The title of this study is "Judicial Review in Asylum Law. A Legal Analysis of the Intensity of Judicial Review in the Dutch Asylum Procedure, 2001-2015".

In asylum cases, the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Dutch Council of State, suggests that, since the enforcement of the Aliens Act 2000, administrative authorities, in their factual assessment of an asylum claim, have a certain amount of discretion as regards whether the statements of the asylum applicant are to be considered credible. This discretion is not formulated by law; however, it follows from the consideration that the facts in asylum cases cannot be assessed fully as there is almost always an evaluation of the events of the asylum account that might have occurred. As a result of this discretion, judicial review of the credibility assessment in Dutch asylum cases is restricted. When the Dutch decision-making authorities, the Immigration and Naturalisation Service (IND) find that an asylum claim is credible, a judge conducts a full review of the risk assessment they have made in the light of the Refugee Convention and Article 3 of the European Convention on Human Rights (ECHR). In terms of Dutch asylum law, the assessment of the credibility of an asylum claim is reviewed on the basis of the (un)reasonableness of the findings of the administrative authorities. This is referred to as a restricted, or marginal, review. Although the recast Procedures Directive (2013/32/EU), implemented in Article 83a of the Aliens Act 2000, has since July 2015 provided for a full and ex nunc review of first-instance decisions by a court or tribunal and specifies that the notion of effective remedy requires a review of both facts and points of law, the Dutch Council of State still allows for a restricted judicial review of the credibility of statements that are not accompanied by any objective proof. In the Netherlands, restricted judicial review in migration law cases is explained or justified, among other arguments, in terms of the constitutional relation between judiciary and administration. In migration law, constitutional arguments compete with individual human rights arguments to affect the position of the judge. Where administrative law demands a restricted judicial review of the exercise of administrative competences as these concern a certain freedom, international norms might demand an intensified judicial review in order to guarantee the protection of individual human rights. It is this tension that is the central theme of this PhD thesis.

In this study, I present the legal background to restricted judicial review in Dutch asylum cases. An analysis of the case law of the Administrative Jurisdiction
Division of the Council of State from 2001 to July 2015 provides new insights into the debate on the intensity of judicial review in asylum cases. The two principal research questions are:

1. How does restricted judicial review in Dutch asylum law until implementation of Article 83a of the Aliens Act 2000 relate to Dutch legal theory of the role of the courts in administrative law?

2. Is restricted judicial review in Dutch asylum law until implementation of Article 83a of the Aliens Act 2000 in accordance with European Union (EU) law and the ECHR?

In seeking answers to these questions, it has been useful to divide this study into three parts. Part 1 describes national theories of the intensity of judicial review and investigates how the Dutch asylum procedure relates to these theories. Part 2 describes the legal norms of EU law and of the ECHR which influence judicial review in asylum cases. Part 3 comprises an in-depth analysis of the case law of the Administrative Jurisdiction Division of the Council of State which is used to provide answers to the research questions.

**PART 1. THE ROLE OF THE ADMINISTRATIVE COURTS IN THE DUTCH ASYLUM PROCEDURE**

In chapters 2 and 3, national theories of the role of the courts in administrative law and of the intensity of judicial review are presented. There are a variety of ways for courts to approach the question of the deportation of an asylum seeker. Courts may take an ‘active’ approach to reviewing the decision taken by government authorities. In such a case, the court thoroughly reviews the fact-finding and, should it find the decision unlawful, replaces the decision with its own opinion of the case. On the other hand, there is also what may be called the ‘distant’ approach, in terms of which the courts restrict their review to whether the decision taken by government authorities is ‘reasonable’. Any reasonable decision is acceptable. With the active approach, the possible risk of expulsion is central, whereas with the distant approach, the question of the appropriate legality of the decision-making process is central.

Dutch asylum law is categorised as administrative law. The General Administrative Law Act (GALA) provides courts with legal norms for reviewing a decision taken by government authorities. Investigative powers are a component of these norms. Research shows that the way in which courts apply these norms strongly depends on their view of the task. Judicial review of decisions taken by government authorities should not upset the balance between the judiciary and the executive. A central notion as regards this balance is that the judiciary should not replace the role of the executive with a judicial review. Political and social developments influence and change the relation between the judiciary and the executive. Growing executive powers in an increasing number of fields of government action make it more difficult for the judiciary to offer a counterbalance. Government policies that regulate the exercise of authority are increasingly often established without, or with
little, democratic control. In controlling government action, courts should focus on the exercise of authority and the decision-making process, to ascertain whether these are in accordance with constitutional values derived from laws and from the fact that the decision-making authorities should have expertise, and should be objective.

On the other hand, there is the growing influence of international norms, which strengthen the role of the judiciary in relation to the executive. The judiciary is obliged to directly apply international legal norms and the interpretation of international courts. The executive and legislative powers may not interfere and are bound to these interpretations. International law therefore contributes to the shift in powers at the national level.

Interestingly, this shift in powers plays no role in the national theory of the judicial review decisions of government authorities. Although a shift in powers is recognised by the judiciary,¹ the duty of a judge is still considered a constitutional duty, in terms of which deference to the governmental decision-making occurs when executive actions are reviewed. Dutch legal practice appears still to be attempting to understand how to deal with these changing concepts. As a result, restricted judicial review of administrative action is a valuable tool by means of which judges can implicitly remain faithful to the traditional division of powers and hide the shift in powers.

In every legal order, theory has developed around the question of the way in which judicial control of the exercise of administrative competences maintains a balance in the division of powers. According to these legal theories, judicial review of the exercise of administrative competences should be restricted when the latter include certain freedoms; this is referred to as ‘discretion’. It is for the administration to furnish meaning to the given discretion, which the judiciary should respect. Besides its occurrence in Dutch practice, similar discussions may be witnessed among, for example, American lawyers on ‘judicial restraint’, German lawyers on ‘Freies Ermessen’, and British lawyers on ‘doctrinal deference’. In Dutch administrative law, discretion is assumed to be present when the legal rule explicitly states that that is the case, for example, when the word ‘may’ is used. In such a case, the executive authorities have the freedom to decide to use the competence or not. When the legal rule compels the use of a competence but leaves it to the executive authorities to decide the circumstances in which this occurs, discretion also occurs (for example, a legal rule that states ‘the permit is granted when, according to the mayor, the applicable obligations are fulfilled’). In both cases, judicial review of the administrative action is restricted to a reasonableness test. In Chapter 3 of this study, it is shown that legal rules are often not clearly formulated and that discretion is often implicitly present, which gives rise to difficulties in analysing the role of the judge who reviews the exercise of these competences. The theoretical

framework is therefore a useful tool to only one extent in analysing the intensity of judicial review in administrative law. In addition to the aim of the legislation as expressed in the legal rule, other factors, like political, cultural or constitutional factors, also influence judicial review.

In this study, it is shown that the Administrative Jurisdiction Division of the Dutch Council of State is inconsistent in its use of concepts to clarify the type of discretion at stake. The manner in which the Council of State assumes discretion in the legal rule to provide international protection to refugees does not fit the traditional theoretical framework. The Council of State reasons that the expertise of the executive authorities in the assessment of the credibility of an asylum account justifies a restricted judicial review, as the judiciary does not have the same expertise. The approach of the Council of State makes it useful to analyse the decision-making process in asylum cases in terms of four phases of the general decision-making procedure: 1. the interpretation of the law, 2. the establishing of the facts, 3. the qualification of the facts, and 4. if applicable, a weighing of interests.

The intensity of the judicial review of each phase may differ. The interpretation of the law, as well as the interpretation the government authorities have given in the individual decision, will be reviewed thoroughly by the courts as it is a core task of the judiciary to interpret the law. Generally, the establishing of the facts is also reviewed thoroughly by the judiciary, except for in asylum cases. The intensity of the judicial review of the third phase, the qualification of the facts, depends on the discretion available in the competence. The weighing of interests is reviewed in a restricted manner.

In Chapter 4, it is shown how the establishing and qualification of the facts overlap in the Dutch asylum procedure. In the course of the processing of the asylum claim, IND decision-makers clarify which facts are relevant and require further substantiation. In a sense, these facts are qualified in terms of the legal norm, before they are established. The design of the Dutch asylum procedure, which lasts eight days, weakens the already difficult procedural position of the asylum applicant. This is in contrast with the assumption in asylum law that applicants should be given the benefit of the doubt because of the difficulties in proving the stated facts. This asylum procedure of eight days embodies the tension in the position of the IND: restrictive immigration policy has been an aim of the government and has resulted in a swift procedure to filter out asylum claims that are not genuine. On the other hand, the IND has to be impartial, objective, and an expert in deciding asylum claims, as follows from Article 10 of Directive 2013/32/EU.

Nevertheless, with a restricted judicial review, a thorough review of the government’s duties of care with regard to the procedure and of the stating of reasons in the written decision occurs. These legal norms follow from the law and can be explicated in policies for the decision-making authorities. However, it is clear that the individual decision-maker has substantial discretion in applying these norms in individual cases. This study suggests that the legal theoretical framework
should be inspired by the notion of street-level bureaucracy as this has been developed in the social sciences. In the Dutch asylum procedure, the individual decision-maker has discretion in conducting a credibility assessment of an individual claim. Judicial review of the exercise of competences should take note of the manner in which decision making occurs in practice and what procedural guarantees are in place. This would provide the judiciary with the opportunity to control the executive according to constitutional values, and to control the exercise of executive competences in practice.

PART 2. LEGAL NORMS IN EU LAW AND IN THE ECHR THAT INFLUENCE THE INTENSITY OF NATIONAL JUDICIAL REVIEW IN ASYLUM CASES

In addition to national legal norms, the administrative courts are obligated to follow legal norms derived from the ECHR and EU law. In Chapter 5 is described how three legal orders that influence one another are of relevance for the courts when reviewing governmental decisions regarding asylum applications. As concerns the intensity of judicial review, this is very clear as the legal norm of an effective remedy is implemented in EU law where it is defined as providing ‘for a full and ex nunc examination of both facts and points of law’ (article 46(3) of Directive 2013/32/EU,) a definition that was first used in the case law of the European Court of Human Rights (ECtHR) and which is now implemented in national law.

Both the ECHR and EU law require an effective remedy that demands thorough control of the decisions of government authorities. Full jurisdiction is required by Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. Rigorous scrutiny is required by Article 3 and Article 13 of the ECHR as well as by Article 47 of the EU Charter. In addition to these general norms, a full and ex nunc examination of points of fact and points of law is required for asylum law by the recast Procedures Directive, 2013/32/EU. According to all these norms, a judge should be able to establish the facts him- or herself, assess proof, and quash a decision. In all legal orders, there are exceptions to this general rule for cases that are politically sensitive and for those that require technical expertise to establish the facts. In such situations, a restricted judicial review is allowed. Neither the ECtHR nor the European Court of Justice (ECJ) of the EU answer the question of what type of national judicial review is required.

The rigorous scrutiny that is required according to articles 3 and 13 of the ECHR is not defined by the ECtHR for the judicial review of the government’s decision-making regarding the credibility of the account of asylum. The ECtHR itself, in cases pertaining to Article 3 of the ECHR, applies a thorough review of the credibility of the account. Although it is a general principle that government authorities are best placed to decide on the credibility of such an account, the ECtHR has not hesitated to replace this with its own judgment of the credibility if it is afraid of a breach of Article 3 of the ECHR.

Since the 15th Protocol was signed in 2015, the ECtHR has paid more attention to the principle of subsidiarity in its judgments. This protocol aims to lay down this
The principle together with the margin of appreciation within the ECHR. The principle of subsidiarity requires that states guarantee the human rights in the treaty in the first place. The ECtHR therefore first scrutinises whether national procedures, both in the executive and in the judiciary phases, guarantee these rights. If these procedures lack a guarantee of the protection of the ECHR rights, the ECtHR asks the national authorities to review the national procedure, without judging the material norm at stake. Nevertheless, Chapter 6 of this book demonstrates that the absolute character of Article 3 of the ECHR still results in rigorous scrutiny of an asylum claim when the ECtHR is convinced that a breach of the article is at stake. The government’s decision on the credibility of the asylum claim is the starting point for the ECtHR, though it will differ from the viewpoint of the national authorities when required to according to the ECtHR. It is not yet clear whether this rigorous scrutiny should be applied in the same way by national courts. The Council of State has decided that it is not required, as the two courts review different objects: the Dutch administrative court reviews a decision of the government, which it can quash and send back to the government authorities, while the ECtHR reviews the actual expulsion. In section 6.7 of this study, it is argued that the approach of the Council of State does not correspond to the system of the ECHR, in which it is the primary responsibility of contracting states to guarantee the ECHR rights within their own legal orders. The Netherlands has the duty to offer an effective remedy, which should entail the same form of scrutiny of asylum decisions as the ECtHR applies. In addition, the Dutch restricted judicial review in asylum cases, in combination with the substantial number of decisions of the Council of State taken on higher appeal in which the complaint does not constitute grounds for overturning the impugned judgment and does not give rise to need for a determination of legal issues in the interests of legal uniformity and legal development, does not contribute to a reduction in the number of individual complaints about expulsion and possible breach of Article 3 of the ECHR.

Analysis of the legal norms following from EU law also shows that judicial review of the establishing of the facts should be thorough. Article 39 of Directive 2005/85/EC in conjunction with article 47 of the EU Charter of Fundamental Rights already pointed towards such an interpretation. The EU legislator confirmed this reading in the recasting of the Procedures Directive (2013/32/EU) by introducing as an effective remedy one by means of which a court or tribunal provides for a full and ex nunc examination of both facts and points of law. This means that a national court should itself assess the available proof, including the asylum seeker’s statements regarding the account of asylum. It does not mean that the court has to do so for every asylum appeal; however, if the government’s decision provides a reason for it to do so, the national court should have the option of establishing the facts itself. The Dutch Council of State nevertheless reasons that Article 46 (3) of the Procedures Directive (2013/32/EU) allows for a restricted judicial review of the statements of an asylum seeker that are not accompanied by any proof. Whether this reasoning holds is questioned in Chapter 7 of this study as the ECJ, in reviewing whether a national procedural rule complies the principle of effectiveness, has already underlined the importance of the fundamental right of international
refugee protection and the difficult procedural position of the asylum seeker. At the time of completing the research, several preliminary reference procedures were pending on the meaning of the full and *ex nunc* examination in article 46 (3) of Directive 2013/32/EU.

In case law other than asylum law, the ECJ has accepted a restricted national judicial review of decisions of the government decisions where the competence has clear discretion or where the establishing of facts is complex. In Chapter 7 of this study, it is argued that the credibility assessment in asylum cases cannot be compared to the complexity of the establishing of facts in the area of law in which the CJEU allows for a restricted judicial review on that basis. Assessing the credibility of statements does not require any technical expertise. The judiciary is well able to examine whether statements are contradictory or vague.

If the reasoning of the Council of State holds, it is important that in the restricted judicial review, as formulated by the ECJ, an intensive judicial review is required of the underlying gathering of evidence and the reasoning in the written decision of the government. The restricted national judicial review as formulated by the ECJ is the lower limit for asylum law; it requires a national judge who reviews whether the facts have been thoroughly examined, whether all the relevant factors have been assessed, whether factors that are not relevant have played a role in the government’s decision-making process, and whether the standard of proof has been fulfilled.

**PART 3. THE ADMINISTRATIVE JURISDICTION DIVISION OF THE DUTCH COUNCIL OF STATE IN ASYLUM CASES: CONCLUSIONS AND RECOMMENDATIONS**

In chapter 8, the case law of the Council of State is analysed. Close to 400 decisions of the highest court are assessed regarding the intensity of the judicial review. The analysis shows that the marginal judicial review that the Council of State introduced following the enforcement of the Aliens Act 2000 suits the view of the task of an administrative judicial review in which the legality of the decision is central. This view follows from a strict reading of the GALA. The view that the administrative judicial review should contribute to final dispute resettlement has not played a clear role in asylum law. Although the GALA offers the judge investigative competences, the case-law analysis shows that courts do not use these competences for the required restricted judicial review.

The case-law analysis does not fit the mainstream theoretical framework for discretion in the Netherlands. Apparently, it is the nature of the asylum claim that justifies a restricted judicial review. As it is a given that the establishing of facts in asylum cases is difficult because of a lack of proof, the credibility of the asylum claim has become central in the decision-making process pertaining to such claims. According to the Council of State, the IND has more expertise than courts to assess credibility.
The case-law analysis shows how in the IND’s assessment of the credibility of the asylum account, the establishing and the qualification of the facts overlap. The asylum seeker only knows which aspects of the account will be found to be not credible or will need further corroboration with the first written intention of rejection of the asylum claim. Therefore, the facts are already qualified during the establishment phase. This is problematic as the nature of the legal norm requires an intensive review of the qualification of the facts. In addition, the case-law analysis shows that the individual decision-maker has discretion during the assessment of the facts, which is barely controlled because of the restricted judicial review.

**FINDING 1:** In the government’s decision-making process, the establishing and qualification of the facts overlap. The individual decision-maker has (informal) discretion during these phases. The asylum seeker is often in a position of not being able to provide proof.

International protection demands an effective remedy with rigorous scrutiny, or an intense judicial review, as the fundamental prohibition of *refoulement* is at stake. At the same time, the legal norm has three characteristics that could clarify why the Council of State requires a restricted judicial review. First, a future risk has to be proven; second, most asylum applications lack (objective) proof; and, third, there is the aim of having an efficient and restrictive migration policy, which leads to a brief procedure. Although these characteristics also would justify a thorough judicial review as a guarantee of a fundamental right, the Council of State argues that these characteristics mean that the IND is best placed to assess the credibility of the asylum account. The case-law analysis demonstrates that the expertise assumed is not scrutinised thoroughly as the policy of the IND gives leeway to the individual decision-maker, which is not scrutinised within the IND nor within the reasonableness test of the courts. Although the restricted judicial review has been given nuance by the Council of State since the implementation of Article 83a of the Aliens Act 2000 (as the implementation of Article 46 (3) of Directive 2013/32/EU), it is not yet clear what these nuances mean in practice. The common interest of an efficient migration policy would go well with guaranteeing the expertise of the governmental decision-making authorities. However, the role of common interest is different for migration law compared to other areas of administrative law, especially when the government authorities aim for a restrictive migration policy. The risk exists that an efficient migration policy translates into procedural rules that make fulfilment of the material norm, international protection, more difficult, rather than facilitating the actualisation of this norm. This risk makes it difficult to fulfil the requirement of an impartial and objective decision-making authority of article 10 (3) of Directive 2013/32/EU.

**FINDING 2** The decision-making authority has two roles in asylum law. On the one hand, it must aim for a restrictive immigration policy, which leads to a strict and brief asylum procedure. On the other hand, it must guarantee expertise in the assessment of asylum claims.

The restricted judicial review also affects the judicial review of the general principles of good governance, the duty of care involved in the procedure and the duty
to state reasons. The case-law analysis shows how courts of first instance have attempted to give meaning to their judicial review through these principles, which was rejected by the Council of State. Case law of the Council of State since the implementation of Article 83a of the Aliens Act 2000 suggests that these two principles should acquire greater meaning. The role of the Council of State for policy-making in asylum law becomes clear in the case-law analysis when the reasoning of the Council of State on the assessment of the credibility of an asylum claim is literally transposed to working instructions and policies for the IND. The requirement of ‘positive convincing’ statements follows directly from case law of the Council of State, as does the role of ‘corrections and additions’ to the asylum interviews, the meaning of late-admitted reasons for international protection or late-admitted evidence, and the value of country-of-origin information. In addition to this, the IND repeats litigation in all asylum procedures.

**FINDING 3:** The functions of the Council of State and the IND are intertwined as the case law of the Council of State is literally transposed in policies regarding the assessing of the credibility of asylum claims. In addition to this, the IND repeats litigation in all asylum procedures.

The case-law analysis further demonstrates that judgments of the ECtHR have little effect on the intensity of the judicial review of an asylum claim. The *Salah Sheekh* judgment did change policies and working instructions regarding the role of country information; however, it did not directly influence the intensity of the judicial review. In the legislative process concerning the implementation of Article 46 (3) of 2013/32/EU, the legislator mentioned that a more intensive judicial review would cater to the ECHR norms; however, the Council of State has thus far stated that a distinction between ECtHR scrutiny and national scrutiny is justified. The Council of State argues that articles 3 and 13 of the ECHR require rigorous scrutiny in the national system as a whole. Judicial and government authorities should together offer rigorous scrutiny of the asylum claim. Within such a system, a restricted judicial review is possible according to the Council of State. In addition, the Council of State argues that the ECtHR reviews the expulsion, whereas the national courts review the government’s decision. This reasoning does not fit with the development in ECHR case law I described earlier, to the effect that the ECtHR is increasingly reviewing national asylum procedures. National procedural law should protect the material norm at stake, in this case Article 3 of the ECHR. The subsidiary role of the ECtHR demands a legal remedy at the national level that offers the same protection as at the level of the ECHR. As long as the ECtHR still assesses the credibility of an asylum claim itself, as soon as there is the slightest impression of a possible breach of Article 3 of the ECHR in the case of an expulsion, the national judicial review should be in accordance with that scrutiny.

**FINDING 4:** The difference between the rigorous scrutiny of the ECtHR in asylum cases and the restricted national review of national courts is considerable and is not desirable when the aim is a good, working system of human rights protection in light of the ECHR.
Finally, the case-law analysis shows that the reasoning of the Council of State on the restricted judicial review in relation to EU law will most likely not hold. The Procedures Directive explicitly describes a full and *ex nunc* examination of the facts and points of law by a court or tribunal. Although the ECJ has not yet ruled on the interpretation of this requirement, it is most likely that it requires that a national court has the possibility of establishing the facts, among them the credibility of the asylum account, itself. The Council of State argues that the expertise that is required for an assessment of the credibility of the asylum claim justifies a restricted judicial review. The case law of the ECJ the Council of State is referring to concerns other areas of law in which complex technical expertise is required. In these areas of law, there is no such explicit requirement as can be found in the Procedures Directive for national judicial review. Even if the ECJ allowed for a restricted judicial review of the credibility assessment, this review should meet the strict requirements the ECJ sets out for the judicial review of the duty of carefulness regarding procedure and the duty to state reasons. The case-law analysis in the study demonstrates that courts of first instance have lived up to these requirements, which have been rejected by the Council of State as a judicial review that is too intensive. The implementation of Article 83a of the Aliens Act 2000 has, however, changed this line of case law as judicial review of the duty to state reasons has been intensified. The judicial review of statements that are not accompanied by proof is, however, still restricted.

The case-law analysis shows at the same time that the Council of State gives a restrictive interpretation of the so called benefit of the doubt, a starting point in refugee law to acknowledge the difficult position for the asylum seeker (as follows from the UNHCR Handbook). Also the legal norm in terms of which the member state assesses the relevant elements of the application in co-operation with the applicant (as follows from Article 4 (1) of Directive 2011/95/EU) is interpreted restrictive by the Council of State. The duty of the applicant to make a plausible claim, as also follows from the UNHCR Handbook, the Qualification Directive and national administrative law, has resulted in procedural rules that make the benefit of the doubt and the duty to cooperate inapplicable in practice.

**FINDING 5.** The Council of State continues to argue that a restricted judicial review is allowable, although the legal norm in EU law clearly requires a full and *ex nunc* examination of both facts and points of law.

This study demonstrates that EU law and ECHR norms influence the intensity of a national review, though that, above all, it is the choice of the national courts to determine how these norms are used for a judicial review of a government’s decision. Both EU law and the ECHR provide for this possibility as neither supervisory court has not yet answered the question as to the degree of intensity with which the national courts should review government assessments of the credibility of asylum accounts.
Chapter 9 describes abovementioned findings and concludes with recommendations for the future. The effective remedy should offer the asylum seeker judicial protection against the strong position of the decision-making authorities. Judicial control should concern more than an intensified review of the duty to state reasons, which the Council of State introduced following the implementation of Article 46(3) of Directive 2013/32/EU. I argue in section 9.5 that Dutch administrative law provides sufficient tools to offer a full and *ex nunc* examination as prescribed by EU law, but the courts need to use these tools. The GALA offers investigative competences for the courts which are of importance for an active judge, regardless of whether that judge establishes facts him- or herself or reviews the government’s decision on the facts. I am thinking here of the competence to ask for information, to call witnesses, or to appoint an expert. Courts should seriously take into account the explanation of the asylum seeker for statements that the authorities find not credible when reviewing the duty of care in the governmental procedure. A full and *ex nunc* judicial review demands the use of these tools if there is the slightest indication of persecution or the risk of a breach of Article 3 of the ECHR when an expulsion occurs. An investigation such as this by the courts can shed a different light on the original credibility assessment, without the facts themselves being assessed. Courts can use their judgments to give specific orders to government authorities. A judicial review would be in accordance with the norms of ECHR and EU law. It would also be in accordance with the rigorous scrutiny the ECtHR applies in cases concerning Article 3 of the ECHR.

The expertise the Council of State assigns to the IND should be guaranteed within the government system by, for example, a system of peer review. Courts should be able to control the manner in which decision-makers have compared individual claims, as the possibility of comparison is an argument for the expertise of the government authorities. This would provide the judiciary with the opportunity to control the informal discretion of individual decision-makers, as is required for the maintaining of checks and balances between the judiciary and the executive.

Such active administrative courts would decide on the intensity of the judicial review of government’s decisions to refuse asylum according to constitutional values like the law, the guarantee of executive expertise and the realisation of the rights of citizens.