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**The Sheltering Sky of Strasbourg;
On the ECtHR's judgement in the case of *Salah Sheekh v.
the Netherlands* and its effects on asylum policy and
adjudication in the Netherlands¹**

In Paul Bowles's 1949 novel *The Sheltering Sky*, the sky is depicted by one of the main characters as "a solid thing up there, protecting us from what's behind".² This description will be presented in this paper as a metaphor for the role of the European Court of Human Rights (hereafter: the Court) in the legal sphere of the Contracting States to the Convention, and more specifically with regard to the legal system of the Netherlands. It will be argued that the Court's recent judgement in the case of *Salah Sheekh v. the Netherlands* sheds more light on the "shelter" provided by the Strasbourg Court's case law regarding the guarantee of protection against torture, inhuman or degrading treatment or punishment laid down in Article 3 of the European Convention on Human Rights (hereafter: the Convention). Furthermore, the judgement in the *Salah Sheekh* case gives rise to some comments concerning the limit of the "sky" of the Court's competences vis-à-vis government and judicial authorities in the Netherlands. Preliminary to this analysis, the main elements of the *Salah Sheekh* case will be presented.

§1. Reaching for the sky: the main elements of the *Salah Sheekh* case

On 11 January 2007, the Strasbourg Court handed down a judgement in the case of *Salah Sheekh v. the Netherlands*.³ The seven judges of the Court's Third Section, including the Court's Dutch Judge Mr Egbert Myjer, unanimously declared the application of Somali asylum seeker Mr Abdirizaq Salah Sheekh admissible, and held that the applicant's expulsion

¹ The author wishes to thank Ad Mak for his comments on an earlier version of this paper.

² BOWLES (2006): p. 99.

³ *Salah Sheekh v. the Netherlands*, 2007.

to Somalia would be in violation of Article 3 of the Convention.⁴ Salah Sheekh, born in Somalia in 1986, arrived in the Netherlands on 12 May 2003 and applied for asylum on the following day, *inter alia* claiming that, as a member of the Ashraf minority, on return to Somalia he would run the risk of (again) falling victim to harassment and extortion. By a decision of 25 June 2003, the Minister of Immigration and Integration (hereafter: the Minister), refused Salah Sheekh's asylum request. Among the grounds for this decision featured the consideration that the reasons advanced by Salah Sheekh for his flight from Somalia were insufficient to qualify him as a refugee. Notably, the situation in Somalia for asylum seekers, regardless of them belonging to the Ashraf minority or not, was considered to be "not such that the mere fact that a person came from that country was sufficient for refugee recognition".⁵ Concerning the applicability of Article 3 of the Convention, the Minister concluded that no "real risk" appeared to exist of Salah Sheekh being subjected to treatment in breach of this article upon his

⁴ The Court further held that in Salah Sheekh's case there has been no violation of Article 13 of the Convention. Concerning the applicant's claim that he did not have an effective remedy in that the Netherlands authorities refused to suspend his expulsion pending a decision on his objection against the manner of that expulsion, the Court considered: "Bearing in mind that the word "remedy" within the meaning of Article 13 does not mean a remedy bound to succeed (see *Hilal*, cited above, § 78), and that the compatibility of the scheduled removal with Article 3 was examined, the Court considers that the applicant was provided with an effective remedy as regards the manner in which his expulsion was to be carried out." *Salah Sheekh v. the Netherlands*, 2007, § 154. The Court also held that there was no need to examine the issue of just satisfaction on the basis of Article 41 of the Convention, no such claim having been made by the applicant. These parts of the Court's judgement will not be dealt with further in the present paper. Concerning the Court's interpretation of the right to an effective remedy, which is protected by Article 13 of the Convention, see ECtHR, *Hilal v. the United Kingdom*, March 6th, 2001, no. 45276/99, ECHR 2001-II.

The Dutch government appealed the judgement by asking for referral of the case to the Court's Grand Chamber on the basis of Article 43 of the Convention (see *NRC Handelsblad*, February 3rd, 2007, p. 3), but this appeal was not admitted by the Grand Chamber (decision of May 23rd, 2007, see the Court's press release 488(2007) of July 6th, 2007; cp. *RVD*, "Beleid na uitspraak Europese Hof aangepast", June 22nd, 2007). SPIJKERBOER (2007): p. 385 predicted the uncertainty of the acceptance of the government's request, as a survey of requests lodged in 2006 shows that only a limited number of judged cases is considered to raise "a question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance" (Article 43 § 2). According to Spijkerboer, in case of admission of the government's request, a judgement of the Grand Chamber would have been unlikely to lead to radical changes to the Third Section's unanimous judgement.

⁵ *Salah Sheekh v. the Netherlands*, 2007, § 27.

return to Somalia, and that his return to Somalia, given the general situation there, would “not amount to undue harshness because, in order to avoid any future problems, he could settle in one of Somalia’s relatively safe areas”.⁶ An appeal against the rejection of the request for asylum was lodged by Salah Sheekh on 26 June 2003. In a judgement of 7 November 2003, this appeal was rejected by the Regional Court of The Hague, sitting in Amsterdam, which confirmed the decision of the Minister on almost all grounds. The Regional Court, *inter alia*, agreed with the Minister “that the problems experienced by the applicant had not so much come about as the consequence of an unfavourable interest shown in the applicant personally, but that the events were rather to be seen as a result of the generally unstable (security) situation in Somalia, in which intimidation and insults by criminal groups regularly and arbitrarily occurred”.⁷ The Regional Court took in consideration the “internal flight alternative” which consisted in Salah Sheekh’s option to move to one of the “relatively safe areas” of Somalia, indicated in the country reports drawn up by the Dutch Ministry of Foreign Affairs.⁸ On 15 January 2004, Salah Sheekh introduced an application to the Court in Strasbourg, which, through an interim measure, cancelled the intended expulsion to Somalia. While his case was pending with the Court, Salah Sheekh obtained a residence permit in the Netherlands on 10 March 2006, on the basis of a temporary “categorical protection policy” adopted by the Minister on 24 June 2005.⁹

The Court’s judgement was issued on 11 January 2007 and made it to the front pages of Dutch newspapers.¹⁰ It also immediately incited a stream of commentaries in the law literature.¹¹ The attention paid to the judgement can be traced back to three remarkable considerations of the Strasbourg Court. First, Salah Sheekh’s application to the Court was considered admissible despite the case not having been submitted for judgement to the national highest instance in administrative law cases in the Netherlands: the Administrative Jurisdiction Division of the Council of State. Secondly, the Court put into question the country reports on Somalia compiled by the Dutch Ministry of Foreign Affairs, and reprimanded the

⁶ *Salah Sheekh v. the Netherlands*, 2007, §§ 30-31.

⁷ *Salah Sheekh v. the Netherlands*, 2007, § 35.

⁸ *Salah Sheekh v. the Netherlands*, 2007, § 35.

⁹ *Salah Sheekh v. the Netherlands*, 2007, §§ 39-40.

¹⁰ *NRC Handelsblad*, January 11th, 2007, p. 1; *De Volkskrant*, January 12th, 2007, p. 1. Further journalist and expert commentaries have been published in *NRC Handelsblad* in the weeks following the Court’s Salah Sheekh judgement. See for example JESSURUN D’OLIVEIRA (2007); ETTY (2007); JENSMA & STOKMANS (2007).

¹¹ VAN DER VLIES (2007); *NJB*, vol. 82 (7), theme issue on the Salah Sheekh case.

Dutch authorities for not checking the effective accessibility to Salah Sheekh of an “internal flight alternative” in Somalia. Last but not least, the Court specified the grounds for application of Article 3 of the Convention. Contrary to the interpretation of Article 3 which is given in Dutch policy documents and in administrative law adjudication, the Court considered the applicant’s membership of a minority group (in this case the Ashraf-minority in Somalia) a sufficient ground for deeming foreseeable that, in case of expulsion to Somalia, he would be exposed to treatment in breach of Article 3 of the Convention.¹² These elements of the Salah Sheekh judgement give rise to some comments on the Court’s interpretation of the required “exhaustion of domestic remedies” of Article 35 § 1 of the Convention; on the scope of the Court’s competence to evaluate domestic policies of Contracting States to the Convention; and on the consequences concerning content which are derived by the Court from the guarantee provided by Article 3 of the Convention. We will now first inquire into the “sheltering sky” provided by the Court’s review in the light of Article 3 of the Convention.

§2. A sheltering sky: the protection offered by the European Court of Human Rights under Article 3 of the Convention

The Strasbourg Court’s judgement in the Salah Sheekh case offers an important clarification with regard to the Court’s interpretation of Article 3 of the Convention. The Court reiterates its opinion that Article 3 implies an obligation not to expel an individual to a country if “substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country”.¹³ With regard to the assessment of the existence of a “real risk” of the mentioned kind, the Court specifies the conditions for protection of members of minority groups. The argument focuses on the “singled out-criterion” which is used by the Administrative Jurisdiction Division of the Council of State in its case law, and on the requirements regarding the definition of an “internal flight alternative”.

With regard to the interpretation of Article 3 of the Convention, the standing practice of the Dutch government and judicial authorities is based on the argument “that it (can) not necessarily be concluded solely on the basis of the general situation in a country that a particular person (runs) a real risk, but that it (is) required that individuals (show) that they (have)

¹² *Salah Sheekh v. the Netherlands*, 2007, notably §§ 114-149.

¹³ *Salah Sheekh v. the Netherlands*, 2007, § 135. Cp. *Hilal v. the United Kingdom*, 2001, § 59.

been singled out for persecution”.¹⁴ The opinion of the Dutch government, stating “that the applicant, if expelled, did not run a real risk of being exposed to treatment in breach of Article 3, since the problems experienced by him were not so much the result of person-specific unfavourable attention, but of events that could better be described as the result of the generally unstable security situation in Somalia”¹⁵, should be understood in the context of that argument. This argument also underlies the standing case law of the Administrative Jurisdiction Division in asylum cases.¹⁶

The Salah Sheekh judgement sheds more light on the Court’s assessment of this argument. Judging from the Court’s case law, it could have been estimated before that the “singled out-criterion”, which has a basis in the 1951 UN Convention relating to the Status of Refugees¹⁷, formed part of the elements included by the Court in its interpretation of the guarantee of protection under Article 3. Though not as clearly present as in the case law of the Dutch administrative law courts, the Court’s case law was interpreted by some as to support a milder version of the “singled out-criterion” or as to deem individualisation of the risk of submission to ill-treatment in most contexts a necessary precondition for accepting a “real risk” in the sense mentioned above.¹⁸ In the Salah Sheekh judgement, the Court makes more explicit to what extent it adheres to the “singled out criterion”. The Court first states that “(w)hile the Netherlands authorities were of the opinion that the problems experienced by the applicant were to be seen as a consequence of the general unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people (see paragraphs 28 and 35 above), the Court is of the view that that is insufficient to remove the treatment meted out to the applicant from the scope of Article 3. (...) What is relevant in this context is whether the applicant was able to obtain protection against and seek address for the acts perpetrated against him.”¹⁹ The Court then dismisses the Dutch authorities’ assessment that the treatment to which Salah Sheekh fell victim was meted out arbitrarily. In the light of Salah Sheekh’s membership of the threatened Ashraf minority in Somalia, the Court considers “that, in its opinion, it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues

¹⁴ *Salah Sheekh v. the Netherlands*, 2007, § 131.

¹⁵ *Salah Sheekh v. the Netherlands*, 2007, § 131.

¹⁶ Cf. SPIJKERBOER (2007): p. 381.

¹⁷ DRUIJF & SMULDERS (2007): p. 388.

¹⁸ Cp. SPIJKERBOER (2007): p. 381.

¹⁹ *Salah Sheekh v. the Netherlands*, 2007, § 147.

to be, personally at risk”.²⁰ These considerations go the show that the Court does not dismiss the requirement of individualisation of the risk of submission to ill-treatment. However, in some circumstances the “real risk” of being subjected to treatment contrary to Article 3 flows directly from the fact that the person applying for asylum belongs to a specific minority group, thus rendering unnecessary the establishing of further special distinguishing features.

A second clarification concerning the Court’s interpretation of Article 3 of the Convention regards the possibility of expulsion of an alien in case of the availability of an “internal flight alternative”. The Court exercises a review of all the facts of the Salah Sheekh case and, on the basis of its findings, concludes to a dismissal of the Dutch authorities’ opinion that an internal flight alternative in Somalia was available to Salah Sheekh. In the context of this deliberation, the Court enumerates as requirements in order for there to be question of a reliable “internal flight alternative”: that the person to be expelled must be able to travel to the area concerned; that he or she must be able to gain admittance to this area; and that he or she must be able to settle there.²¹ When applying these criteria to the case at hand, the Court comes to the conclusion that no “internal flight alternative” would have been available to Salah Sheekh in case of his expulsion to Somalia:

“Bearing in mind that, according to information provided by the respondent Government [i.e. the Dutch government – EM], Somalis are free to enter and leave the country as the State borders are hardly subject to controls, the Court accepts that the Government may well succeed in removing the applicant to either Somaliland or Puntland (even though, having regard to a recent BBC report (see paragraph 113 above) this is no certainty). However, this by no means constitutes a guarantee that the applicant, once there, will be allowed or enabled to stay in the territory, and with no monitoring of deported rejected asylum seekers taking place, the Government have no way of verifying whether or not the applicant will have succeeded in gaining admittance. In view of the position taken by the Puntland and particularly the Somaliland authorities, it seems to the Court rather unlikely that the applicant would be allowed to settle there. Consequently, there is a real chance of his being removed, or of his having no alternative but to go to areas of the country which both the Government and UNHCR consider unsafe.”²²

These considerations of the Court, which contradict the decisions of the Dutch government and the Dutch judicial authorities not only as regards

²⁰ *Salah Sheekh v. the Netherlands*, 2007, § 148. Concerning the “special distinguishing features-criterion”, cp. *Vilvarajah and Others v. the United Kingdom*, p. 37, §§ 111-112.

²¹ *Salah Sheekh v. the Netherlands*, 2007, § 141. Cp. DRUIJF & SMULDERS (2007): p. 389.

²² *Salah Sheekh v. the Netherlands*, 2007, § 143.

legality but also as regards content, lead us to have a closer look at the scope of the Court's competences of judicial review.

§3. The sky's limit: the Court's competences evaluated vis-à-vis the competences of government and judicial authorities in the Netherlands

The judgement in the Salah Sheekh case has important consequences regarding the functioning of the administrative and judicial authorities in the Netherlands when dealing with asylum cases. First, the Strasbourg Court gives an opinion on the sources to be consulted by administrative authorities when evaluating the admissibility of a request for asylum and by the judicial authorities when reviewing the legality of the administrative authorities' decisions. Secondly, the Court, by exercising itself a "full" review in an *ex nunc* perspective, puts into question the developed practice of the Dutch administrative law courts, which consists in an auto-limitation of the scope of their competences to a "marginal" and *ex tunc* review.

Regarding the duties of the domestic government, the Court is of the opinion that, regarding the consideration of an "internal flight alternative", the indirect removal of an alien to a particular region of his or her country of origin does not affect "the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention".²³ In this context, the Court puts into question the country reports issued by the Dutch Ministry of Foreign Affairs and proceeds with an assessment of the facts of the Salah Sheekh case.²⁴ The Court interprets its own competences of assessment of the risk of ill-treatment to include an evaluation of "those facts which were known or ought to have been known to the Contracting State at the time of the expulsion".²⁵ Herewith, we touch upon another important element of the Court's judgement in the Salah Sheekh case.

Concerning the evaluation of the judge's duties under the Convention, the Court takes a view which is radically opposed to the standing practice of the Administrative Jurisdiction Division of the Council of State. In its case law, the Court has stated that the application of Article 3 of the Convention asks for a "rigorous" judicial evaluation; if the alien has not yet been expelled, the Court esteems that its judicial deliberations shall take place in the light of the actual situation at the moment of its judgement, including the scrutiny of information which has only come to light after the

²³ *Salah Sheekh v. the Netherlands*, 2007, § 141. Cp. *T.I. v. the United Kingdom*, 2000.

²⁴ *Salah Sheekh v. the Netherlands*, 2007, §§ 138-149.

²⁵ *Salah Sheekh v. the Netherlands*, 2007, § 136. Cp. *Vilvarajah and Others v. the United Kingdom*, p. 36, § 107.

decision on the domestic level with regard to the expulsion, and that it shall base its judgement on all the materials made available by the domestic authorities as well as materials from other, reliable and objective sources.²⁶ In the case of *Said v. the Netherlands*, the Court has already stated that other materials than the country reports have to be taken into account in deliberations on a request for asylum²⁷, thereby expressing disagreement with the Administrative Jurisdiction Division's opinion that the country reports coming from the Ministry of Foreign Affairs should be considered correct unless specific indications exist which raise doubt as to the correctness or completeness of these reports.²⁸ The Court's opinion is reiterated in the *Salah Sheekh* judgement²⁹, the novelty brought by the present judgement being that the Court's estimation is made in a manner and a context which render inevitable the conclusion that the practice of "marginal" review in Dutch administrative law adjudication in asylum cases does not meet the Court's criterion of a "rigorous" judicial evaluation.³⁰ This conclusion is notably implied by the terminology used by the Court, whose requirement of "a full and *ex nunc* assessment" contrasts in a significant way with the common definition of the Dutch judicial practice in administrative law cases as "marginal" and *ex tunc*.³¹

It has been suggested in the Dutch law literature that the Court's rather severe attitude towards the Administrative Jurisdiction Division, in the *Salah Sheekh* case, is related to its opinion regarding the merits of the case. This impression is invigorated by the way the Court glosses over the fact that *Salah Sheekh*, at the time of the Court's judgement, had been granted a residence permit on the basis of the "categorical protection policy" adopted for Somalia, thus not being subject to direct expulsion and a possible breach of Article 3 of the Convention.³² A similar lack of trust in the rigour of the Division's scrutiny and a condemnation of the possible negative effects of that missing rigour can be acknowledged in the *Said* judgement. This is explicitly expressed in Judge Thomassen's concurring opinion where she states that "this lack of rigorous scrutiny justifies the Court's decision not to follow the national courts' assessment" and "that, given what is at stake, and noting those facts which have been established,

²⁶ SPIJKERBOER (2007): p. 384.

²⁷ *Said v. the Netherlands*, 2005, § 49.

²⁸ Cp. ADVIESCOMMISSIE VOOR VREEMDELINGENZAKEN (2006): p. 22.

²⁹ *Salah Sheekh v. the Netherlands*, 2007, § 136.

³⁰ Cf. SPIJKERBOER (2007): p. 385.

³¹ Cf. SPIJKERBOER (2007): p. 385. Cp. *Salah Sheekh v. the Netherlands*, 2007, § 136.

³² DRUIJF & SMULDERS (2007): p. 389. Cp. *Salah Sheekh v. the Netherlands*, 2007, § 40.

despite persistent doubts as to what actually happened, the balance should tip in the applicant's favour".³³

Also with regard to the Strasbourg Court's opinion on administrative law adjudication in the Netherlands, a much discussed topic in the Dutch law literature concerned the Court's admission of Salah Sheekh's case despite him not having lodged an appeal with the Administrative Jurisdiction Division of the Council of State against the judgement of the Regional Court of 7 November 2003. Article 35 § 1 of the Convention states after all that "(t)he Court may only deal with the matter after all domestic remedies have been exhausted". In some of the earliest commentaries, the admissibility decision was interpreted as an expression of the Court's doubts concerning the independence and impartiality of the Administrative Jurisdiction Division.³⁴ This would not raise eyebrows, as the institutional guarantees of administrative law adjudication in the Netherlands have been subjected to the Court's scrutiny in earlier cases³⁵, and are an ongoing topic of discussion in political and academic debates in the Netherlands.³⁶

I agree, however, with those commentators who are of the opinion that the Court's admission of the case does not give rise to difficulties in the light of the requirements of the Convention.³⁷ The Administrative Jurisdiction Division has, on several occasions, considered the mere fact of belonging to a minority group insufficient to hold a breach of Article 3 of the Convention, and Salah Sheekh had not stated any facts claiming an extra risk for him as an individual on returning to Somalia. In the light of these circumstances, the Court considered that the obligation to exhaust domestic remedies could not be upheld in the present case, as this obligation is

³³ *Said v. the Netherlands*, 2005, concurring opinion of Judge Thomassen.

³⁴ See for example *Trouw*, January 15th, 2007. SPIJKERBOER (2007): p. 380-381 criticizes the comments made by the president of the Council for the Judiciary, Bert van Delden, in the TV-programme "Buitenhof" on 14 January 2007. Van Delden deemed it "incomprehensible" that the Council of State had been passed by and stressed the independent character of the highest administrative law tribunal.

³⁵ Cp. *Bentham v. the Netherlands*, 1985 (holding a condemnation of the since then abolished remedy called "Kroonberoep"), and *Kleyn v. the Netherlands*, 2003 (in which the Strasbourg Court avoided taking a stand concerning the objective impartiality of the Administrative Jurisdiction Division). Concerning the latter judgement, cp. DAMEN (2003).

³⁶ Cp. *NRC Handelsblad*, February 15th, 2007, p. 3, and *Kamerstukken II*, 2005-2006 and 2006-2007, 30 585, concerning recent legislative initiatives to strengthen the institutional guarantees regarding the independence and the impartiality of the Administrative Jurisdiction Division. Academic opinions are given *inter alia* by DAMEN (2003) and JESSURUN D'OLIVEIRA (2007).

³⁷ In this sense SPIJKERBOER (2007): p. 380-381; DRUIJF & SMULDERS (2007): p. 388-389.

“limited to making use of those remedies which are likely to be effective and available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention. An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail.”³⁸ Commentators of the *Salah Sheekh* judgement agree in majority with the Court’s consideration that in the present case “virtually no prospect of success”³⁹ would have existed in case of a further appeal of the decision to expel.⁴⁰

A partly opposing view is held *inter alia* by P. van Dijk, a former judge in the Strasbourg Court and the president of the Administrative Jurisdiction Division of the Council of State. Van Dijk acknowledges the Court’s interpretation of Article 35 § 1 of the Convention as excluding an obligation to exhaust domestic remedies in case of procedures which do not meet the requirements of a “fair trial”, laid down in Article 6 § 1 of the Convention, or which virtually do not have a prospect of success. However, the application of these criteria in the *Salah Sheekh* case, according to Van Dijk, does not fit the rule and reason of Article 35 § 1 of the Convention. The president of the Administrative Jurisdiction Division stresses that the Division judges each appeal on its individual merits, and that it does not fit within the Strasbourg Court’s competences to give a prediction concerning the outcome of this evaluation in individual cases. Van Dijk is of the opinion that a reference to preceding case law of the Division does not offer sufficient ground for such a prediction, as the national judge might reach a different judgement or nuance his case law in the individual case at hand.⁴¹ True as this may be in a general sense, the “unambiguousness” and “clearness” of the Division’s case law in asylum cases⁴², as well as the constancy of this case law and the absence of indications that the Division would adopt a different line of reasoning in the near future, in my opinion justify the Court’s consideration that in the present case an appeal to the Administrative Jurisdiction Division was bound to fail, and thus give reason for sanctioning *Salah Sheekh*’s by-passing of the highest administrative law court.⁴³

³⁸ *Salah Sheekh v. the Netherlands*, 2007, § 121.

³⁹ *Salah Sheekh v. the Netherlands*, 2007, § 123.

⁴⁰ SPIJKERBOER (2007): p. 381; DRUIJF & SMULDERS (2007): p. 389.

⁴¹ LINDO (2007): p. 393.

⁴² DRUIJF & SMULDERS (2007): p. 389.

⁴³ Cp. in this respect the criticism of the Administrative Jurisdiction Division’s case law in asylum cases: ESSAKKILI & SPIJKERBOER (2006).

It can be concluded that the Court's judgement to admit the Salah Sheekh case, and its judgement concerning judicial duties with regard to the protection of the right laid down in Article 3 of the Convention, are legitimate in that the Court was thus in the position to fulfil its supervisory role with regard to the protection of the rights and freedoms guaranteed by the Convention. It would be contrary to Article 13, which states the right to an effective remedy before a national authority in respect of violations to the Convention, if a more complete guarantee – i.e. judicial review of a certain quality – could be had before the Court than before the national judicial authorities.⁴⁴ The limit to the sky of the Court's competences can thus be found in the interpretation of its supervisory role regarding the guarantee by the Contracting States of the rights and freedoms laid down in the Convention, a role which is subject to the principle of subsidiarity.⁴⁵

§4. Conclusion

When asked what exists behind the sky, Paul Bowles's protagonist Port Moresby answers: "Nothing, I suppose. Just darkness. Absolute night."⁴⁶ In Salah Sheekh's case, "darkness" and "night" are epitomised in the threat of exposure to torture, inhuman or degrading treatment in the sense of Article 3 of the European Convention. The Strasbourg Court's judgement of 11 January 2007 forms an important step in optimising protection against this threat on the level of the Contracting States to the Convention. Given the Court's supervisory role vis-à-vis authorities on the domestic level of the Contracting States, Strasbourg's "sheltering sky" lights the way for a change of government policy and administrative law adjudication concerning asylum cases in the Netherlands.⁴⁷

⁴⁴ Cf. SPIJKERBOER (2007): p. 386.

⁴⁵ Cf., *inter alia*, *Z. and Others v. the United Kingdom*, 2001, § 103. Cp. SPIJKERBOER (2007): p. 386.

⁴⁶ BOWLES (2006): p. 99.

⁴⁷ Some suggestions for change are given by SPIJKERBOER (2007): p. 385-387. HARTLIEF (2007) criticizes the defensive attitude which has been adopted by the Dutch government and other official actors in the aftermath of the Salah Sheekh judgement. After the rejection of its appeal to the Court's Grand Chamber (see *supra*, note 4), the Dutch government has started the implementation of the Salah Sheekh judgement. In this context, the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*) has been modified by the orders 2007/19 and 2007/20 of the State Secretary of Justice of July 30th, 2007, *Stcrt.* 2007, 148, pp. 5-6. The modifications concern *inter alia* the re-evaluation of the "singled out-criterion" and the assignation of the Reer Hamar group in Somalia as a "vulnerable minority" in the sense of C2/3.1.3 ("singled out-criterion") of the Guidelines. See also the letter of the State Secretary of Justice of June 22nd 2007, *Kamerstukken II*, 2006-2007, 29 344, nr. 64.

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