

English summary¹

Traces of the past

An advisory report on the role of medical examination in asylum procedures

Under asylum law, it is principally for the asylum-seeker to plausibly demonstrate that he or she requires the protection of the Dutch government. The most significant sources of information for this are the interviews that the personnel of the IND (Immigration and Naturalisation Service) conduct with the asylum-seeker and general information about the country of origin. Alongside these two sources, in some cases medical examination is used to either substantiate or refute assertions of the asylum-seeker. This type of medical examination is the subject of this advice.

For many years, asylum law adhered to the premise that medical aspects should generally not play a role in the evaluation of asylum requests. Government members responsible for this area have continuously taken the position that, medically speaking, there can be no certain conclusions drawn concerning the cause of scars, physical and psychological trauma (at least in most cases).

This position is not uncontroversial. As early as 1999, there was a handbook available, drafted by a large number of experts, advising on medical examination of the signs of torture and other cruel, inhuman or degrading treatment or punishment. This handbook is also known as the Istanbul Protocol. It explicitly describes how to investigate the likelihood of a causal relationship between scars, physical and psychological trauma and the alleged causes thereof.

Likewise, in practice the IND takes a more nuanced position on whether medical aspects can play any role. If the asylum-seeker submits a medical report conforming to the guidelines of the Istanbul Protocol, the personnel of the IND will consider it in the evaluation of the asylum request. Up to now, asylum-seekers have been dependent on various private organisations (particularly the iMMO, the Institute for Human Rights and Medical Assessment) for this type of medical examination.

Background of the advice and research question

The revised Asylum Procedures Directive was published on 26 June 2013, with a view to the further harmonisation of the European asylum system. This Directive contains minimum standards that all asylum procedures in the member states of the European Union must meet. The Directive must be implemented in national legislation/regulations by 20 July 2015. Article 18 of the revised Directive contains a new provision specifically pertaining to medical exams relating to indications of past persecution or serious harm. The result of the Directive is that scars and psychological or physical trauma will be an element that the state secretary should take into account in evaluating asylum requests, and should be the subject of investigation at the State Secretary's own initiative.

¹ Summary of the Advisory Committee on Migration Affairs report nr. 40 [Sporen uit het verleden - advies over de rol van medisch onderzoek bij de beoordeling van asielaanvragen (Traces of the past, p.96); juli 2014 - www.acvz.org/publicaties/ACVZ_Advies_40-web.pdf]

On 21 March 2014, the state secretary asked the Advisory Committee on Migration Affairs (ACVZ) for recommendations on how to implement Article 18 in the asylum procedure. The question evaluated by the ACVZ was: *'How should the implementation of Article 18 of the revised Asylum Procedures Directive concerning medical examination be structured in regulations and in the asylum procedure?'*

The recommendations address the cases in which medical examination must be performed, the standards the medical examination must meet, how to structure the medical examination in procedural terms and how much weight should be given to the examination in the evaluation of an asylum request. The recommendations also review how immigration services in other countries handle this type of medical exam.

Major findings

Article 18 of the Asylum Procedures Directive determines that the decision-making authority (in the Netherlands, the State Secretary) must ensure, if there are grounds to do so, that asylum-seekers are given the opportunity to undergo a medical examination to ascertain indications of past persecution or serious harm. The central consideration on the question of whether the state secretary must initiate a medical examination for the evaluation of an asylum request is whether a medical examination must be considered relevant to the evaluation of the request.

The state secretary is obliged to order a medical examination whenever he considers such an examination relevant to the evaluation of an asylum request.

Case law indicates that the state secretary is not completely free to determine when such an examination must be considered relevant. When there are sufficiently strong indications that the asylum-seeker has previously been exposed to torture, rape or other severe forms of psychological, physical or sexual abuse, this creates a duty of investigation on the part of the state secretary. Sufficiently strong indications can be understood as the presence of psychological or physical trauma and scars that could have been caused by torture, rape or other severe forms of psychological, physical or sexual abuse.

The ACVZ is of the opinion that medical investigation can only be considered relevant where it could make a meaningful contribution to the evaluation of an asylum request. Conducting a medical examination would not be particularly worthwhile if the asylum request could be rejected for other reasons, for example if another country was responsible for the processing of the asylum request, or if the allegations of torture have already been deemed credible.

The state secretary must designate an independent organisation to conduct the medical examination.

If a medical examination is deemed relevant by the state secretary, he may charge the examination to an independent organisation of his choosing. If the asylum-seeker has good reason to decline to take advantage of this option, the state secretary would then have to give the asylum-seeker the opportunity to approach another organisation or person for the conduct of the examination. If the state secretary can establish that the performer of the examination is a qualified medical practitioner working in accordance with the standards applicable to this type of medical examination, then the state secretary must also finance the costs of the examination. Additionally, the asylum-seeker may always obtain a medical examination at his/her own initiative and expense, even if a medical examination is not deemed relevant by the state secretary. The Asylum Procedures Directive requires that the result of any such examination must be taken into account in the asylum request.

As a rule, a decision on the relevance of medical examination can only be made after a detailed interview with the asylum-seeker.

A decision on whether or not to conduct a medical examination can, as a rule, only be made after a detailed interview with the asylum-seeker. This interview is the asylum-seeker's first opportunity to explain to the IND what he/she has gone through and his/her reasons for leaving the country of origin. Only then can statements of the asylum-seeker be linked to potential indications of torture, rape or other severe forms of psychological, physical or sexual abuse. If the decision to conduct a medical examination is made, the asylum-seeker's request for asylum must be reviewed in the extended procedure.

If there are indications, but the state secretary still does not wish to order an examination, he/she must explain his/her reasoning.

The asylum procedure must be set up to identify and document indications of torture, rape and other severe forms of psychological, physical or sexual abuse.

In order to assess the relevance of medical examination, indications of torture, rape or other severe forms of psychological, physical or sexual abuse must be identified and documented over the course of the asylum procedure. The advisory committee identifies at least three sources of potential indications:

- Medical examination by MediFirst
- Medical statements of doctors or psychologists
- Observations of the behaviour of asylum-seekers by all state actors involved in the asylum procedure and legal aid providers

MediFirst advises the state secretary on medical restrictions that must be taken into account in interviews and decisions. The instruction to MediFirst must be supplemented with an investigation with the intention of documenting indications of torture, rape or other severe forms of psychological, physical or sexual abuse. These indications must be reported to the state secretary and included in the asylum-seeker's file.

The state secretary must also ensure that all state actors involved in the asylum procedure are alert to indications that an asylum-seeker has been a victim of torture, rape or other severe forms of psychological, physical or sexual abuse. For this reason, it is important to have employees trained in identifying and describing this type of indication at every location of the Central Agency for the Reception of Asylum Seekers (COA) or asylum-seeker shelter, and that the reporting point for such indications be clear. These indications must then be included in the asylum-seeker's file.

It is also advisable to have the asylum-seeker's preparations for the asylum procedure with his/her attorney take place prior to the MediFirst examination. Often, it is in the interview with the attorney that the asylum-seeker will begin talking about what happened to him/her in the country of origin. Discussions the ACVZ has had with psychologists, psychiatrists and other professional practitioners have revealed that psychological issues often only first manifest themselves when the asylum-seeker has been asked about his/her reasons to flee his/her country of origin.

The asylum-seeker must be informed about the relevance of scars and physical and psychological complaints.

Within the context of the duty of care principle, prior to the start of the asylum procedure the state secretary must provide the asylum-seeker with information about the relevance of scars and physical or psychological complaints that could indicate torture, rape or other severe forms of psychological, physical or sexual abuse and the potential impact on the evaluation of the asylum request. The state secretary must also indicate where the asylum-seeker can turn to with relevant information.

Subsequent applications must be evaluated substantively in the event of indications of torture, rape or other severe forms of psychological, physical or sexual abuse.

Because scientific research demonstrates that both physical and (especially) psychological symptoms of torture, rape or other severe forms of psychological, physical or sexual abuse may only manifest themselves later, the state secretary must evaluate any subsequent application substantively if there are sufficiently strong indications that the asylum-seeker may be a victim of torture, rape or other severe forms of psychological, physical or sexual abuse.

Standards for medical-forensic examinations must be developed by all relevant parties.

In order to arrive at a generally accepted standard for medical-forensic examination in the asylum procedure, the ACVZ observes that the state secretary should institute a working group with employees of the IND, MediFirst and the iMMO, and medical forensic experts without an active involvement in asylum law. It would be regrettable if the experts to perform the medical-forensic examination unnecessarily would become the subject of discussion themselves, as does happen in certain other areas of expertise within asylum law.

Recommendations.

The advisory committee makes the following recommendations to the state secretary for Security and Justice:

- 1) Ensure timely implementation of Article 18 of the Asylum Procedures Directive in national legislation by adding a new Article to chapter 3, part 4, paragraph 3 of the Aliens Act 2000 to regulate the medical examination.
- 2) Designate an independent organisation, one with adequate knowledge and capacity, that can examine asylum-seekers at the instruction of the state secretary to establish a causal relationship between scars or physical and psychological trauma and torture, rape or other severe forms of psychological, physical or sexual abuse.
- 3) Argue, both in the intention and in the decision on the asylum request, why despite the presence of indications of torture, rape or other severe forms of psychological, physical or sexual abuse, no medical examination was arranged. This obligation to provide argumentation must be incorporated into the Aliens Decree 2000.
- 4) The Aliens Decree 2000 must include a clause stipulating that the decision on arranging a medical examination must normally be made after a more detailed interview, but that exceptions to this rule may be allowed. The consequence of instructing a medical examination is that the asylum-seeker is then sent into the Extended Asylum Procedure.
- 5a) Implement Article 18, third paragraph of the revised Asylum Procedures Directive, which regulates that the result of medical examinations must be considered in the evaluation of an asylum request, in the Aliens Decree 2000.
- 5b) Ensure that the medical examiners and employees of the IND meet regularly to discuss the significance of reports, so that reporter and staff member with decision-making authority can learn from each other.

- 5c) Make the interpretation, weighing and understanding of medical-forensic reporting a part of the training process of decision-making staff members of the IND.
- 6a) Prior to the asylum procedure, provide the asylum-seeker with information about the significance of scars and physical or psychological trauma that could indicate torture, rape or other severe forms of psychological, physical or sexual abuse, and explain where the asylum-seeker can go with information on this.
- 6b) Instruct personnel of the IND to ask directed questions about the cause of scars or physical and psychological trauma reported by MediFirst, and offer the personnel who take these interviews the required training.
- 7a) Expand MediFirst's mandate with examination for indications of torture, rape or other severe forms of psychological, physical or sexual abuse. MediFirst must report any such indications to the state secretary, and these must also be entered into the asylum-seeker's file so they can be considered in the state secretary's decision to arrange a medical examination.
- 7b) Ensure that all employees in the process are alert to indications that an asylum-seeker has been a victim of torture, rape or other severe forms of psychological, physical or sexual abuse. Additionally, ensure that there are employees trained in identifying and describing this type of indication, and personnel to whom these can be reported, at every COA-location or asylum-seeker shelter, and train employees of the IND in identifying these indications. Specific indications must be entered into the asylum-seeker's file.
- 7c) Plan the preparation for the asylum procedure with the asylum-seeker's attorney prior to the MediFirst examination.
- 8) Include in the Aliens Act Implementation Guidelines 2000 that subsequent applications will not be rejected under application of section 4:6 of the General Administrative Law Act if there are sufficiently strong indications of torture, rape or other severe forms of psychological, physical or sexual abuse.
- 9) Institute a working group with employees of the IND, employees of MediFirst and the iMMO and medical forensic experts without an active involvement in asylum law to jointly develop a generally accepted standard for medical-forensic investigation in the asylum procedure. This working group must also be given the assignment of consulting with experts in these areas to draft a list of indications that could indicate the consequences of torture, rape or other severe forms of psychological, physical or sexual abuse.