rights situation in Bahrain. The applicant stated that he feared persecution and ill-treatment by the Bahraini authorities on account of his political activities, his religion and the fact that his brother was a political activist who had fled to Germany and was sought by the Bahraini authorities.

8. His asylum account may be summarised as follows. The applicant had been a member of the opposition group "Barbar Revolutionary Youth" since 2012 and had gathered news for it and written critical articles about the Bahraini regime which were then published, either by him or by someone else, on the group's social media accounts. His brother who was an active member of this group, had left Bahrain for Iran in 2013. Later, his brother had been granted refugee status in Germany. On 9 February 2017 X, one of the members of the group, had been arrested, after which the homes of several other members had been searched. Fearing that he would be arrested next because X, after having been tortured, would divulge his name to the authorities, the applicant had fled the country to Iran on 10 February 2017. The applicant received information that on 11 or 12 February 2017 his home had been searched, that later that month more members of the group had been arrested and that several people, including X, had indeed divulged his name to the authorities. Around the same time the Bahraini government had asked the German authorities to extradite the applicant's brother from Germany to Bahrain because he was suspected of terrorist activities. Furthermore, the applicant had discovered that there was a list with the names of forty-

five alleged terrorists on it, including his brother, who was supposed to be the leader of the terrorist cell, and he feared that he was also one of the forty-five.

9. On 20 August 2017 the Deputy Minister of Security and Justice (*Staatssecretaris van Veiligheid en Justitie*) issued a written notice of his intention (*voornemen*) to reject the applicant's asylum application. Noting that relevant parts of the applicant's statements were incoherent and implausible and that he had presented no evidence of any Internet article written by him or post by him on social media, the Deputy Minister did not deem the applicant's claimed activities for the Barbar Revolutionary Youth credible. He therefore also found it implausible that the applicant would fear prosecution by the authorities for these activities. The Deputy Minister further declared the applicant's statements inconsistent as to why X had been arrested and why X would divulge his name and how he had learnt about this. The Deputy Minister also considered it striking that the applicant had stated that one or two days after his departure the authorities started looking for him and had searched his home while, in possession of a valid national passport duly obtained and issued in his name, he had been able to leave the country legally and passed border control without encountering any problems. Furthermore, noting that the applicant based the connection between the suspicion against his brother and his own insecurity in Bahrain solely on the unsubstantiated assumption of being one of the persons named on the terrorist list, the Deputy Minister held that it had not been made plausible by the applicant that he had attracted negative attention of the Bahraini authorities because of the activities of his brother. Lastly, he noted that the applicant had not claimed to have ever personally encountered any problems due to his religion, to belonging to a particular social group or by participation in demonstrations.

10. On 21 August 2017 the applicant submitted written comments (*zienswijze*) regarding the Deputy Minister's intended decision. On 23 August 2017 the Deputy Minister rejected the applicant's asylum application, confirming the reasoning set out in his notice of intention of 20 August 2017 (see paragraph 9 above) and rebutting the applicant's written comments.

11. The applicant applied for judicial review. He submitted, *inter alia*, a statement from a leading member of the Barbar Revolutionary Youth group in Germany, as well as information from Human Rights Watch dated 6 March 2017 which showed that family members of political activists were being targeted in Bahrain as retribution for the activities carried out by the activists. The applicant further submitted country-of-origin information regarding ill-treatment of detainees by the Bahraini authorities. By a judgment of 20 September 2017, the Regional Court (*rechtbank*) of the Hague, sitting in Haarlem, declared his application inadmissible. It held that the applicant had not demonstrated that he had lodged the grounds for judicial review electronically in time. Referring to the Court's judgment in *Bahaddar v. the Netherlands* (19 February 1998, *Reports of Judgments and Decisions* 1998-I), it further held that there were no special circumstances that excused the applicant from the obligation to comply with the set time-limit and that the evidence adduced was not sufficient to substantiate his fear of being subjected to treatment contrary to Article 3 of the Convention.

12. The applicant further appealed to the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*). Pending the examination of his appeal, he changed lawyers and from that moment on he was no longer represented by Mr. B. but by Ms. S.

13. On 21 March 2018 the Administrative Jurisdiction Division held that, since the way in which the electronic system operated meant that the applicant himself could not prove that the grounds for judicial review had been filed successfully and within the time-limit, this was a matter that should be examined by the Regional Court. It therefore declared the further appeal well-founded, quashed the judgment of 20 September 2017 and referred the case back to the Regional Court.

14. By a judgment of 19 September 2018, the Regional Court ruled again that the appeal was inadmissible. It held that the electronic system showed that the applicant had not uploaded the grounds for judicial review into the Regional Court's system within the set time-limit and that there were no special facts and circumstances relating to the individual case, as referred to in the judgment in *Bahaddar* (cited above), which could be seen as a reason for not enforcing that procedural rule as laid down in domestic law (see paragraph 11 above).

15. The applicant did not lodge a further appeal to the Administrative Jurisdiction Division against the Regional Court's judgment of 19 September 2018.

II. INTERVIEWS WITH THE REPATRIATION AND DEPARTURE SERVICE

16. In anticipation of the applicant's removal, officers of the Repatriation and Departure Service (*Dienst Terugkeer & Vertrek*, "DT&V") of the Ministry of Justice held return interviews (*vertrekgesprekken*) with the applicant several times. During these interviews the applicant repeatedly indicated that he did not wish to cooperate with his expulsion to Bahrain because he feared immediate arrest upon arrival, alleging that he was on a wanted list in connection with terrorism, but that he was willing to leave for Iran or Georgia. During an interview on 9 October 2018, he was notified by the officer of DT&V that it had proven impossible to arrange a departure to Georgia for him. When during an interview on 16 October 2018 the applicant was informed that departure to Iran had also proved to be impossible, he stated that he was not willing to return to Bahrain voluntarily. The authorities declared their intention to make a detention order with a view to his expulsion.

17. The Council for Legal Aid (*Raad voor de Rechtsbijstand*) informed Ms S. on 16 October 2018 that the applicant wished to be assisted by her in the proceedings regarding the detention order. This request was accepted by Ms S. on the same day.

18. The interview regarding the detention order took also place on 16 October 2018. The applicant's lawyer was not present. After the applicant had repeated that he would not cooperate with his expulsion to Bahrain, the detention order was issued.

19. On 17 October 2018 the applicant's lawyer was informed that the applicant's expulsion to Bahrain would take place on 20 October 2018. The flight details were provided to her.

20. On 18 October 2018 a final return interview took place. During that interview the applicant was informed that he would be expelled to Bahrain on 20 October 2018. When he repeated that his life would be at danger upon return to his country of origin, he was informed that it was possible for him to make a new asylum application, but that this would not automatically lead to the cancellation of the flight. The applicant indicated that he wished to consult his lawyer to obtain advice. The applicant was given the opportunity to call Ms S., but he was unable to reach her. An officer of DT&V notified the applicant's lawyer that same day by email that her client wished to consult her.

III. THE APPLICANT'S SUBSEQUENT ASYLUM APPLICATION, "LAST-MINUTE" PROCEEDINGS AND REMOVAL

21. On 19 October 2018 at 3:08 p.m. Ms S. sent documents by email to the detention centre where the applicant was being held, noting that her client, the applicant, needed those documents for a subsequent asylum application that he wished to submit. She asked for them to be forwarded to him immediately. On 3.20 p.m. that day, the detention centre confirmed to her that the documents had been given to the applicant.

22. In the afternoon of 19 October 2018, the applicant informed the IND that he wished to submit a subsequent asylum application. He submitted the documents had he had received from his brother via Ms S. These were copies of documents in Arabic with the letterhead of the Bahraini Public Prosecutor's Office on them.

23. The next morning, on 20 October 2018, the applicant was transferred to Schiphol Airport and interviewed by an officer the of IND about his subsequent asylum application. A report was drawn up of the interview, which was conducted in Arabic with the assistance of an interpreter. This interview was not attended by a lawyer. According to the transcript of the interview, the officer who conducted the interview had asked an Arabic speaking colleague about the content of the documents beforehand. During the interview, the applicant stated that he had only just received these documents from his brother. Although he could not answer the question how exactly his brother had obtained the documents, he knew that his brother had tried to obtain several documents from the Bahraini Public Prosecutor's Office. The applicant stated that his name was mentioned in these documents, that he had been charged with participating in a terrorist organisation and confirmed that the documents were a copy of the record of the questioning of a person who had divulged the applicant's name while being questioned. The officer asked the applicant if his brother had the original documents in his possession; the applicant answered that he did not know.

24. At the end of the interview the applicant was informed immediately, orally and informally, that his request would be denied. The transcript of the interview contains the following text:

"*Because of time and because you are about to be expelled, I will give you my decision immediately. Because the documents are not original and are in Arabic, they cannot serve as new evidence.*

I did not have the time to get the original documents. I only had four days. Maybe you can give me time.

I stand by my decision that your application will be rejected.

I kindly request you to give an extension of one week to get the documents.

Your application was not deemed credible during the previous procedure; you had more time than the four days to get evidence. This means that I am not going to give you a week's extension."

25. By virtue of a written decision (*besluit als bedoeld in artikel 3.1 Vreemdelingenbesluit*; see paragraph 38 below) taken by the Deputy Minister that day (20 October 2018), the applicant was informed that his subsequent asylum application could be declared inadmissible because no new elements or findings had emerged during the interview that would be relevant to the assessment of the application. In that connection the Deputy Minister noted that no probative value could be attached to the documents submitted by the applicant because they were not original documents, they were untranslated, and the applicant could not explain how his brother had obtained the

documents. The Deputy Minister also considered that because the applicant had not submitted the documents until just before the planned removal, his subsequent asylum request had only been made to delay or prevent the expulsion. The decision stated that the applicant must leave the Netherlands immediately. The decision further indicated that a copy of the decision and a copy of the report of the interview had been faxed to his lawyer, Mr B., and that an objection could be lodged against the decision and a request for interim relief could be submitted to the Regional Court. It can be seen from the case file that the fax was sent to Mr B. at 3.13 p.m.

26. The applicant did not make use of those remedies.

27. By an aeroplane with its departure scheduled for 2.10 p.m. on that day (20 October 2018), the applicant was expelled to Bahrain.

IV. EVENTS AFTER REMOVAL

28. On 29 October 2018 Ms S. informed the DT&V that the applicant had been arrested and detained immediately on arrival in Bahrain. She argued that it was very likely that he would be tortured by the Bahraini authorities, which would violate Article 3 of the Convention. She asked for the removal order to be set aside and for the applicant to be returned to the Netherlands as soon as possible. These requests were denied.

29. On 22 November 2018 a written notification of the Government's intention to reject the applicant's subsequent asylum application was sent to Ms S. The intention to reject this application was based on the same reasoning as the decision of 20 October 2018 (see paragraph 25 above).

30. By a letter of 4 December 2018, Ms S. informed the IND that she was no longer in touch with the applicant and could therefore not continue to act as his legal representative.

31. The applicant's subsequent asylum application was rejected by the Deputy Minister by a decision of 22 February 2019 on the basis that no new elements or findings had been presented. The Deputy Minister noted that the applicant had submitted new documents in Arabic which were not authentic, held that the applicant should have submitted these earlier in the proceedings and that he should have been able to answer certain questions about the documents.

32. By a letter of 22 February 2019, Ms S. returned the decision of 22 February 2019 to the Deputy Minister, repeating that as she was no longer in contact with the applicant she could not continue to act as his legal representative. No application for judicial review of the decision of 22 February 2019 was lodged on the applicant's behalf.

33. On 28 February 2019 the applicant was convicted for the possession of weapons and ammunition and taking part in terrorist activities. He was sentenced to life imprisonment and a fine of 500 dinars. The applicant also lost his Bahraini nationality.

34. That verdict was upheld on appeal on 12 May 2019, although it appears that the applicant's nationality was reinstated by royal decree. The applicant's legal representative informed the Court that an appeal on points of law against the upheld verdict of life imprisonment had also been dismissed.

35. The applicant alleged that he had been tortured by the Bahraini authorities to extract a confession and that he had not had a fair trial. Furthermore, he submitted that detention conditions were very poor: he was being detained in an overcrowded cell which he shared with twelve other inmates. He could see his family once a month for half an hour, during which direct

physical contact was not permitted. Other visitors were not allowed. He was not allowed unmonitored contact with his lawyer.

36. On 15 August 2023 the applicant's representative informed the Court that a group of prisoners, including the applicant, had gone on hunger strike to protest against their detention conditions.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Aliens Act 2000

37. Section 30a, subsection 1 of the Aliens Act 2000 provides:

"1. An application for a temporary residence permit as referred to in section 28 may be declared inadmissible within the meaning of Article 33 of the Asylum Procedures Directive if:

...

d. the alien has submitted a subsequent application which he has not based on any new elements or findings and which has not raised any new elements or findings that could be relevant to assessment of the application; or ..."

B. Aliens Decree 2000

38. Article 3.1 of the Aliens Decree provides:

"...

2. If an application for a temporary asylum residence permit is submitted, the removal shall not take place unless:

...

e. the alien has submitted a first subsequent application merely in order to delay or frustrate the enforcement of the return decision and the application can be declared inadmissible pursuant to section 30a, subsection 1 (d) of the Aliens Act.

3. The exceptions referred to in paragraph 2 shall not apply if removal would result in a violation of the Convention relating to the Status of Refugees, obligations under EU law, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4. A decision on whether an application has been submitted merely in order to delay or frustrate the enforcement of the return decision as referred to in paragraph 2 (e) must take account of all circumstances of the case, including in particular:

a. the period within which the alien has made known his application for a temporary asylum residence permit in the light of his statements about this;

b. the circumstances in which the alien was found or made his application known;

...

e. the substantiation of the application."

39. This section transposes the obligations emanating from Article 41 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 (see paragraph 42 below).

C. Aliens Act Implementation Guidelines 2000

40. Chapter C1/2.9 of the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*) defines a "last-minute application" as one submitted after concrete steps have been taken to effect the applicant's removal. As soon as the alien indicates that he or she wishes to submit a

last-minute application, the IND will assess whether it is possible to process the application before the planned removal or transfer within the time-limits of the one-day asylum test. If the subsequent application for a temporary asylum residence permit cannot be processed before the planned removal or transfer, the IND will first assess whether the submission of the application means that the removal or transfer has to be cancelled in accordance with Article 3.1 of the Aliens Decree or that it can proceed on the basis of one of the exceptions referred to in Article 3.1, paragraph 2, of the Aliens Decree. In that case, the IND will determine where and how the alien (contrary to the normal procedure) can submit his or her application for a temporary asylum residence permit. After the application has been submitted, the IND will conduct a "second interview" (this refers to the interview on the substance of the application for international protection) as soon as possible. During the interview, the IND will give the alien the opportunity to present new elements and findings and will enquire about the reasons for the late submission of the application. On the basis of the interview and the other circumstances of the case, including information from the DT&V, the IND assesses whether or not the removal or transfer can proceed. If the removal or transfer is to proceed, the alien and his or her lawyer will be notified in a decision to that effect.

41. Chapter C1/4/6 of the Aliens Act Implementation Guidelines 2000, on the assessment of subsequent applications, provided at the relevant time that, if the previous application for a temporary asylum residence permit by the IND had been rejected on the basis of the implausibility of the alien's statements, the elements or findings that the alien brought forward in the context of a subsequent application for a temporary asylum residence permit had to remove the implausibility of the statements in order to qualify as elements or findings as referred to in section 30a(1)(d) of the Aliens Act. Furthermore, at the relevant time, this chapter provided that if, within the procedure for a subsequent application for a temporary asylum residence permit, the alien submitted elements or findings that dated from before the first rejection, the IND would assess whether the alien could have submitted those elements or findings within the previous procedure for the application for a temporary asylum residence permit. In principle, the IND requires that the alien must submit all information and documents known to him or her in the context of the application for a temporary asylum residence permit. If, within the procedure for a subsequent application for a temporary asylum residence permit, the alien submits elements or findings that date from before the previous rejection decision, the alien must demonstrate that he or she could not have reasonably submitted those elements or findings earlier.

II. EUROPEAN UNION LAW AND PRACTICE

A. Asylum Procedures Directive

42. 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, provides, *inter alia*, as follows:

Article 33: Inadmissible applications

"...

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; or ..."

Article 40: Subsequent application

"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)."

Article 41: Exceptions from the right to remain in case of subsequent applications

"1. Member States may make an exception from the right to remain in the territory where a person:

(a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or ..."

Article 46: The right to an effective remedy

"1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

...

(ii) considering an application to be inadmissible pursuant to Article 33(2);

...

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where

applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

..."

B. Qualification Directive

43. 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, provides, among other things, as follows:

Article 4: Assessment of facts and circumstances

"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.

..."

III. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

44. On 10 June 2021 the Third Chamber of the Court of Justice of the European Union (CJEU) delivered its judgment in *LH* (C-921/19, ECLI:EU:C:2021:117). The case concerned an Afghan national whose subsequent asylum application had been declared inadmissible by the Deputy Minister because the authenticity of newly submitted copies of documents could not be established and therefore those documents could not be regarded as new elements or findings. The Administrative Jurisdiction Division requested a preliminary ruling concerning the interpretation of Article 40 § 2 of Directive 2013/32, read in conjunction with Article 4 § 2 of Directive 2011/95, as to whether a document submitted in support of a further application could automatically be regarded as not constituting a "new element or finding" if the authenticity of that document could not be established or if the source of such a document could not be objectively verified, and whether in that case the assessment of the evidence submitted might vary according to whether it was a first or a subsequent application.

45. In its judgment the CJEU held as follows:

"40. It should be noted, in that regard, that since Article 40(2) of Directive 2013/32 does not draw any distinction between a first application for international protection and a subsequent application as regards the nature of the elements or findings capable of demonstrating that the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95, the assessment of the facts and circumstances in support of those applications must, in both cases, be carried out in accordance with Article 4 of Directive 2011/95. ...

44. It follows that any document submitted by the applicant in support of his or her application for international protection must be regarded as an element of that application to be taken into account, in accordance with Article 4(1) of Directive 2011/95, and that, consequently, the inability to authenticate that document or the absence of any objectively verifiable source cannot, in itself,

justify the exclusion of such a document from the examination which the determining authority is required to carry out, pursuant to Article 31 of Directive 2013/32.

45. In the case of a subsequent application, the fact that a document has not been authenticated cannot therefore lead to the conclusion from the outset that that application is inadmissible, without an assessment having been carried out as to whether that document constitutes a new finding or element and, if so, whether it significantly increases the likelihood of the applicant qualifying for international protection status under Directive 2011/95. ...

62. Moreover, it should be noted in that context that, in order for the submission of such a document to lead, under Article 40(3) of Directive 2013/32, to the substantive examination being carried out in accordance with Chapter II thereof, it is not necessary for the Member State to be convinced that that new document adequately supports the subsequent application; it is sufficient that that document significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95 ...

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 40(2) of Directive 2013/32 ..., read in conjunction with Article 4(2) of Directive 2011/95 ..., must be interpreted as precluding national legislation under which any document submitted by an applicant for international protection in support of a subsequent application is automatically considered not to constitute a 'new element or finding', within the meaning of that provision, when the authenticity of that document cannot be established or its source objectively verified.

2. Article 40 of Directive 2013/32, read in conjunction with Article 4(1) and (2) of Directive 2011/95, must be interpreted as meaning, first, that the assessment of the evidence submitted in support of an application for international protection cannot vary according to whether the application is a first application or a subsequent application and, second, that a Member State is required to cooperate with an applicant for the purpose of assessing the relevant elements of his or her subsequent application, when that applicant submits, in support of that application, documents the authenticity of which cannot be established."

IV. SUBSEQUENT DOMESTIC CASE-LAW

46. Following the CJEU's above judgment the Administrative Jurisdiction Division ruled on the compatibility of domestic law and practice with EU law, as explained by the CJEU. In its judgment of 26 January 2022 (ECLI:NL:RVS:2022:208) the Administrative Jurisdiction Division found that henceforth the Deputy Minister would need to examine whether non-authentic documents which were relied on by an alien contained new elements or findings and, should this be the case, whether they were relevant for the assessment of the asylum application. The Administrative Jurisdiction Division described this as phases 1 and 2 of the admissibility assessment of the subsequent asylum application. If the application was admissible, the Deputy Minister would need to examine the merits of the subsequent asylum application. The Deputy Minister would be acting in breach of EU law if, as he had done previously, he dismissed documents as irrelevant for the assessment of the asylum application for the sole reason that the authenticity of those documents could not be verified, or the source of the documents was not objectively verifiable. The Deputy Minister would henceforth be required to examine such documents in a different manner, for example by assessing the documents in the light of an applicant's previous statements or

previously submitted documents or country of origin information, or by interviewing the applicant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

47. The applicant complained that the risk of being subjected to treatment contrary to Article 3 of the Convention if expelled to Bahrain, which risk had indeed materialised, had not been sufficiently assessed by the Dutch authorities. Article 3 reads as follows:

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

48. The Government contested that complaint.

A. Admissibility

1. *The parties' submissions*

(a) The Government

49. The Government submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

50. Relying on *Bahhadar v. the Netherlands* (19 February 1998, *Reports of Judgments and Decisions* 1998-I), the Government contended that the applicant had not exhausted domestic remedies in respect of his first asylum application. They further noted that he could have lodged an objection against the actual deportation announcement and requested interim relief.

51. With regard to the second asylum proceedings, the Government submitted that the remedies available to the applicant satisfied the requirements of being "effective" and "available". In that connection they submitted that also in "last-minute" proceedings, an asylum-seeker could make use of free legal assistance from a lawyer. They noted that even though the applicant had been represented by a lawyer in those proceedings, namely by Ms S., he had not lodged an objection against the decision of 20 October 2018 refusing him leave to remain in the Netherlands to await the outcome of the examination of his subsequent application and had not sought interim relief from the Regional Court. While the Government regretted that the decision of 20 October 2018 had been erroneously sent to the applicant's previous lawyer, Mr B., they noted that that decision, of which the applicant had been notified, explicitly listed the remedies and that the applicant could, on his own initiative, have consulted his lawyer about this.

(b) The applicant

52. The applicant submitted that the relevant question at issue was whether he had had effective legal remedies available to him in the "last-minute" proceedings to contest the decision of 20 October 2018, which decision had not allowed him to remain in the Netherlands to await the outcome of the examination of his subsequent asylum application and had prompted his expulsion. He emphasised that such remedies must be available not only in theory but also in practice. He argued that such remedies had not been available to him because in those proceedings he had not been offered any form of legal representation or guidance while legal action against that decision could effectively only have been undertaken with the aid of a lawyer, especially given that the applicant had been in custody and faced summary removal within a matter of hours. The applicant's representative before the Court submitted an email from Ms S. in which she

had stated that she had not represented the applicant during the second asylum proceedings and that he had made his subsequent asylum application without any other legal representation.

2. *The Court's assessment*

53. Considering that the Deputy Minister made his final risk assessment prior to the applicant's expulsion by decision of 20 October 2018 in the context of "last-minute" proceedings, it is appropriate for the Court to focus its admissibility assessment on the availability of effective remedies against that decision.

54. The Court notes that the parties do not agree on whether the applicant at that stage of the proceedings was represented by a lawyer and the case file does not contain a clear answer on this point. However, taking into account the very particular circumstances of the present case, the Court finds that in either scenario, no effective remedy was available to the applicant, for the following reasons.

55. The Court observes that while the Government maintained that the applicant was represented by a lawyer in the second asylum proceedings, namely Ms S., they did not contest the applicant's position that legal action against the decision of 20 October 2018 could not effectively have been taken without the assistance of legal counsel.

56. Assuming that the applicant was not represented by a lawyer or offered any other legal assistance, the Court considers that it cannot accept that the remedies mentioned by the Government were available to him in practice.

57. Assuming that the applicant was represented by a lawyer, namely Ms S., the Court notes that the case file does not contain any indication that the authorities had enabled the applicant to contact and consult Ms S. after the interview or when he was issued with the decision denying him leave to remain in the Netherlands to await the outcome of the examination of his subsequent asylum application, which decision was written in a language that he could not read himself. It is further undisputed that as a result of the actions of the authorities, the decision of 20 October 2018 was sent to a lawyer who did not represent him, and only after he had already been removed (see paragraphs 25-27 above). In the light of the foregoing, the Court finds that this complaint cannot be rejected for non-exhaustion of domestic remedies.

58. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The applicant

59. The applicant submitted that the domestic authorities' final risk assessment prior to his expulsion had been flawed and had not met the procedural standards required by Article 3 of the Convention.

60. In this connection the applicant stated that the domestic authorities had failed to properly take into account all the relevant information available to them. He argued that when deciding on whether or not to give him leave to remain in the Netherlands to await the outcome of the examination of his subsequent asylum application, the Deputy Minister should have taken a "cumulative approach" and assessed the risk he alleged he would face, if expelled, on the basis of

information submitted by him to substantiate his fear of prosecution and consequent ill-treatment by the Bahraini authorities in the course of his first and subsequent asylum proceedings, as well as on other information available in the case file, in the light of the knowledge the authorities must have had of the general situation in Bahrain. He relied on case-law of the Court (among other authorities, *F.N. and Others v. Sweden* no. 28774/09, 18 December 2012; *M.A. v. Switzerland*, no. 52589/13, 18 November 2014; and *Singh and Others v. Belgium*, no. 33210/11, 2 October 2012) and also referred to Article 3.1 (4) of the Aliens Decree and the relevant parts of the Aliens Act Implementation Guidelines 2000 (see paragraphs 40 and 41 above).

61. The applicant further submitted that the Government had wrongly dismissed the documents he had filed during his subsequent asylum application on administrative grounds. Relying on *M.D. and M.A. v. Belgium* (no. 58689/12, 9 January 2016) and the CJEU's judgment in *LH* (see paragraphs 44 and 45 above) and recent domestic case-law examples (which culminated in the case-law quoted in paragraph 46 above), the applicant argued that those documents should not have been automatically considered not to constitute a "new element or finding". The fact that the documents had been in Arabic and no translation had yet been available should not have been held against him in the "last-minute" proceedings because he had just received those documents from his brother. He also noted that an interpreter had been available during the interview on 20 October 2018, that it was very common for the IND to ask an interpreter for an unofficial summary of the content of documents and that he had offered to provide an official translation within a week.

62. Lastly, the applicant disputed the Government's position that he had had ample opportunity to submit a subsequent application at an earlier stage, pointing out in that connection that this would have made no sense until he could adduce new evidence. He had informed the IND of his wish to submit a subsequent asylum application on the same day that he had received the documents from his brother (see paragraphs 21-22 above).

(b) The Government

63. The Government submitted that the risk assessment carried out by the competent authorities when handling the applicant's subsequent asylum application in the "last-minute" proceedings had complied with the requirements for such an assessment as set out in the Court's case-law (referring to *M.D. and M.A. v. Belgium*, cited above). They also submitted that this assessment was compliant with the obligations under Asylum Procedures Directive, as explained by the CJEU in its *LH* judgment (see paragraphs 44 and 45 above).

64. In that connection, the Government submitted that the Deputy Minister had not disregarded the documents submitted by the applicant in the subsequent asylum application for the sole reason that it did not concern an authentic document, but also because the applicant had been unable to explain what this document was exactly and from where it originated, had not provided a translation and had failed to produce the document earlier despite having had ample time and opportunity to substantiate his claims.

65. Lastly, the Government submitted that during the subsequent asylum proceedings the applicant had not mentioned the documents filed during the previous judicial review proceedings, which had therefore not been included in the assessment of that application.

2. *The Court's assessment*

(a) General principles

66. The relevant general principles have been summarised in *F.G. v. Sweden* ([GC], no. 43611/11, §§ 111-27, 23 March 2016) and *J.K. and Others v. Sweden* ([GC], no. 59166/12, §§ 77-105, 23 August 2016) and, more recently, in *Khasanov and Rakhmanov v. Russia* ([GC], nos. 28492/15 and 49975/15, § 109, 29 April 2022).

67. In particular, the Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, removal and deportation of aliens. However, the removal or deportation of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention where substantial grounds have been shown for believing that the person in question, if removed or deported, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention in the destination country. In these circumstances, Article 3 of the Convention implies an obligation not to remove or deport the person in question to that country (see *F.G. v Sweden*, cited above, § 111, and the cases cited therein).

68. The Court further reiterates that, in view of the fact that Article 3 enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, it is imperative that the risk assessment of the existence of a real risk that is to be carried out by the domestic authorities must necessarily be a rigorous one (see *F.G. v. Sweden*, cited above, § 113, and *Khasanov and Rakhmanov*, cited above, § 109). The domestic authorities are obliged to take into account not only the evidence submitted by the applicant but also all other facts which are relevant in the case under examination (ibid. § 113, and *J.K. and Others v. Sweden*, cited above, § 87). As regards the distribution of the burden of proof, the Court clarified in *J.K. and Others v. Sweden* (cited above, §§ 91-98) that it was the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts in asylum proceedings.

69. Lastly, the Court acknowledges the need to ease the strain of the number of asylum applications received and in particular to find a way to deal with repetitive and/or clearly abusive or manifestly ill-founded applications for asylum (see *M.D. and M.A. v. Belgium*, cited above, § 56 and compare *Mohammed v. Austria*, no. 2283/12, § 80, 6 June 2013), especially applications that are submitted immediately before a scheduled removal. However, given the absolute character of Article 3 of the Convention, such difficulties cannot release a State from its obligations under that provision.

(b) Application of the above principles in the present case

70. The issue before the Court is whether the domestic authorities' risk assessment prior to the applicant's removal had met the procedural standards required under Article 3 of the Convention.

71. The Court notes at the outset that this assessment was made by the Deputy Minister in his decision of 20 October 2018 within the context of "last-minute" proceedings, which deal with subsequent applications that are submitted shortly before removal. Article 3.1 (2)(e) of the Aliens Decree, which was the basis of the decision of 20 October 2018, provides that an applicant may be removed prior to the final assessment of his first subsequent asylum request if that application is regarded as an abuse of process, given its sole purpose of frustrating or delaying removal, and if

no new elements or findings have been presented, unless the removal would result in a violation of, amongst other treaties, the Convention (see paragraph 38 above).

72. The Court will now turn to the applicant's claim that the competent authorities had failed to make a proper assessment of the risk to which he would be exposed upon return to Bahrain.

73. The Court notes that during the first asylum proceedings the applicant submitted that he feared persecution by the Bahraini authorities because, among other things, he had been politically active in Bahrain. The applicant had feared that some of the people with whom he had engaged in political activities, and who had been arrested, would divulge his name when questioned under torture. After he had fled to Iran, the applicant had learnt that his name had indeed been divulged to the authorities. The applicant had also indicated that his brother, who was an active member of the same group and had been granted international protection in Germany, was on a list of alleged terrorists sought by the Bahraini authorities. He feared that his name was also on this list (see paragraph 8 above).

74. The Court reiterates that it is often difficult to establish precisely the pertinent facts in cases such as the present one and it has accepted that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of asylum claimants since it is they who have had an opportunity to see, hear and assess the demeanour of the individuals concerned (see *F.G. v. Sweden*, cited above, § 118, and *A.G. and M.M. v. the Netherlands* (dec.), no. 43092/16, § 28, 26 June 2018). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts (see *F.G. v. Sweden*, cited above, § 118).

75. In the present case, the Court observes that the Deputy Minister did not reject the assertion that the applicant would face a real risk of being subjected to ill-treatment as prohibited by Article 3 of the Convention if his name had been divulged to the Bahraini authorities by others during questioning or if his name had been on a terrorist list. However, he found the applicant's account of events inconsistent and implausible because, among other things, he did not believe that the applicant had been politically active. The Deputy Minister also held that the applicant's mere assumption that his name might be on a terrorist list was not enough to substantiate that he had attracted negative attention on the part of the Bahraini authorities because of the activities of his brother (see paragraphs 9 and 10 above). The Court further observes that for reasons that cannot be attributed to the authorities, the applicant's appeal against the rejection of his asylum application was not subjected to substantive judicial review (see paragraphs 11-14 above). However, the information the applicant had submitted during the appeal proceedings – country-of-origin information, as well as a statement from the leader in Germany of the opposition group he had been involved with – was available in the applicant's case file at the time that the competent authorities made their final risk assessment prior to his expulsion. This also applies to information from DT&V, including transcripts of the return interviews, which show that the applicant repeatedly indicated that he feared immediate arrest upon arrival in Bahrain as a result of being on the aforementioned list of alleged terrorists (see paragraph 16 above). The Court observes that it does not appear from the decision of 20 October 2018 that this information was included in the risk assessment.

76. The Court further notes that the Deputy Minister, in his decision of 20 October 2018, considered, in relation to the first criterion mentioned in Article 3.1(2)(e) of the Aliens Decree, that the applicant had submitted his subsequent asylum application solely to delay or prevent his expulsion since he had done so just before the scheduled expulsion (see paragraphs 25, 38 and 71 above). The applicant pointed out that lodging a subsequent application only made sense when he could adduce new evidence and that he had informed the IND of his wish to lodge such an application on the day that he had received new documents from his brother, (see paragraphs 21, 22 and 62). The new documents were copies of documents in Arabic with the letterhead of the Bahraini Public Prosecutor's Office on them (see paragraph 22). The translation submitted to the Court shows these documents to be the record of the questioning of a person who had named the applicant several times as being involved in hiding people who were sought by the police. Taking note of the date that the applicant had received these documents and given his interest to substantiate his subsequent asylum application to the best of his ability, the Court sees no reason to doubt the applicant's good faith on this point (see *M.D. and M.A. v. Belgium*, cited above, § 65). It is therefore unable to accept the Deputy Minister's finding in his decision of 20 October 2018 that the applicant's subsequent application was submitted for the sole purpose of delaying or frustrating his removal.

77. Turning to the second criterion for denying leave to remain pending the assessment of a subsequent asylum application, which is the absence of new elements or findings, the Court notes that the Deputy Minister in his decision of 20 October 2018 merely stated that the documents in question were untranslated copies and that the applicant had been unable to expand on the origins of the documents (see paragraph 25 above).

78. The Court has accepted that States may confine the assessment of a subsequent asylum application to an examination of the question whether relevant new facts have been brought forward, and that when no such facts are found they are not required to conduct their assessment with the same thoroughness. However, the examination of that question should not be carried out in a too restrictive a manner (see *M.D. and M.A. v. Belgium*, cited above, § 65). These principles seem to correspond to the reasoning adopted by the CJEU in its judgment in *LH* (see paragraph 45 above). As regards the case at hand, the Court notes that the new documents do not appear to have been easy to come by, as they do not appear to be publicly available records. By bluntly concluding that no probative value could be attached to these documents for the reasons set out in paragraph 77 above, without any prior assessment of their potential relevance in the light of all the other information regarding the individual situation of the applicant and of the general situation in Bahrain, the competent authorities took too narrow an approach, which cannot be regarded as ensuring the careful and rigorous examination expected of them.

79. The foregoing considerations are sufficient to enable the Court to conclude that the respondent State failed to discharge its procedural obligation under Article 3 of the Convention to properly assess in the context of the "last-minute" proceedings the alleged risk of treatment contrary to that provision before removing the applicant from the Netherlands.

80. There has accordingly been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 READ IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

81. The applicant complained under Article 13 read in conjunction with Article 3 of the Convention that he had had no effective domestic remedies available to him to challenge the denial of his asylum requests.

82. The Government contested this complaint.

83. Having regard to the reasoning which has led it to conclude that Article 3 of the Convention was breached in the present case, the Court finds nothing that would justify a separate examination of the same facts from the standpoint of Article 13 of the Convention. It therefore deems it unnecessary to rule separately on either the admissibility or the merits of the applicant's complaints under this head (see *Amerkhanov v. Turkey*, no. 16026/12, § 59, 5 June 2018).

III. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 46 of the Convention

84. The relevant part of Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

85. The applicant asked the Court to order the Government to take specific remedial action, including doing everything in their power to end his detention in Bahrain.

86. The Government submitted that no remedial action should be ordered because it fell to the Committee of Ministers to address this issue.

87. The general principles regarding the respondent State's obligations under Article 46 of the Convention in the context of the execution of judgments in which the Court found a breach of the Convention are laid down in, *inter alia*, *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 193-95, ECHR 2013). The Court's judgments are essentially declaratory in nature. Article 46 notably comprises a legal obligation to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in the respondent State's domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (ibid.). In view of its jurisdiction and the nature and scope of the violation found, the Court does not consider it appropriate to exceptionally indicate any general measures that may be taken to put an end to the violation in question (contrast *Oleksandr Volkov*, cited above, §§ 199-202). It will be for the respondent State to implement, under the supervision of the Committee of Ministers, such measures as it considers appropriate to secure the rights of the applicant.

B. Article 41 of the Convention

88. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

89. The applicant claimed 30,000 euros (EUR) in respect of pecuniary damage, to compensate for the loss of income during the first four years of his imprisonment in Bahrain.

90. The Government submitted that this claim should be rejected as being unsubstantiated.

91. The Court considers that it does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

92. In respect of non-pecuniary damage, the applicant claimed EUR 105 per day spent in prison to date (that is, from 20 September 2017) and suggested that the Court award EUR 949,365 in compensation for "damage for future loss", assuming that he would be in prison in Bahrain in similar conditions for a total of fifty-one years. The applicant also claimed EUR 150,000 to compensate for the additional harm inflicted on him, such as torture and inhuman and degrading treatment and punishment, and the psychological consequences of the lack of a prospect of release.

93. The Government regarded those amounts as exorbitant.

94. The Court considers that as a result of the respondent State's failure to discharge its procedural obligation under Article 3 of the Convention, the applicant must have suffered fear, anguish and distress which cannot be remedied by the mere finding of a violation and that an award should therefore be made to him. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 50,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

2. *Costs and expenses*

95. The applicant also claimed EUR 27,426 for the costs and expenses incurred before the Court. He stated that if just satisfaction of more than EUR 15,670 were awarded, the Legal Aid Board would withdraw the legal aid granted and he would be required to pay those costs himself.

96. The Government submitted a guarantee that the legal aid would not be withdrawn, regardless of any award of just satisfaction.

97. In the light of the Government's guarantee, the Court rejects the claim for costs and expenses for the proceedings before it.

FOR THESE REASONS, THE COURT

1. *Declares,* unanimously, the complaint under Article 3 of the Convention admissible;
2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;
3. *Holds*, by six votes to one, that there is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention;
4. *Holds*, unanimously,

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

   Done in English, and notified in writing on 24 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar

Pere Pastor Vilanova President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.
P.P.V.
M.B.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

Introduction

1. The applicant is of Bahraini origin and had been an asylum-seeker in the Netherlands since 2017. His complaints before the Court were: firstly, that he had been expelled to Bahrain, where there was a risk that he would be subjected to ill-treatment, which eventually materialised (alleged substantive violation of Article 3 of the Convention); secondly, that the risk of being subjected to ill-treatment contrary to Article 3 of the Convention if expelled to Bahrain, which risk had indeed materialised, had not been sufficiently assessed by the Dutch authorities (alleged procedural violation of Article 3); and, thirdly, that he had no effective remedies available to him to challenge that assessment.

2. The application focuses, apart from the applicant's expulsion to Bahrain where there was a risk of being ill-treated, on the domestic authorities' final risk assessment prior to the applicant's expulsion to Bahrain and, in particular, on the assessment made by the Deputy Minister in his decision of 20 October 2018 within the context of "last-minute" proceedings, which dealt with the subsequent asylum application that was submitted shortly before the applicant's removal to Bahrain, in view of the new evidence that he had submitted to the domestic authorities. The Deputy Minister's decision of 20 October 2018 did not allow the applicant to remain in the Netherlands to await the outcome of the examination of his subsequent asylum application and prompted his expulsion. The substantive allegations made by the applicant in his subsequent asylum application were that he feared persecution and ill-treatment by the Bahraini authorities on account of his political activities, his religion and the fact that his brother was a political activist who had fled to Germany and was sought by the Bahraini authorities. He also made those allegations before the Court, as well as complaining that the risk of his ill-treatment in Bahrain had ultimately materialised because it had not been possible to prevent his expulsion to Bahrain. Regarding the genuineness of the applicant's subsequent asylum application, the present judgment observes in paragraph 76:

"Taking note of the date that the applicant had received these documents [the new evidence] and given his interest to substantiate his subsequent asylum application to the best of his ability, the Court sees no reason to doubt the applicant's good faith on this point ... It is therefore unable to accept the Deputy Minister's finding in his decision of 20 October 2018 that the applicant's subsequent application was submitted for the sole purpose of delaying or frustrating his removal."

3. Upon his arrival in Bahrain, the applicant was immediately arrested and detained. He was subsequently convicted of taking part in terrorist activities and sentenced to life imprisonment. He alleged before the Court that he had been tortured in Bahrain to extract a confession, that he had not had a fair trial there and that his detention conditions were very poor. His complaints under

Articles 5 and 6, however, were rejected by a single judge as inadmissible for non-exhaustion of domestic remedies.

4. I voted in favour of points 1, 2 and 4 of the operative provisions of the judgment, respectively declaring the complaint under Article 3 of the Convention admissible, holding that there has been a violation of that Article and awarding the applicant EUR 50,000, plus any tax that may be chargeable, in respect of non-pecuniary damage. However, I voted against point 3 of the operative provisions of the judgment holding that there is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention, and I also voted against point 5 dismissing the remainder of the applicant's claim for just satisfaction, which includes his claim in respect of pecuniary damage and his claim for legal costs and expenses.

I. Not only a procedural but also a substantive violation of Article 3

5. Regrettably, the judgment (see especially paragraphs 70 and 79-80) limits the issue before the Court to the alleged procedural violation of Article 3, whereas the applicant in his application form also complained of a substantive violation of Article 3, invoking "the absolute principle of *non-refoulement* under Article 3" (application form: Statement of alleged violations, especially paragraphs 1 and 3, under "Article invoked" – "Article 3 of the Convention"; and the annex to the application form, especially paragraphs 32, 39-40, 49 and 51). Furthermore, the second question put to the parties when notice of the application was given, dealing also apparently with the "last-minute" proceedings to contest the decision of 20 October 2018, appears to cover an alleged substantive violation of Article 3:

"In the light of the applicant's claims and the documents which have been submitted, did he face a real risk of being subjected to treatment in breach of Article 3 of the Convention when he was expelled to Bahrain?"

The Government dealt with this question in their observations on the merits (especially paragraphs 140, 147-72 and 176). The applicant also dealt with this question in his observations (observations on the merits, especially paragraphs 20-22, 27 et seq. and 33, and observations on just satisfaction, especially paragraphs 1, 5, 9-10 and 25). The fact that the applicant in his observations on the merits (paragraphs 11 and 34) submitted that there was a close connection between the procedural limb of Article 3 and the right to an effective remedy under Article 13 should in no way be taken as meaning that he was abandoning his complaint of a substantive violation of Article 3. It is evident from the case-law of the Court that the limits between substantive violations and procedural violations are sometimes not very clear, but the Court has an obligation in my view to examine both. This should be the case also in the present instance, where the complaint about the risk assessment and the expulsion itself were linked.

6. I respectfully submit that there has been not only a procedural violation of Article 3, but also a substantive violation. Paragraph 80 of the judgment and point 3 of its operative provisions are worded in general terms, referring to a violation of Article 3, without at the same time specifying whether the violation of Article 3 is procedural or substantive or both. This also supports my submission that the alleged violation of Article 3 actually concerned both its procedural and substantive limbs.

7. Nonetheless, since paragraphs 70 and 79 refer only to a procedural violation, I feel the need to partly concur with the judgment on this point, so as to explain my position on the importance of

also finding a substantive violation of Article 3. The substantive violation was due to the fact that the expulsion of the applicant to his country of origin in breach of the principle of non-refoulement subjected him to a risk of ill-treatment and torture, a risk which ultimately materialised. The principle in question is a principle of customary international law and is binding on all States, even those which are not parties to the United Nations Refugee Convention or any other treaty for the protection of refugees. In *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, §§ 22-23 and 134, ECHR 2012), among other cases, the Court clearly recognised the principle of *non-refoulement* as a binding rule of international law.

8. This principle of *non-refoulement* emanates from the norm of effectiveness in the relevant Convention provisions, especially Articles 2 and 3, safeguarding the right to life and the right not to be subjected to ill-treatment respectively. It ensures that aliens are protected from harm and persecution. In a Note on International Protection of 13 September 2001 (A/AC.96/951, § 16), the United Nations High Commissioner for Refugees indicated that "international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment" (see also *Hirsi Jamaa*, cited above, § 23).

9. It is my submission that the two fundamental principles of *non-refoulement* and human dignity are integral aspects or components of the principle of effectiveness both in its capacity as a norm of international law and as a method of interpretation, ensuring that human rights are not theoretical and illusory, but practical and effective (on this principle, I have had the opportunity to elaborate further in three separate opinions in cases concerning international protection of aliens: *Khlaifia v. Italy* [GC], no. 16483/12, 15 December 2016; *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020; and *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021). Respect for the applicant's human dignity should have been central to his protection in the present case. However, the judgment makes no mention either of the principle of *non-refoulement*, or of the principle of respect for human dignity, or of the principle of effectiveness.

10. Regrettably, the protection of the applicant's right under Article 3 by the Court was not full and complete, because the Court did not also find a substantive violation of Article 3. Consequently, the above-mentioned Convention principles have been only partially applied by the Court in the present case, since it limited the violation of Article 3 to its procedural limb only.

11. In my humble view, for the sake of improving transparency, accountability and clarity in legal reasoning, the Court should always expressly and specifically refer to these principles. This will also help the Court to always be aware of its role and the aim (*raison d'être*) of the Convention, which is the effective protection of human rights, and not to omit to examine any aspect of such protection, thus rendering the protection of the right concerned incomplete.

12. Even without examining whether there had been a substantive violation of Article 3, the Court should have referred to the principle of *non-refoulement*. While this principle primarily applies in the case of a substantive violation of Article 3, it should be emphasised that a procedural violation of that provision that may result in a real risk of a substantive violation of the same provision should also be considered in the context of the principle of *non-refoulement*.

II. Need to examine the alleged violation of Article 13 read in conjunction with Article 3 of the Convention

13. Apart from his complaint under Article 3 of the Convention, the applicant complained under Article 13 read in conjunction with Article 3 of the Convention that he had had no effective domestic remedies available to him to challenge the denial of his asylum requests.
14. However, in paragraph 83 the judgment states that "[h]aving regard to the reasoning which has led it to conclude that Article 3 of the Convention was breached in the present case, the Court finds nothing that would justify a separate examination of the same facts from the standpoint of Article 13 of the Convention". In the same paragraph, the judgment concludes that "[i]t therefore deems it unnecessary to rule separately on either the admissibility or the merits of the applicant's complaints under this head (see *Amerkhanov v. Turkey*, no. 16026/12, § 59, 5 June 2018)".
15. The applicant in his application form (statement of alleged violations, paragraphs 10 and 11, under "Article invoked" – "Article 13 read in relation to Article(s) 3 ... of the Convention"), rightly and clearly argued the following:
"10. Individuals at risk of prohibited treatment under the Convention have a right to an effective remedy, which is capable of reviewing and overturning the decision to expel. Such a remedy must be accessible in practice as well as in law, must not be theoretical, and illusory, and cannot be unjustifiably hindered by the acts or omissions of the authorities.
11. In the present case the applicant was not provided an effective remedy, since despite an arguable claim at no stage of the procedure the risk of refoulement was substantively – let alone rigorously – examined. Several procedural arguments were used by the authorities for its lack of scrutiny, yet these can neither preclude a proper assessment nor stand in the way of an effective legal remedy against expulsion. This means that Article 13 has been violated in relation to the principle of refoulement enshrined in Article 3 ... of the Convention."
(The applicant further elaborated on this point, both in his observations on the merits and also in paragraphs 55-58 of the annex to his application form.)
16. With all due respect, I disagree with the decision of the majority not to examine the complaint under discussion, which, while it is in a way related to the complaint under Article 3 in its procedural limb, is actually a different complaint. Furthermore, the complaint in question, by its nature, is a very serious one, because the non-existence of an effective remedy in the Netherlands to deal with the applicant's complaint under Article 3 regarding the decision of 20 October 2018 was the reason why his expulsion to Bahrain could not be prevented. This reason should be viewed together with the fact that the expulsion was carried out immediately after the last request by the applicant for the authorities to consider new evidence, so even if there had been an effective remedy, there would have been no time left for the applicant to pursue that remedy.
17. It is humbly submitted that the majority's decision not to examine the complaint in question is not compatible with the fact that when notice of the application was given, the Court decided to put a question to the parties on the complaint under Article 13 read in conjunction with Article 3, apparently also covering the complaint against the Deputy Minister's decision of 20 October 2018:
"4. Did the applicant have at his disposal an effective domestic remedy for his complaints under Article 3, as required by Article 13 of the Convention?"
18. Lastly, an examination of the complaint in question would have rendered more pressing the need for the Court to indicate general and individual measures under Article 46 of the Convention in the present case, an issue which will be discussed below. The importance of the examination of

Article 13 in conjunction with Article 3 can also be shown by the fact that if an expulsion is carried out, as occurred in the present case, without the person concerned being provided with an effective remedy or the time needed to pursue such a remedy, then the respondent State will be in a weaker position to remedy the situation in the future, especially when the expulsion is to a country which is not a member of the Council of Europe. However, this, as I will explain, does not prevent the Court from indicating some general and individual measures for the implementation of its judgment and the respondent State from exercising diligence and making its best efforts to implement the measures indicated by the Court.

III. Need for general and individual measures under Article 46 of the Convention

19. The applicant in his observations on just satisfaction first and foremost asked the Court to order the Government to take action to remedy his situation, as far as possible. In particular, he requested the following:

"Remedial action should include:

- specified obligation of the Government to do everything in its power to end the (unlawful) detention of the applicant in Bahrain.
- The acceptance of a monitoring obligation with respect to the applicant's detention and treatment in Bahrain, unless expressly barred by the local authorities.
- An obligation to relocate the applicant to the Netherlands in case of release from prison. Diplomatic pressure could be directed at obtaining a pardon, in accordance with local law.
- The obligation to grant the applicant (and his direct family) a residence permit in the Netherlands would he be released from prison." (Applicant's observations on just satisfaction, § 13).

20. As the applicant also argued:

"These actions are necessary to bring the applicant in a situation in which he is able to profit from any other damages awarded, which is justified given the irreparable nature of the violation. In short, if a violation of Articles 3 and 13 of the Convention is found, repatriation to the Netherlands is a proper manner of acting on the *restitutio in integrum* principle." (ibid., § 14)

21. The Government submitted that no remedial action should be ordered because it fell to the Committee of Ministers to address this issue.

22. The present judgment (in paragraph 87) states the following:

"In view of its jurisdiction and the nature and scope of the violation found, the Court does not consider it appropriate to exceptionally indicate any general measures that may be taken to put an end to the violation in question (contrast *Oleksandr Volkov*, cited above, §§ 199-202). It will be for the respondent State to implement, under the supervision of the Committee of Ministers, such measures as it considers appropriate to secure the rights of the applicant."

23. The judgment confines itself only to general measures, whereas the power of the Court also extends to indicating individual measures, as the Court held in, among many other cases, *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 193-95, ECHR 2013), to which the present judgment refers in paragraph 87; this is despite the fact that the applicant's request focused on the ordering by the Court of individual measures.

24. Indeed, while the execution of the Court's judgments is carried out by the respondent High Contracting Party under the supervision of the Committee of Ministers (see Article 46 §§ 1 and 2 of the Convention), it is well established that the Court has the power to contribute to the

implementation of its own judgments by indicating some general or individual measures. As I understand it, the concept of "implementation" with reference to judgments of the Court is broader than the concept of "execution" of such judgments, since "implementation" starts from the time the Court decides the case, while "execution" starts after the judgment of the Court becomes final.

25. The present judgment does not provide any reasoning as to why it "does not consider it appropriate to exceptionally indicate any general measures" in the present case, and why it says nothing about any individual measures, which was the actual request and concern of the applicant. The judgment, in saying within brackets "(contrast *Oleksandr Volkov*)" in paragraph 87, does not explain why such a contrast between the present case and *Oleksandr Volkov* should be made. If the reason for such differentiation is that *Oleksandr Volkov* referred to a systemic problem while the present case does not, again, this is not a sufficient explanation and a valid reason why in the present case the Court should not indicate general measures. General measures can be indicated by the Court not only regarding systemic problems, but also in any other instances of violations where this is appropriate, as, for example, in the present case.

26. In my view, the present case is a classic instance where both general and individual measures, especially the latter, should be indicated by the Court. It was due to acts under the responsibility of the respondent State which were not compatible with Article 3 guarantees, namely the "last-minute" proceedings and the consequent expulsion of the applicant, that the applicant was ultimately deported to a country where there was a risk and eventually this risk materialised, resulting in him suffering a violation of Article 3 in both its procedural and substantive limbs. Hence, the Court has an obligation, besides finding a violation of Article 3, to contribute to the implementation of its own judgment by indicating general and individual measures to assist both the respondent State and the Committee of Ministers in the execution and the supervision of the execution of judgments respectively. Otherwise, the role of the Court in practically and effectively protecting and safeguarding human rights will not be fulfilled in the present case.

27. Though I am in the minority, I would have proposed indicating some general measures relating to the availability of effective domestic remedies to challenge the denial of an asylum request, such as the asylum request relating to the Deputy Minister's decision of 20 October 2018 in the present case, as well as some general measures to prevent immediate expulsion to a country where there is a risk that the person will be ill-treated, until all pending asylum applications by that person have been thoroughly examined by the domestic authorities. The fact that the Court decided not to examine the complaint under Article 13 would not have assisted it in indicating general measures, if it had decided to do so. I would also have proposed indicating some individual measures, in particular along the lines of indicating to the respondent State that it should work and cooperate on a diplomatic and international level with Bahrain with the aim of lessening or alleviating some of the negative consequences the applicant had suffered as a result of his expulsion to Bahrain. Since I was in the minority, however, there is no need for me to elaborate further on such measures.

IV. Pecuniary damage

28. The applicant claimed 30,000 euros (EUR) in respect of pecuniary damage to compensate him for the loss of his income during the first four years of his imprisonment in Bahrain, and in his

observations on just satisfaction (paragraph 28) he argued, *inter alia*, that before his expulsion to Bahrain, he had been working in the Netherlands as a network operator for a cash machines company and receiving around 2,000 United States dollars per month. As the only ground for rejecting the applicant's claim, the judgment mentions that it does not discern any causal link between the violation found and the pecuniary damage alleged (see paragraph 91 of the judgment); it does not say that this claim is not substantiated, which was the allegation made by the Government.

29. I respectfully disagree with rejecting the applicant's claim in respect of pecuniary damage, and I am unable to see that there is no causal link between the violations found and the pecuniary damage alleged. The judgment overlooks the fact that it was the "last-minute" proceedings and the applicant's expulsion to Bahrain which led to the violation of Article 3, and it was due to those facts that the applicant could not stay in the Netherlands any longer, with the consequence of losing his job there. The judgment also omits to see that the applicant's claim in respect of pecuniary damage related only to the first four years of his imprisonment, even though his sentence in Bahrain is one of life imprisonment, and not to any pecuniary damage that might also be incurred in the future.

30. In other words, it was the respondent State's failure to fulfil its positive substantive and procedural obligations and safeguard effectively the applicant's right not to be subjected to ill-treatment which led to his expulsion to the country of his origin, with the result that he lost his job in the Netherlands.

V. Legal costs and expenses

31. The applicant claimed EUR 27,426 for legal costs and expenses incurred before the Court. He stated that if just satisfaction of more than EUR 15,670 were awarded, the Legal Aid Board would withdraw the legal aid granted and he would be required to pay those costs himself (see paragraph 95 of the judgment).

32. However, the Government submitted a guarantee that the legal aid would not be withdrawn, regardless of any award of just satisfaction (see paragraph 96 of the judgment).

33. The judgment, in the light of the Government's guarantee, rejects the claim for legal costs and expenses for the proceedings before it (see paragraph 97 of the judgment).

34. And here lies my disagreement with the judgment: if the applicant's legal costs and expenses that were actually and reasonably incurred amounted to EUR 27,426, and the Legal Aid Board had undertaken to pay only EUR 15,670 out of those costs and expenses, I have difficulty in understanding why then the Court did not award the applicant, for his legal costs and expenses, the difference between the amounts of EUR 27,426 and EUR 15,670, namely EUR 11,756.

Conclusion

35. In view of the above, I would have concluded as follows: there has also been, besides the procedural violation, a substantive violation of Article 3; the Court should have examined the complaint under Article 13 read together with Article 3, and, in my submission, there has also been a violation in respect of that complaint; the Court should have indicated under Article 46 some general and individual measures for the implementation of its judgment, as noted above; the Court should have awarded the applicant an amount in respect of pecuniary damage, as indicated above;

and, lastly, the Court should have awarded an amount in respect of the applicant's legal costs and expenses, as indicated above.