Report

Report further to a complaint against the Medical Advisors Office, BMA

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Contents

INTRODUCTION

1.1 Background to investigation

A foreign national wishing to remain in the Netherlands lawfully must obtain a residence permit from the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst:* IND), an agency of the Ministry of Security and Justice. Where a permit application is made on medical grounds, the IND will request the *Bureau Medische Advisering* (Medical Advisors Office; BMA) to provide an opinion about the applicant's medical situation, i.e. his or her state of health and treatment requirement. In certain cases, the BMA must also assess whether essential medical treatment is available in the applicant's country of origin. The BMA's opinion carries great weight: it is generally the deciding factor in whether the IND grants or denies leave to remain in the Netherlands.

The National Ombudsman received a complaint from an immigration lawyer relating to the methods and procedures of the BMA. The complaint was accompanied by five concrete examples drawn from the lawyer's own practice which, she claimed, demonstrated clear shortcomings. The National Ombudsman deemed the complaint to warrant further investigation. It may be summarised as follows (here in translation):

> The complaint relates to the methods and procedures applied by the Medical Advisors Office (BMA) when preparing and producing a medical opinion at the request of the Immigration and Naturalisation Service (IND). The complainant contends that the BMA relies on information obtained from 'medical advisors' in the country of origin, the identity of whom is unknown, and that the sources and reliability of the information they provide cannot be verified.

The BMA's methods and the manner in which the IND acts upon the advice of the BMA, have been the subject of much discussion between the State Secretary of Security and Justice, the legal profession and various NGOs. There have been a number of complaints lodged against the BMA with the medical disciplinary councils. Several professional organisations and research institutes have published reports discussing the medical aspects of immigration and asylum policy. They include the *Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst* (Royal Dutch Medical Association; KNMG), the *Onderzoeksraad voor Veiligheid* (Dutch Safety Board; OVV) and Pharos (the national centre of expertise on health disparities).

In 2011, the KNMG called for greater transparency with regard to how the BMA arrives at its conclusions and opinions.[1] In 2014, the Dutch Safety Board expressed concern about the manner in which the BMA determines whether essential medical treatment is available in an applicant's country of origin.[2] It drew attention to the difference between

[1] KNMG, written communication to the Parliamentary Standing Committee on Health, Welfare and Sport, 23 March 2011.
[2] Dutch Safety Board*, Veiligheid van vreemdelingen*, The Hague, April 2014.

'availability' and 'accessibility', stating that failure to assess whether the treatment would be accessible to the individual concerned poses an unacceptable risk to his or her safety. In May 2014, the Parliamentary Assembly of the Council of Europe adopted a resolution which calls on member states to refrain from returning a foreign national with HIV to any country in which appropriate treatment is not available, or is not accessible to the individual concerned.[3] In March 2014, Pharos wrote to the Parliamentary Standing Committee on Security and Justice recommending that BMA's approach and methods should be reviewed, and permanent solutions to any shortcomings put in place.[4] Pharos identifies one such shortcoming as the manner in which the BMA advises on the 'opportunities' for treatment in the country of origin, without ascertaining whether such opportunities are accessible to all. In July 2012, the Advisory Committee on Migration Affairs published a report considering the role of expert advice (including but not confined to that of the BMA) in asylum procedures.[5] The report concludes that it is often difficult to establish the quality of such advice. The issues have also attracted much media attention, notably in an edition of the current affairs programme *Brandpunt* broadcast on 12 October 2014. (http://brandpunt.kro.nl/seizoenen/2014/afleveringen/12-10-2014).

1.2 Investigation method

The National Ombudsman began the investigation by meeting with representatives of the BMA itself. The complaint was forwarded to the State Secretary of Security and Justice, together with various questions about the methods and procedures of the BMA. The State Secretary was invited to respond to the five cases presented by the complainant. The National Ombudsman was granted access to the IND files relating to those cases, as well as files relating to five further cases selected by the IND itself. The intention was to form a full and accurate impression of how the BMA's opinions are produced, and how they are subsequently used to support the IND's decision whether to grant or deny a residence permit. (Throughout the remainder of this document, the term 'opinion' refers to a formal advisory report, as submitted by the BMA to the IND.)

1.3 Structure of this report

Following this general introduction, Chapter 2 examines the role of the BMA and its working methods. The manner in which the National Ombudsman opted to investigate the complaint is described in Chapter 3, followed by the State Secretary's response to the complaint, his answers to the questions submitted by the Ombudsman, the information provided by the BMA and the findings of the examination of the ten case files. The National Ombudsman's conclusions and recommendations are given in Chapter 4.

[3] Council Resolution no. 1997 (2014).
[4] Pharos, written communication to the Parliamentary Standing Committee for Security and Justice, 31 March 2014.
[5] Advisory Committee on Migration Affairs, *Expertise getoetst*, The Hague, July 2012.

THE MEDICAL ADVISORS OFFICE (BMA)

2.1 When does the IND ask the BMA to provide an opinion?

Under the provisions of the *Vreemdelingenwet* (Aliens Act 2000) a person may be eligible for permanent or temporary resident status in the Netherlands on medical grounds. To determine whether this is the case, the IND needs the expert advice of a qualified medical practitioner. According to the guidelines issued by the KNMG, this advice cannot be given by the applicant's own treating physician, but must be obtained from an independent and impartial source. The BMA, which falls within the organisational structure of the Ministry of Security and Justice, fulfils the role of 'independent' medical advisor to the IND. It is expect to arrive at its own opinions, based in part on information provided by the treating physician.

On request, the BMA will advise the IND on all medical aspects which have some bearing on the decision to be taken further to the Aliens Act 2000. It also advises the Ministry of Security and Justice on medical matters relevant to general immigration and asylum policy, including the resettlement of refugees admitted to the Netherlands. It is for the IND to decide whether a person is to be granted leave to remain in the Netherlands on medical grounds. Before making this decision, the IND will wish to know whether the applicant is indeed suffering from any medical complaint, whether he or she is under treatment and, if so, what that treatment entails. If the applicant has a medical condition and is being treated in the Netherlands, the IND will then wish to know whether the discontinuation of treatment is likely to lead to an 'acute medical emergency in the short term'. An acute medical emergency is defined as a situation in which the person's condition is such that, based on current scientific knowledge, the discontinuation of treatment will lead to death, permanent disability or other serious physical or mental impairment. The working definition of 'short term' is a period of three months. If the BMA concludes that discontinuation of treatment would indeed give rise to an acute medical emergency in the short term, the IND will then ask the BMA to advise whether appropriate treatment is available in the applicant's country of origin. The IND may also ask the BMA's opinion as to whether the applicant is fit to travel.[6]

2.2 How does the BMA arrive at its opinions?

The IND requests the BMA to submit a medical opinion, and will submit a set of questions to which it seeks answers. Those questions relate to both the individual applicant and his or her country of origin. For example:

- Is the applicant suffering from a medical condition and, if so, what is the nature of that condition?
- Is the applicant under treatment for that condition and, if so, what does that treatment comprise? Is the treatment of a temporary or ongoing nature? If temporary, when will it be completed?

[6] BMA Protocol, October 2010; Journaal Vreemdelingenrecht, June 2014.

- Would discontinuation of the treatment give rise to an acute medical emergency in the short term?
- Is the applicant fit to travel? Are there any travel conditions which must be observed?
- If the applicant is not fit to travel, is this a temporary or permanent situation? When will he or she be able to travel?
- Is the treatment – in the general medical sense – available in the applicant's country of origin?
- What does the treatment in the country of origin comprise, and where is it given?

Based on information provided by the applicant and his or her treating physician in the Netherlands, the BMA attempts to build a complete picture of the medical condition concerned and the current treatment regime. The BMA can, at its discretion, require the applicant to attend an interview or examination conducted by one of its own medical staff. It may do so if the information provided by the treating physician is incomplete, out of date or contains any anomalies. The BMA may also decide to consult an independent expert, and will do so if the information provided by the treating physician is incomplete or if there is any reason to doubt its veracity.

Having formed an impression of the applicant's medical condition and treatment regime, the BMA will assess whether discontinuation of treatment is likely to lead to an acute medical emergency in the short term. If this is indeed the case, the BMA will then determine whether the necessary treatment is available in the applicant's country of origin. To answer the IND's questions about treatment opportunities in the country of origin, the BMA obtains information from 'medical advisors' (physicians practising in the country concerned), as well as from organisations such as International SOS and, since April 2014, Allianz Global Assistance.

The overseas medical advisors are recruited by the Ministry of Foreign Affairs. Their names, medical background and qualifications are not divulged and do not appear in any of the documents submitted to the applicant or his legal representative. The information received is checked by the BMA's international desk for completeness and currency, and is compared against past information from the same country. The documents which form the basis of the BMA's opinion are termed the 'source documents'. They state what medicines and treatments are available in the country of origin and where treatment can be provided. The source documents are appended to the BMA's formal opinion.[7] Any questions which the applicant or his legal representative may have about the content of the opinion must be submitted to the IND. If necessary, the BMA will ask the overseas medical advisor for additional information.

The BMA has access to another important source of information: the global network of medical staff contracted by International SOS. (Since April 2014 the BMA has also made use of the Allianz Global Assistance network. Because this organisation had no input in the cases examined during the National Ombudsman's investigation, its role falls outside

[7] Written communication from the State Secretary of Security and Justice, 5 September 2013, p.2.

the scope of this report.) International SOS is a commercial undertaking which has its roots in the insurance industry. It provides assistance to organisations whose staff work abroad, either as ‘expats’ or on business visits. According to the International SOS website, “we help to keep them [the employees] healthy and safe, so you can focus on your core business.” International SOS runs its own medical facilities in various countries and has a global network of helpdesks, the staff of which can help to source medical care services or arrange repatriation if necessary. International SOS refers the BMA’s questions to its own medical staff in the country concerned. In most cases, this is a country in which there is no medical advisor recruited by the Ministry of Foreign Affairs, there being too few residence permit applications to warrant having a permanent contact.

An example of the type of questionnaire which the medical advisors are asked to complete is given below.

ANSWER FORM
Medical Advisors
Immigration and Naturalisation Department
MINISTRY OF JUSTICE
- THE NETHERLANDS -

REQUEST NUMBER : _____

FROM :
Date
TO: Medical Advisors
FAX:
MAILTO:

LEVEL :

Answer on question(s):
1. 1. Is treatment and follow up by an internal specialist / nephrologists available in .? – **YES, we do have internal specialists and a few Nephrologists**
2. Is treatment and follow up by an ophthalmologist available? – **Yes**
3. Is treatment and follow up by a neurologist available? – **Yes**
4. Is haemodialysis available in ? – **Yes**
5. Is kidney transplantation possible in ? **at the hospital.**
6. Is the following medication available in
a. multi vitamin
- vitamin C — **Yes**
- vitamin B1– **Yes**
- vitamin B2– **Yes**
- vitamin B3– **Yes**
- vitamin B5– **Yes**
- vitamin B6– **Yes**
- vitamin B11– **Yes**
- vitamin D3– **Yes**

b. Etalpha (alphacalcidol) – **Yes**
c. labetalol– **Yes**
d. Calci-Chew– **Yes**
e. nexium– **Yes**
f. fosrenol– **Yes**
g. atarax– **Yes**
h. aprovel– **Yes**
i. volcolon– **Yes**
j. resonium– **Yes**
k. mimpara– **Yes**
l. neoRecomon– **Yes**

Please mention :
a. Whether there are problems with the medicines supply or not.- **These medicines are available in country**
b. The alternatives if one of more medicines are not available in the country. nil
c. The maximal time of delay if problems in delivery occur.- Nil

Please also mention the names and addresses of hospital / medical facilities / pharmacies where the above mentioned treatment is available. – Most hospitals, clinics and Pharmacies (public and private will have these drugs in the country).

Yours sincerely,

GEOGRAPHIC AREA
Country:

GEOGRAPHIC AREA
Country:
Specific Area / City(ies), if relevant:

2.3 The role of the BMA's opinion in the IND decision-making process

The IND officials who consider an application for a residence permit have no medical qualifications and are unable to arrive at a medical opinion unaided. The IND therefore requests the BMA to do so. Once it has received the medical opinion, the IND proceeds to decide whether to grant the applicant leave to remain the Netherlands. The IND has a written procedure which sets out the steps in obtaining a medical opinion from the BMA, together with instructions relating to the information requirement in each case.[8] There are standard questionnaires (see illustration above) with a limited number of equally standard questions. The IND rarely seeks answers to questions which do not appear on the form. If the applicant's medical situation changes over time, the IND will request the BMA to submit a new or supplementary opinion. It will also do so if the opinion on which it must base a decision is more than six months old.

According to instructions issued by the government in 2000,[9] the IND's decision should be based solely on the *availability* of appropriate medical treatment in the country of origin. Whether that treatment is actually *accessible* to the individual applicant is seen as irrelevant and is not assessed. In practice, the accessibility of treatment can be subject to a number or limitations and restrictions, including non-medical factors such as cost, location, safety and politics. On 30 January 2014, the State Secretary attended a general consultation session at the House of Representatives during which he was asked whether he would be willing to include the accessibility of medical treatment to the individual in the assessment procedures.[10] The State Secretary replied that he was not, because it is not possible for the IND or the BMA to arrive at an objective evaluation of an individual's access to treatment or care services. He went on to state that this relies on many factors, including cost and physical accessibility (is the patient able to travel to the hospital at which treatment is available?), which in turn rely on a complex combination of factors such as the health insurance system and transport infrastructure of the country concerned, as well as the individual's personal circumstances.

Article 3:2 of the *Algemene wet bestuursrecht* (General Administrative Law Act 1992) requires a government body to obtain all necessary information relating to facts and the interests to be considered before arriving at any formal decision. Accordingly, the IND must satisfy itself that the BMA's advice has been prepared with due care and attention, and that the contents of the resultant opinion are clear and conclusive. The IND subjects the BMA's medical opinions to rather cursory scrutiny to assess whether the BMA has acted impartially and has provided all required information, citing its sources. The IND should also ascertain that there is no apparent reason to doubt the veracity of that information. In practice, the IND automatically assumes that the medical advice is indeed impartial, since the medical advisor limits himself to answering the questions put before him, doing so on the basis of professional autonomy (as expressly stated in the BMA protocol). With regard to the acknowledgement of sources, the BMA merely indicates the

[8] IND working instructions, no 2003/17 (AUB).
[9] Vreemdelingencirculaire 2000, section B8/9.1.7.
[10] Parliamentary Proceedings 2013-2014, 19637, no. 1798, p. 33.

nature of the source, e.g. a designated medical advisor in the country concerned or International SOS. It does not identify the source by name. The IND assumes that an opinion is complete and accurate, even though it does not know the precise source of the key information and has no indication of the background or qualifications of the persons who have provided it. A copy of the BMA's opinion (including the source documents) accompanies the notification of the IND's decision which is sent to the applicant or his legal representative. An unsuccessful applicant is entitled to lodge an 'objection' with the IND itself. If the IND declines to reverse its decision, the applicant has the right of appeal whereupon the case will be considered by the courts. The administrative law division of the Council of State has ruled that it is for the court to determine whether the IND has taken adequate measures to ascertain the accuracy and impartiality of a BMA advisory report, whereby the burden of proof lies with the appellant in the absence of any counter expertise.[11]

[11] ABRvS 13 October 2010, no. 201001245/1 and 14 November 2014, no. 201406143/1.

THE INVESTIGATION

3.1 Introduction

Following receipt of the complaint about the procedures and methods of the BMA, members of the National Ombudsman's staff visited the BMA's offices in The Hague. The National Ombudsman then brought the complaint to the attention of the State Secretary of Security and Justice, requesting his response. For reasons of privacy and medical confidentiality, the State Secretary declined to comment on the individual cases put forward by the complainant. The Ombudsman's staff therefore requested, and were granted, access to the relevant IND files. To gain a more complete impression of the situation, they were also granted access to five further case files, selected by the IND itself.
This chapter presents the standpoints of the complainant and the response of the State Secretary, followed by a summarised account of the discussions with the BMA. It concludes with a consideration of the evidence provided by the case files.

3.2 The complainant's standpoints

The complainant is an immigration lawyer. In support of her complaint, she presented five cases drawn from her own practice. Her contentions are given below, here in translation.

<u>The BMA</u>
The complainant holds that the current organisational structure of the BMA is not fit for purpose. She states that the BMA relies on the expertise of (external) insurance company doctors who offer opinions on very specialised medical matters, basing their conclusions on information from anonymous sources of unknown quality. The complainant believes that the BMA must modify its procedures and methods to arrive at a situation in which its opinions can be seen as both expert and reliable.
The BMA currently relies on information provided by medical advisors working in an applicant's country of origin. Their identity is unknown, as are the sources of their information. The complainant alleges that the information they provide is frequently unclear or incorrect. She finds nothing to suggest that the BMA attempts to verify the information it receives in a given case. The frequency with which the BMA re-evaluates the reliability of any particular medical advisor is unknown, as is how it would go about doing so. In the complainant's view, the BMA should be required to provide full transparency with regard to the expertise, qualifications, professional affiliations and specialisms of its sources. She understands that there are good reasons to preserve the anonymity of the doctors concerned, but contends that it is possible to provide relevant information without revealing their identity. The complainant also draws attention to the lack of clarity with regard to the remuneration of medical advisors. Are they paid a fee for each form completed, by the hour or day, or on a retainer basis? This, she submits, is extremely pertinent since a doctor whose income relies on payments from the BMA may be more inclined to report whatever information is likely to find greatest favour.

Finally, the complainant refers to the difference between availability and accessibility. A treatment which is available to some people in the country concerned may not be accessible to all citizens. If it is possible that an individual applicant will not have access to appropriate treatment in his or her country of origin, this should be expressly stated in the BMA opinion. At present, the assessment is confined to the availability of treatment in theory, with no consideration of whether it is accessible in practice.

The IND and the verification requirement

The complainant contends that the burden of proof with regard to the accuracy and completeness of a medical opinion should not rest with her clients. Rather, those clients should be able to assume that the IND has verified and corroborated the BMA's findings with regard to the availability and accessibility of treatment in their country of origin. This is particularly important given that the clients are suffering from serious, life-threatening conditions. They are vulnerable and oversights could prove fatal. The complainant asserts that the IND should satisfy itself beyond any reasonable doubt that an opinion produced by the BMA has been prepared with all due care and attention. Further to Article 3:49 of the General Administrative Law Act, it must also assess whether the resultant opinion is complete and conclusive. At present, the complainant contends, the IND does not take appropriate measures to ensure that this is the case. The IND relies on the opinion of the BMA, which in turn relies on the information provided by a foreign doctor or International SOS. The accuracy and reliability of that information cannot be readily ascertained.

Fitness to travel

In some cases, the IND will ask the BMA to determine whether an applicant is fit to travel. The BMA may state that he or she can indeed travel provided certain conditions are met. One such condition might be that the applicant is transferred directly to a hospital at which the required treatment is provided. If the BMA merely states that the required treatment is 'generally' available in the country of origin, the IND is inclined to assume that this condition *can* be met; it does not consider whether it *will* be met in practice. It falls to another government agency, the *Dienst Terugkeer & Vertrek* (Repatriation and Departure Service; DT&V) to examine whether the travel conditions recommended by the BMA can be met when a foreign national is to be repatriated or expelled. As the complainant points out, the question of whether someone should be granted leave to remain in the Netherlands and that of whether he or she should be repatriated are therefore separated. A foreign national who is declined a residence permit finds himself in a grey area if the DT&V decides that it is not possible to meet the travel conditions. He then has no legal entitlement to remain in the Netherlands but cannot be removed.

Funding of care in other countries

When determining whether the discontinuation of treatment would result in 'an acute medical emergency in the short term', the IND generally defines 'short term' as a period of three months. The complainant has been unable to determine the basis for this definition. She states that the Dutch government will sometimes pay the costs of treatment in the country of origin for a period of three months. She asks what will happen

to the patient once that period has expired. In the current situation, in which it falls to the DT&V to ensure compliance with the travel conditions, the DT&V is authorised to make arrangements, including the financial arrangements, for treatment and care in a private hospital. The foreign national is repatriated to his country of origin and transferred directly to that hospital. After three months, the hospital will discharge the patient if there is no money for further treatment. The complainant suggests that the government's funding of treatment abroad is a matter of expediency which pays only lip service to humanitarian responsibility. The only thing it accomplishes is to defer by three months the moment at which a person who has been removed from the Netherlands does indeed face an 'acute medical emergency'. In the complainant's opinion, this practice places the Netherlands in direct contravention of Article 3 of the European Convention on Human Rights.

3.3 Response of the State Secretary of Security and Justice

Medical advisors in other countries

In response to the National Ombudsman's investigation, the State Secretary of Security and Justice provided the following information (here in translation).

Medical advisors in other countries are recruited by the Ministry of Foreign Affairs. At the BMA's request, the ministry will contact the Dutch embassy in the country concerned and ask mission staff to select one or more suitable candidates. The BMA has the final decision in the appointment. The BMA enters into a contract with the medical advisor. A candidate for the role must:

- be reliable
- practising in the country concerned
- have a network of professional contacts within various medical specialisms
- have a reasonable command of English
- have enough time to answer the BMA's questions
- have access to appropriate communications resources (such as email or fax).

In general terms, the selection criteria and the specialisms represented by the medical advisors as a group are public information. Detailed information regarding the background or expertise of any individual can not be made available for reasons of privacy. In many cases, it would be possible to identify a medical advisor based solely on a brief curriculum vitae, according to the State Secretary. It is possible that he or she would then face intimidation or repressive measures from the authorities in the country concerned, as well as the disfavour of the relatives of failed asylum seekers and the general community. Identifying a medical advisor in any way could prevent him from practising his profession without fear of personal consequences. Accordingly, the State Secretary is not willing to reveal any information which would serve to identify a medical advisor. Information which might identify other sources who have been approached by either the medical advisors or International SOS is also to remain confidential for reasons of privacy.

The questions which the BMA puts to a medical advisor can relate to virtually any medical specialism. If the advisor is knowledgeable about the treatment options that exist in his country, he may answer the questions himself. If not, he is expected to consult his

professional contacts. All medical advisors are qualified doctors who practise in the country concerned. The written information that they and International SOS provide (the 'source documents') are included with the written opinion which the BMA submits to the IND. Because applicants and their legal representatives also have access to this report, the State Secretary contends that full transparency is provided: they see the information as it was originally presented to the BMA. The completeness and currency of that information is verified by the BMA, and the information is compared to that derived from the same country in the past.

Travel conditions

The State Secretary confirms that the BMA can include 'travel conditions' as part of its recommendations. One example of a travel condition is that the asylum seeker must be transferred immediately to a clinic or hospital in the country of origin ('physical transfer'). When considering the application for leave to remain in the Netherlands, the IND must satisfy itself that, if leave is not granted, the applicant can be repatriated in accordance with all conditions stated by the BMA. It must not defer doing so until repatriation is imminent. If 'physical transfer' is indeed one of the conditions in the BMA's advisory, the IND's decision might include the name of the clinic or hospital which is to be approached to arrange the transfer. Where it is clear that the travel conditions cannot be met, the IND must give a firm undertaking that the applicant will not be repatriated. According to the State Secretary, the IND's obligation to verify whether the conditions will be met does not extend to making any firm arrangements or guaranteeing the transfer at the time of making its decision. Responsibility for fulfilling the travel conditions rests with the DT&V. If it is not possible to do so, the repatriation will not proceed. The DT&V will then request the IND to grant the person concerned leave to remain in the Netherlands.

Accessibility of treatment

The State Secretary asserts that the Dutch government is bound by jurisprudence handed down by the European Court of Human Rights, whereby it is obliged to assess the availability of treatment in the country of origin. However, it is not obliged to assess the accessibility of treatment, i.e. whether it is available to a specific individual. The IND does not take accessibility into account in its decision-making. The State Secretary cites a number of reasons. First, the Netherlands has an excellent health care system compared with those of many other countries. The Dutch government cannot resolve the differences between the quality of health care here and the quality elsewhere in the world. Moreover, any attempt to arrange individual access to treatment in another country would create unjust situations, or even a precedent, with regard to other people in that country who have not applied for resident status in, or even visited, the Netherlands. Second, determining whether the individual will have access to treatment requires a consideration of several non-medical factors, such as that person's financial situation and where he or she is domiciled, which may be at some considerable distance from a location at which the treatment is available. Any such assessment would be arbitrary in nature; it is extremely difficult for either the IND or the BMA to determine reliably and objectively whether an individual will indeed have access to treatment. Third, the State Secretary cites a significant complicating factor. Much time can elapse between the date

on which the IND makes its decision and the actual repatriation of an unsuccessful applicant. At the time of the decision itself, it is not known when the applicant will arrive back in the country of origin. It is therefore impossible to give any guarantee that he or she will have access to care at that time. It is possible that the medical situation in the country of origin will change during the intervening period, and equally possible that the applicant's medical condition will worsen or improve to a material degree.

The State Secretary nevertheless wishes to act upon the Dutch Safety Board's suggestion that the limits of the government's responsibility should be reviewed and reassessed. He has announced an international comparative study to examine how other countries take account of economic, geographic and political factors when assessing the availability and accessibility of treatment elsewhere in the world. Based on its findings, the State Secretary will explore opportunities to include some assessment of accessibility in the IND's decision-making process and the repatriation procedures. The results of this study are expected in 2015.

Funding of treatment

During the round table discussions organised by the Dutch section of the International Committee of Jurists for Human Rights (NJCM), it was asserted that the DT&V will, in certain cases, pay for the treatment given to a person who has been repatriated from the Netherlands following the refusal of a residence permit on medical grounds.[12] This claim prompted a member of the House of Representatives to question the State Secretary on the matter. The State Secretary replied that the DT&V will make appropriate arrangements to fulfil any and all travel conditions recommended by the BMA, and will guarantee that those conditions will be met before the person concerned is repatriated. If the BMA's travel conditions include 'physical transfer', whereby the person is taken directly to a clinic or hospital in the country of origin, the DT&V will indeed make agreements with the relevant health care provider. The DT&V is authorised to offer appropriate support to ensure that the required medical treatment is made available for a period of up to three months with a view to averting an 'acute medical emergency'. Once this three-month period has elapsed, the patient himself or herself is responsible for the continuation of treatment, including the payment of its costs.

3.4 Information received from the BMA

The BMA has provided the following information in response to questions submitted further to the National Ombudsman's investigation.

There are twenty countries in which one or more medical advisors are active on behalf of the BMA. They are: Afghanistan, Angola, Armenia, Azerbaijan, Burundi, Bosnia-Herzegovina, Cameroon, Egypt, Georgia, Ghana, Guinea, Indonesia, Iran, Morocco, Nigeria, Sudan, Suriname, Turkey, Syria and Ukraine. The fee paid to a medical advisor for providing information is between €100 and €200 on each occasion, depending on the number of questions asked and the urgency of the request.

[12] Report of round table discussion *'Het Bureau Medische Advisering: experts in gesprek*'. 29 November 2013.

The staff of the BMA's international desk includes a qualified doctor in the role of medical documentation researcher, as well as a graduate assistant who works under that doctor's supervision. The medical opinions submitted to the IND are currently produced by a group of twelve qualified doctors, of whom eight are registered as social health physicians (the majority being insurance doctors). Over eighty per cent of opinions are prepared by doctors engaged by two external consultancies. These doctors have no employment relationship with the BMA and are free to work for other clients. The other four doctors hold degrees in general medicine, represent various backgrounds and have considerable experience in an advisory role. Three doctors have over ten years' experience in advisory work of this nature. role. One is a former general practitioner and company medical officer, another has over ten years' experience as a general practitioner as well as experience working with the Health Care Insurance Board (CVZ, now known as the National Health Care Institute), one has experience in psychiatry and holds a Master of Public Health degree, while one is an experienced neurologist and has also studied forensic medicine. The BMA maintains a database of medical information collated from answers given by the international medical advisors in the past.

The BMA obtains information about a permit applicant's diagnosis and current treatment regime from his or her treating physician in the Netherlands. This information is reviewed by one of the medically qualified BMA staff. If it is found to be incomplete or out of date, the BMA will contact the treating physician for clarification. If there is any doubt concerning the diagnosis or the reliability of other information, the BMA may consult an external specialist. Once the diagnosis and treatment requirement have been established, the BMA doctor will determine whether the discontinuation of treatment is likely to result in an 'acute medical emergency in the short term.' If this is the case, the next question is whether the required treatment is available in the applicant's country of origin. This is one of the questions put to the relevant international medical advisor. The BMA does not ask for the precise names or locations of health care providers able to provide the treatment. This line of enquiry is restricted to the type of health care provider (e.g. hospital, pharmacy, psychiatrist, cardiologist). In many cases, the international medical advisors do name specific institutions but this is not a requirement.
In certain situations, the BMA may decide to discontinue its contacts with a particular medical advisor. This would be the case if the advisor:
- no longer has time to complete the requested questionnaires and reports
- regularly takes too long to return the requested information
- has ceased to practise in the country concerned.

If the information provided by an international medical advisor is found to be incorrect, the BMA will first attempt to ascertain the reasons for the errors or omissions, and will then revise its medical opinion in accordance with the correct information. The BMA reports that there have been very few instances in which the information provided has later been found to be incorrect and it has not been necessary to terminate a relationship with an international medical advisor on these grounds.
During the interviews with the National Ombudsman's staff, the BMA did however concede that the medical opinions could be better substantiated, i.e. more detailed information can be given about the basis for the conclusions reached.

The BMA assumes that the information received from an international medical advisor is reliable, since that advisor is a qualified professional and the selection procedure devotes attention to reliability. An advisor is not asked to state whether he has answered the BMA's questions himself or has referred them to someone else. Where a medical advisor has approached someone from within his professional network, the BMA makes no attempt to establish the reliability of this third party. Indeed, it cannot do so because, as noted above, it does not even know of the third party's involvement.

3.5 Examination of case files

The complainant referred to five cases from her own practice in support of her contentions. Staff of the National Ombudsman requested, and were granted, access to the IND files relating to these cases. In order to arrive at a fair assessment of the complaint, the National Ombudsman considered it important to acquire a broader knowledge of the procedures and practices of the IND. A further five case files, selected by the IND, were therefore subject to the same level of scrutiny. The examination of the case files nominated by the complainant revealed the following information.

Richard is 40 years old. He comes from Cameroon and is HIV-positive. Richard has been living in the Netherlands for many years, having obtained a provisional residence permit on medical grounds which has been extended on numerous occasions. Richard's treatment regime comprises regular physical examinations by an internist, various blood tests and medication. This treatment is permanent in nature; Richard can not be cured. If the treatment is discontinued, Richard will die. The IND has extended his residence permit in the past because the drugs he needs are not available in Cameroon. When the latest permit was about to expire, Richard applied for a further extension on medical grounds. The IND requested the BMA to submit a medical opinion. The BMA had no direct contact with Richard but sought information from the internist who is treating him in the Netherlands, as well as from a medical advisor in Cameroon, who was asked whether the medication which Richard takes is available in that country. According to the medical advisor, it is indeed available in Cameroon but only in combination with another drug. Based on the information provided by the medical advisor in Cameroon, the BMA arrived at the conclusion that the medication Richard needs is indeed available in his country of origin. The IND then denied a further permit extension, referring to the BMA's opinion.

Richard's legal representative lodged an objection against this decision, citing medical grounds. She believes that the BMA is wrong to claim that Richard can receive appropriate treatment in Cameroon. She points out that the medication he has been prescribed is not available except as part of a 'cocktail therapy' which includes another drug. Richard has not been prescribed that drug. According to his internist, he could suffer adverse health effects were he to take it. The lawyer therefore contends that the only possible conclusion is that the drug Richard needs is not available in Cameroon. She believes that the BMA arrived at an erroneous conclusion because the staff member assessing the case is not an expert in the treatment of HIV. Based on her arguments, the

IND allowed the objection and granted Richard a residence permit on medical grounds. Internal IND documents reveal that this decision was made because the drug he takes is not available separately in Cameroon. The IND conceded that Richard should not be expected to start taking the combination therapy, since the effects he might experience from the other drug remain unknown.

Kojo is 40 years old, comes from Ghana and has lived in the Netherlands for many years. He suffers from a number of health complaints, including severe renal deficiency: kidney failure. Kojo receives treatment from an internist in the Netherlands. The treatment regime includes various drugs, regular physical examinations and dialysis three times a week. The treatment is permanent in nature: without it, Kojo would die. Kojo needs a kidney transplant; for which the preparations have already begun. Kojo has held a provisional residence permit on medical grounds for several years. His latest application for an extension was rejected by the IND further to the BMA's medical opinion.
According to the BMA, the treatment that Kojo requires is available in Ghana. Surgeons in that country have performed two kidney transplants. Kojo's lawyer lodged an objection to the IND's decision, arguing that that a grand total of two kidney transplants is not sufficient to conclude that the operation is a treatment option for her client. She also pointed out that both operations were performed by a team which included British surgeons who had flown to Ghana specifically for the purpose. The objection letter refers to an earlier BMA opinion in another case, which states that Ghana does not have adequate provisions for haemodialysis. The IND allowed the objection and extended Kojo's residence permit. The decision was based in part on the discovery that only *one* kidney transplant had been performed in Ghana, with assistance from foreign surgeons. Accordingly, the IND concluded that a kidney transplant is not a realistic treatment option in Kojo's country of origin.

Aba is 37 and comes from Ghana. She is HIV-positive and must attend a consultation with her internist three times a year. Her further treatment comprises regular blood tests and medication. This treatment regime is permanent in nature: if it is discontinued, Aba will die. Aba applied for a provisional residence permit on humanitarian (medical) grounds. The IND then requested a medical opinion. The BMA concluded that the treatment Aba needs is available in Ghana. According to the BMA, one of the drugs which she has been prescribed is available 'on order'. The IND rejected Aba's permit application. Her lawyer lodged an objection, asserting that the drug in question must be imported and cannot therefore be deemed to be 'available' in Ghana. Moreover, there is no guarantee that the drug will reach Aba in time. The BMA then revised its opinion, conceding that the drug in question is not 'adequately' available in Ghana. It must be ordered from another country and delivery times are uncertain. The IND allowed the objection and granted Aba a provisional residence permit on medical grounds.

Some time later, Aba applied for the permit to be extended. The IND rejected the application on the grounds that the treatment she needs is available in Ghana. It based this decision on a new BMA opinion which stated that, although the proprietary medication which Aba has been prescribed is not available in Ghana, its chemical

constituents are available, whereupon it would be possible to have the prescription filled by a compounding pharmacist. Aba's lawyer lodged an objection to the IND's decision, again asserting that the medication actually prescribed to Aba must be imported from another country and it is therefore not possible to claim that it is available in Ghana. The IND allowed the objection and extended Aba's residence permit. The case files reveal that IND staff were not satisfied that the information on which the BMA had based its opinion was correct, due to inconsistencies between the sources. They appeared to contradict each other. The production of a revised medical opinion would take many months, whereupon the statutory period in which the IND must return its decision on the objection would elapse. Because the lawyer had indicated that she was prepared to take the matter to court, the IND allowed the objection and extended Aba's residence permit on medical grounds.

Bina and Devi are sisters, nine and eleven years old, from Nepal. Both suffer from an auto-immune disorder and are under the treatment of a paediatrician in the Netherlands. Their treatment regime comprises thyroid hormone replacement and specialised, complex blood tests. The treatment is permanent in nature. If it is discontinued, Bina and Devi will suffer serious physical effects and could die. Bina and Devi applied for a residence permit on medical grounds. The IND asked the BMA for an opinion. Based on information obtained from International SOS, the BMA concluded that the treatment required by the sisters is available in Nepal. The opinion names four hospitals at which the treatment could be given. The IND rejected the permit application.

The girls' legal representative lodged an objection. The foster parents who care for Bina and Devi had themselves investigated whether appropriate treatment opportunities exist in Nepal. Based on their efforts, the lawyer was able to produce a statement written by a doctor working at one of the four hospitals named by the BMA, which confirms that the treatment that Bina and Devi need is *not* available anywhere in Nepal, and that the blood tests which form part of the monitoring regime cannot be performed. The lawyer was able to produce further statements to the same effect, all made by qualified medical practitioners. The IND passed the information provided by the lawyer to the BMA, which in turn made enquiries with International SOS, its source. This organisation was found to have made a serious error with regard to the availability of the blood tests, and now conceded that they could not be performed in Nepal. Both International SOS and the BMA apologised for this mistake. The IND allowed the objection and granted both sisters leave to remain in the Netherlands.

Lulu is a 46-year-old woman from Ghana who has lived in the Netherlands since the 1990s. She has a progressive neurological disorder and is gradually losing the use of her arms and legs. This degenerative condition is irreversible and will eventually lead to complete disability. Lulu is under the treatment of a neurologist and takes medication. The treatment is permanent in nature. Lulu applied for a residence permit on medical grounds. The IND asked the BMA to submit a medical opinion. The BMA concluded that discontinuation of Lulu's treatment would not give rise to an acute medical emergency in the short term. Based on this opinion, the IND rejected her application. Lulu lodged an

objection. During the consideration of that objection, the BMA produced no fewer than six further medical opinions. The IND dismissed the objection as ungrounded, whereupon Lulu's only recourse was to appeal through the courts. During the appeal process, the BMA produced its eighth opinion, based on which the court allowed her appeal and instructed the IND to issue a residence permit on medical grounds. The entire process from the initial application to actually receiving the residence permit took over four years.

The various reports produced by the BMA in this case can be summarised as follows. Both the first and second reports conclude that discontinuation of treatment would not result in an acute medical emergency in the short term. By contrast, the third report concedes that an acute medical emergency would be possible. This is because, in addition to her existing complaints, Lulu had now begun to hear voices instructing her to self-harm. However, the BMA advised that appropriate treatment for this psychosis was available in Ghana. The lawyer then notified the IND that Lulu is heavily dependent on informal care provided by her social network in the Netherlands. The IND once again turned to the BMA. The fourth BMA opinion states that, based on the information available, it was not possible to confirm that Lulu is dependent on informal care to any significant degree.

In the fifth BMA opinion, we read that Lulu is now wheelchair-dependent and is in residential care receiving treatment from a physiotherapist, an ergotherapist, a psychologist and a social worker, as well as her GP and neurologist. The BMA now states that she is indeed dependent on informal care if she intends living at home, going on to suggest that admission to a nursing home is now the preferred option. However, the BMA once again contends that all necessary care is available in Ghana, at a named nursing home. This report does not examine whether informal care is available in Ghana since, almost by definition, this falls outside the medical advisor's sphere of competence. In response to this fifth BMA opinion, the lawyer pointed out that the named location is not a nursing home. She refers to an earlier BMA report produced in another case, which expressly states that the location in question is not a nursing home. The sixth BMA opinion agrees that it is indeed not a nursing home: it is an organisation which provides domiciliary care, i.e. support to patients living in their own homes. The BMA goes on to name another nursing home which would be able to provide the care that Lulu needs. As the lawyer was able to point out, this location had closed two years earlier. In the seventh opinion in the series, the BMA once again concludes that all Lulu's care requirements can be met in Ghana and lists a number of health care providers. Lulu's lawyer duly researched the organisations on the list, and found that none offered residential nursing care. This information was relayed to the BMA, prompting the production of its eighth and final opinion. The BMA now notes that a large number of residential care facilities in Ghana had recently closed due to various irregularities, whereupon existing residents have been placed in emergency care or returned to their families. For this reason, it would not now be possible to transfer Lulu directly to a nursing home in Ghana. Based on this conclusion, the IND finally granted Lulu a residence permit on medical grounds.

In addition to the five cases put forward by the complainant, staff of the National Ombudsman's office examined five case files selected by the IND itself in order to gain a more complete impression of the issues involved. The contents of these files may be summarised as follows.

Zada is an elderly woman from Azerbaijan. She suffers from hypertension, generalised pain, chronic depression and post-traumatic stress disorder (PTSD). She is under treatment from her GP and the local mental health care service (GGZ). She has been prescribed medication. Zada submitted an application for 'deferment of departure' on health grounds, as provided by Article 64 of the Aliens Act 2000. The IND sought advice from the BMA, which concluded that the discontinuation of treatment would not give rise to an acute medical emergency in the short term. With regard to Zada's fitness to travel, the BMA found no objection but indicated that continuation of treatment would be 'desirable', whereupon it would be prudent to allow her to take an ample supply of medication with her (e.g. enough for one month). According to the BMA, all elements of Zada's existing treatment regime, including the prescription drugs, are available in her country of origin. The case file reveals that one specific drug which Zada had been prescribed is no longer available in Azerbaijan, although there are various alternatives. The IND rejected Zada's application for a deferment on the basis of the BMA's advice. She then lodged an objection, whereupon the BMA produced a second opinion. This reiterates that the discontinuation of treatment would not lead to an acute medical emergency in the short term, but goes on to state that 'organ damage could be expected in the longer term'. The BMA recommends that Zada should take her medicine with her when she travels back to Azerbaijan. In this second opinion, the BMA does not state whether the treatment Zada was receiving in the Netherlands would also be available in her own country, since it had already concluded that discontinuation of the treatment would not lead to serious adverse effects in the short term. Based on this opinion, the IND rejected Zada's objection and refused a deferment of departure.

Barta is a young girl of around three or four years old. She is from Armenia and suffers from post-traumatic stress disorder. She is being treated by a psychologist. An application for deferment of departure on medical grounds was submitted on Barta's behalf. The IND sought the advice of the BMA, which concluded that the discontinuation of treatment would "in all likelihood" not lead to any acute medical emergency in the short term. This statement appears to be based on the fact that Barta had not been admitted to a psychiatric institute, did not show any symptoms of psychosis, and there had been no other significant crises such as a suicide attempt. The IND rejected the deferment application, referring to the BMA opinion. The objection to this decision was unsuccessful.

Obi is a Congolese man in his late thirties. He suffers from PTSD, a psychotic disorder and suicidal ideation. He is being treated by a psychiatrist and receives ongoing support from a psychiatric nurse. He has been prescribed medication. Obi submitted an application for deferment of departure on health grounds. The IND requested advice from the BMA, which stated that an acute medical emergency in the short term could not be excluded if Obi's treatment were to be discontinued, and that the opportunities for appropriate treatment in Congo were inadequate. Moreover, supplies of pharmaceuticals in Congo are erratic, leading to shortages of certain drugs which often take weeks to resolve. Accordingly, the IND granted the requested deferment, meaning that Obi was allowed to remain in the Netherlands for one year. Towards the end of that period, Obi once again applied for a deferment under Article 64 of the Aliens Act 2000, and the BMA was again asked to produce a medical opinion. As before, the BMA stated that an acute medical emergency in the short term could not be excluded were Obi's treatment to be discontinued. On this occasion, however, the BMA reported that treatment by a psychiatrist and a psychologist was available in Congo, as was the medication he had been prescribed. Based on this opinion, Obi's second application for a deferment was denied.

Davu is a man in his late thirties from Cameroon. He is HIV-positive and has lived in the Netherlands for a number of years, having been granted a provisional residence permit on medical grounds. Davu takes prescription medication and in the past has developed a high level of resistance to certain drugs, which are then ineffective. For this reason, he must be tested regularly to ascertain whether he has developed any resistance to his current medications. When Davu applied for his residence permit to be extended, the BMA was asked to produce a medical opinion. This states that discontinuation of treatment would (definitely) give rise to an acute medical emergency in the short term. On this occasion, the BMA stated that treatment opportunities in Cameroon were inadequate, since there were no facilities for the resistance tests. Based on this advice, the IND granted an extension to Davu's residence permit on medical grounds.

Eventually, Davu once again had to apply for a further extension. The BMA opinion produced on this occasion notes that Davu is at risk of developing resistance to certain drugs. His treating physician in the Netherlands informed the BMA that Davu needs access to modern 'state-of-the-art' drugs, and that he can only be treated effectively in a well-equipped HIV centre in which access to such drugs is guaranteed on a daily basis.

The BMA concluded that the discontinuation of treatment would give rise to an acute medical emergency in the short term. However, the opinion goes on to state that treatment is available in Cameroon, although certain drugs, including the modern varieties recommended by the internist, are not 'immediately' available. According to the BMA, they can be ordered with a delivery time of approximately one week. The BMA points out that these drugs are expensive. Based on this latest opinion, the IND refused Davu's extension application. Davu lodged an objection, whereupon the BMA produced a further opinion. Once again, it states that discontinuation of treatment would give rise to an acute medical emergency in the short term. It now concludes that treatment opportunities in Cameroon are *not* adequate, based on the fact that the modern drugs and in particular the medication that Davu has been prescribed are not readily available. Based on this latest BMA medical opinion, the IND allowed Davu's objection and extended his residence permit on medical grounds. Some time later, Davu once again applied for an extension, and the IND again approached the BMA for a formal medical opinion. As before, it states that discontinuation of treatment would lead to an acute medical emergency in the short term, that the treatment options in Cameroon are not adequate, that the prescribed medication is not readily available, and that no viable alternatives exist. The opinion does not consider whether other modern drugs are available in Cameroon; it confines itself to the particular medication which Davu had been prescribed. The extension application was granted.

Tene is an elderly woman who claims to be of Somali nationality. She suffers from diabetes and hypertension, as well as a recurrent inflammation of the salivary glands, gastric complaints, back ache and cramp in her hands and feet. Tene is being treated by her GP and takes prescription medication. Tene applied for a deferment of departure under Article 64 of the Aliens Act 2000, whereupon the IND requested the BMA to produce a medical opinion. This states that there is no reason to believe that discontinuation of treatment would lead to an acute medical emergency in the short term. According to the BMA, the medication Tene takes to control her blood glucose level is at a low dosage, whereupon its discontinuation would have little or no adverse effect in the short term. The same applies to all other drugs she has been prescribed: there will be no serious decline in health even if she does not take them. The IND rejected Tene's application. She subsequently lodged an objection to this decision, which was also rejected.

THE NATIONAL OMBUDMAN'S ASSESSMENT

4.1 Introduction

A foreign national's state of health can have a major bearing on whether the Immigration and Naturalisation Service (IND) will grant a residence permit or a 'deferment of departure' (allowed if a course of treatment is expected to be of less than one year's duration). IND officials are not medically qualified. Where an application is made on medical grounds, the IND will in most cases ask the Medical Advisors Office (BMA) to produce an opinion, whereby the central question is whether the discontinuation of treatment will lead to 'an acute medical emergency in the short term'. If so, the BMA is expected to indicate whether appropriate treatment is available in the applicant's country of origin. If it is, the application will be refused. The BMA's opinion is therefore of crucial importance in the IND's decision-making process, and hence to the individual applicant. The National Ombudsman has received a complaint which contends that the medical opinions produced by the BMA advisory reports are not based on reliable, expert knowledge but on anonymous information of uncertain origin and dubious quality.

4.2 Fair and responsible government action

If a sick foreign national is repatriated to a country in which the necessary medical treatment is not available, he or she could suffer serious adverse health impact, permanent disability or even death. It is therefore crucial that the process by which the IND assesses any application for leave to remain in the Netherlands on medical grounds is thorough and scrupulous at every stage. The same applies to the production of the medical opinions by the BMA. Both bodies must observe the statutory requirement of 'good preparation', as intended by the General Administrative Law Act 1992.

In this report, the National Ombudsman examines how the IND and BMA can meet the requirements of good, thorough and conscientious decision-making, whereby we are primarily concerned with ensuring a fair and just process as prescribed by the legislation. We offer a number of principles which, if duly observed by the IND, are likely to enhance the perceived quality of BMA opinions, and hence support for decisions based on its reports. In this assessment, the National Ombudsman devotes particular attention to the 'thorough and conscientious' preparation of a decision as defined and required by legislation. It must be emphasised that it is not for the Ombudsman to question or comment on the IND's decision in any individual case; only the courts can decide whether that decision was just and correct.

Investigation by the BMA

To meet the requirement of 'good preparation', a government body must obtain all information needed to arrive at a fair and balanced decision. In the case of the BMA, this entails ensuring that the information it gathers from various sources can be verified, and that it can provide due accountability. The BMA's role is that of expert advisor to the IND.

Its findings and recommendations must be impartial and objective, the process by which information is gathered must be transparent, and the sources of that information should be given. The resultant report – the 'medical opinion' - should explain how the BMA has arrived at its conclusions. What is the evidence base? Where the opinion states that the discontinuation of treatment will or will not lead to an acute medical emergency in the short term, the reasons for arriving at this conclusion should be explained. Moreover, it is reasonable to expect the BMA to treat the information it receives from its sources, whether the medical advisors in other countries or the International SOS, with a degree of caution. It is not appropriate to assume that such information will always be complete, accurate and reliable.

To determine the availability of certain medical treatment in another country, the BMA relies on information provided by its own network of medical advisors or the medical staff affiliated to the International SOS organisation. The National Ombudsman accepts the State Secretary's view that it is neither necessary or appropriate to reveal the identity of an individual medical advisor to the person applying for leave to remain in the Netherlands. Nevertheless, that person should be able to verify the accuracy of the information obtained from such sources. This is not possible unless it is clear how the source has arrived at the information: what research or investigation has been conducted? Only when this is fully transparent can we speak of any 'equality of arms'. For this reason, the National Ombudsman holds that is necessary and appropriate to reveal precisely what the source has done in order to answer the questions submitted by the BMA. This will entail the production of a factual report of all actions taken to arrive at the information on which the BMA's medical opinion is based. Such a report would, for example, state that the medical advisor telephoned a certain hospital at a certain time to enquire about the availability of a certain treatment option, and it would give a complete account of that hospital's reply.

In the report, the medical advisor should also state whether he has answered the questions based on his own knowledge or has consulted a third party. The applicant should be informed of the relevant qualifications and experience of the medical advisor or the third party concerned. Should a case go to appeal, the court should also have access to this information. This will allow the BMA, the IND and, where appropriate, the courts to ascertain that all sources of information are competent to provide that information.

The role of the IND

The requirement of 'good preparation' entails that the IND must satisfy itself that the contents of each BMA opinion are complete, accurate, consistent and substantiated. The IND consults the BMA because it does not have the necessary medical expertise 'in house'. However, the BMA's involvement does not detract in any way from the IND's direct responsibility as the official body which must decide whether a foreign national is to be given leave to remain in the Netherlands. That responsibility has certain implications, including but not limited to an obligation to read each BMA opinion with a critical eye. Should the contents of the opinion raise any questions, or if the IND's original request for information has not been met in full, further clarification must be sought.

Supervision of external sources
Both the IND and the BMA must ensure that the medical advisors and other sources consulted during the process possess the knowledge and expertise required to answer the questions put to them. If the medical advisor has consulted a third party, the IND and BMA should also ascertain that this person is competent to provide the requested information. Because the BMA has medical expertise, it may be expected to take a more prominent role in doing so than the IND, which does not. This supervision is another important component of the 'good preparation' of decisions.

4.3 Individual cases

Based on the individual cases examined during the investigation, the National Ombudsman wishes to state what might reasonably have been expected of the IND and BMA in the interests of arriving at a fair and just decision.

The five cases referred by the complainant

Richard is HIV-positive and has been prescribed medication. The medical advisor in Cameroon stated that the particular drug Richard is taking is available in that country, but only in combination with another drug. Based on this information, the BMA opinion concludes that Richard's prescribed medication is available in his country of origin, whereupon the IND rejected his application for leave to remain in the Netherlands. Richard's lawyer lodged an objection, asserting that the drug Richard has been prescribed is not available in Cameroon in the same form and dosage, and that his internist in the Netherlands has stated that he should not take the alternative to which the BMA's opinion refers due to the possibility of adverse side effects. The IND then allowed this objection and issued a residence permit, on the grounds that he should not be expected to take that other medication.

In the opinion of the National Ombudsman, once the medical advisor in Cameroon had indicated that the prescribed medication is only available in combination with another drug, the BMA and IND should have contacted Richard's treating physician in the Netherlands *on their own initiative* to enquire whether the alternative 'combination drug' was suitable in his case. They should not have assumed that he would be able to take it. Formulating and asking this question demands no specific expertise, so the IND can reasonably be expected to have sought this information before making its decision. By omitting to ask this question at the appropriate time, the BMA and IND failed to fulfil the requirement of 'good preparation'.

Kojo has various medical problems including chronic renal deficiency. He needs a kidney transplant. According to the BMA, it would be possible to have this procedure in Ghana, since surgeons there have already performed two kidney transplants. Based on this opinion, the IND refused Kojo's application for leave to remain in the Netherlands. Only when considering the objection to that decision did the IND concede that there has been only one kidney transplant in Ghana, performed under the supervision of surgeons from the United Kingdom. Accordingly, the IND determined that it is not possible to state that the procedure is available in Ghana, and granted the extension application.

In this case, the BMA failed to fulfil the requirement of 'good preparation'. In the opinion of the National Ombudsman, the BMA should have given its reasons for concluding that a track record of two kidney transplant operations is enough to suggest that this treatment option is available in Ghana. Because the BMA did not offer any such explanation, the IND should have requested further information as a matter of course. Because the IND did not do so, it too failed to meet the requirement of 'good preparation'.

Aba is HIV-positive and takes medication. According to the first BMA advisory, the drug she has been prescribed is available in her country of origin. However, this advisory also states that it can only be obtained by special order. In a subsequent opinion produced further to Aba's objection, the BMA states that the drug in question is not readily available but must be ordered from abroad and that the delivery times are uncertain. Based on this reformulation of the same conclusion, the IND allowed the objection and granted Aba a residence permit on medical grounds.

If an overseas medical advisor or International SOS states that a particular drug is only available on special order, the BMA and the IND should, in the Ombudsman's opinion, at the very least ascertain where the drug can be sourced, how long the delivery time is likely to be, and whether there have been any supply problems within the last year. By omitting to ask these questions in Aba's case, both the BMA and the IND failed to meet the requirement of 'good preparation'.

Bina en Devi have an auto-immune disorder, the treatment regime for which includes specialised and complex blood tests. The BMA advised that all elements of the treatment, including the tests and the prescribed medication, are available in Nepal. In this case, the girls' foster parents had already investigated whether the necessary treatment was available in their country of origin. Based on the information obtained by the foster parents and their legal advisor, it became apparent that International SOS had made a serious error. A residence permit on medical grounds was then granted.

The initial BMA advisory which stated that the necessary treatment is available in Nepal includes the names of hospitals and clinics at which such treatment is supposedly offered. This report was based on information provided by SOS International, which originally stated that all components of the treatment regime are available, including the blood tests. This information was later found to be incorrect in that the specialised blood tests are *not* available in Nepal. SOS International's error led to the production of a wholly

inaccurate BMA opinion. By omitting to verify the information it had received, the BMA failed to meet the requirement of 'good preparation'.

Lulu has a progressive degenerative disorder which means that she needs permanent care in a residential (nursing home) setting. The BMA's first medical opinion stated that this type care is available in Ghana. Lulu's lawyer is persistent: her correspondence prompted the production of further BMA opinions, a series of eight in all. Each names a different nursing home which would supposedly be able to provide the necessary care. Eventually, the BMA reported that nursing homes in Ghana had been closed, whereupon the IND granted Lulu a residence permit on medical grounds. In the opinion of the National Ombudsman, this case demonstrates the importance of greater transparency with regard to how a medical advisor arrives at the information he or she submits to the BMA. Did the medical advisor in Ghana ever contact any of the named locations to enquire whether it was able to provide the type and level of care that Lulu needs?

If more is known about how the medical advisor has arrived at his information and what investigations he has conducted, it will be easier for the BMA to ascertain whether that information is correct. In Lulu's case, the BMA was forced to revise and amend its opinion on numerous occasions, naming a succession of different organisations which would allegedly be able to provide nursing home care. If the BMA has been forced to revise its findings once, it is surely reasonable to expect it to exercise even more care when doing so again. In Lulu's case the BMA discovered at an early stage that, contrary to the information it had received from the medical advisor, a certain institution was not able to provide the necessary care. Thereafter, both the BMA and the IND should have treated all information from that source with extreme caution. The medical advisor should have been asked to explain how he had arrived at the conclusion that a certain organisation was able to meet Lulu's care requirements. By failing to provide due transparency about the medical advisor's methods and approach, and by placing such unquestioning faith in his information despite clear indications that it may not stand up to scrutiny, the BMA and the IND failed to meet the requirement of 'good preparation'.

The five cases selected by the IND

In the majority of the five cases selected by the IND itself, the BMA concludes that the discontinuation of treatment will not give rise to an acute medical emergency in the short term. In these cases, it is therefore not necessary to determine whether the treatment is available in the applicant's country of origin, whereupon it is equally unnecessary to obtain information from a medical advisor in that country or from International SOS. By contrast, the five cases referred by the complainant involve a situation in which the discontinuation of treatment will (or is likely to) result in an acute medical emergency in the short term, whereupon it is indeed necessary to ascertain whether that treatment is available in the country concerned. The National Ombudsman is mindful of this distinction. Nevertheless, a discussion of the cases selected by the IND serves to illustrate the meaning of 'good preparation' in the decision-making process.

Zada has a number of medical complaints, including hypertension and PTSD. She takes various prescription drugs. In its second opinion in this case, the BMA states that the discontinuation of treatment will not give rise to an acute medical emergency in the short term, but goes on to state that there is a distinct possibility of organ damage *in the longer term*. The National Ombudsman finds it commendable that BMA has not restricted its answer to the precise framework of the question, which is specifically concerned with the 'short term'. The Ombudsman believes that this expansiveness on the part of the BMA should have prompted the IND to ask further questions such as:
- What does the BMA mean by 'in the longer term'?
- Is that a matter of days, weeks or months beyond the three months which is the standard working definition of 'short term' for the purposes of assessing residence applications?
- Could the organ damage which Zada may suffer in the longer term lead to death, disability or any other form of serious physical or mental impairment?
Such questions would form an intrinsic part of the 'good preparation' of the decision. Failure to ask them suggests a lack of good preparation.

Barta is a child of about three or four years old who suffers from PTSD. The BMA states that discontinuation of treatment will *in all likelihood* not lead to any acute medical emergency in the short term. The National Ombudsman finds the inclusion of the words 'in all likelihood' interesting, in that the BMA appears to be introducing a note of caution, and to be doing so quite deliberately. The Ombudsman believes that the BMA should have explained the reasons for this caution in its report. It might also have explained why asking for further information from the treating physician or inviting Barta to attend an examination by a BMA doctor would not resolve the doubt. These omissions indicate a lack of 'good preparation' by the BMA. Moreover, because the BMA had failed to address these matters, the IND should have made its own enquiries, asking the BMA to explain why it had chosen to include this note of caution, and whether it would be possible to resolve any doubt by means of further information or physical examination. Again, failure to ask such questions indicates a lack of 'good preparation'.

Obi has PTSD, a psychotic disorder and suicidal ideation. He is being treated by a psychiatrist and a psychiatric nurse. He has been prescribed medication. Obi was originally granted a 'deferment of departure' for a period of one year, because opportunities for treatment in Congo were deemed inadequate and the availability of the drugs he takes was not assured due to supply chain problems. Just over a year later, the BMA produced another medical opinion. This time, the conclusion is that the necessary treatment is indeed available in Congo. The BMA does not offer any explanation for this *volta face.* Has the availability of treatment improved over the course of the intervening year? Have the supply chain problems been resolved? The information provided by International SOS includes nothing to suggest that this is the case. Based on the BMA's second opinion report, the IND rejected Obi's application for an extension to his residency permit. The notification of this decision makes no mention of the disparity between the two opinions; it does not explain why treatment opportunities are now deemed adequate compared to the situation only months earlier, or why there are suddenly no more drug

shortages in Congo. All such omissions on the part of both the BMA and the IND indicate a lack of ‘good preparation’.

Davu is HIV-positive and has been prescribed medication In the past, he has developed significant resistance to certain drugs. His internist in the Netherlands asserts that proper treatment is only possible in a well-equipped HIV centre at which modern drugs are available on a daily basis. The BMA advised that appropriate treatment is readily available in Cameroon. It concedes that certain drugs, including the ‘modern’ varieties to which the internist refers, are not readily available but can be obtained on order, with a delivery time of approximately one week. Based on this opinion, the IND rejected Davu’s application for a residence permit. Davu lodged an objection, whereupon the BMA produced another opinion which concludes that treatment opportunities in Cameroon are inadequate, because modern drugs and one of the specific drugs that Davu has been prescribed are not available. The IND then allowed Davu’s objection, reversing its original decision and issuing a residence permit.

Davu’s internist in the Netherlands had informed the BMA that treatment was only possible in a good, well-equipped HIV centre with access to modern drugs on a daily basis. The National Ombudsman notes that the word ‘daily’ appears nowhere in the BMA’s medical opinion. In fact, the BMA acknowledges that the delivery time for such drugs in Cameroon is approximately one week. The Ombudsman finds that the BMA should have explained why it considered this delivery time to be acceptable, thus contradicting the medical advice of the internist. Failure to do so indicates a lack of ‘good preparation’. Moreover, because the BMA did not explain why the one week delivery time would be acceptable, the IND should have asked for further information on this point. Once again, this omission indicates a lack of ‘good preparation’.

Tene has diabetes and hypertension, recurrent inflammation of the salivary glands, gastric complaints, back pain and regular cramp in her extremities. She is being treated by her GP and takes various prescription medicines. She applied for a ‘deferment of departure’ under Article 64 of the Aliens Act 2000. The BMA opinion states that there is no indication that discontinuation of treatment would give rise to an acute medical emergency in the short term. Accordingly, the IND rejected Tene’s application. Her subsequent objection was also unsuccessful.

The National Ombudsman notes that the BMA has indeed explained why it believes that the discontinuation of treatment would not give rise to an acute medical emergency in the short term. Having arrived at this conclusion, it was not necessary to ascertain whether appropriate treatment would be available in Somalia, whereupon it was also unnecessary to obtain information from a medical advisor or from International SOS.

4.4 Availability versus accessibility

Where it has been established that discontinuation of treatment will lead to an acute medical emergency in the short term, the IND must then examine whether appropriate treatment is available in the applicant's country of origin. It does not attempt to ascertain whether the treatment will be accessible to the individual concerned. The complainant holds that, where it is clear that a foreign national will not have access to essential medical treatment, this should be clearly stated in the BMA's medical opinion. During their interviews with the National Ombudsman's staff, BMA representatives agreed that the difference between 'availability' and 'accessibility' is a bone of contention which has frequently been raised by the legal profession. In his response to the complaint on which this report is based, the State Secretary of Justice and Security stated that the IND does not take the accessibility of medical care to the individual into account when reaching its decisions.

As stated in Section 1.1, a report published by the Dutch Safety Board in 2014 is particularly critical of the manner in which the availability of essential care in other countries is assessed. It contends that merely ascertaining that care is available, without determining whether it will be accessible to the individual, offers an insufficient guarantee of that individual's safety. The Dutch Safety Board calls for an assessment of both the general availability of treatment and its accessibility to the individual within the IND's decision-making process in order to ensure that a foreign national who is repatriated does not suffer any avoidable adverse health impact. The National Ombudsman agrees. In response to the Dutch Safety Board report, the State Secretary has announced an international comparative study examining how the immigration and asylum policy of other countries makes allowance for the economic, geographic and political dimensions of health care. The National Ombudsman will read its findings with much interest.

4.5 Funding health care abroad

The complainant notes that, in some instances, the Dutch government pays for a person's treatment and care after he or she has been repatriated. The complainant asserts that this is purely a matter of expediency which serves only to defer the inevitable acute medical emergency. The State Secretary has confirmed that the Repatriation and Departure Department (DT&V) is authorised to make arrangements for essential medical treatment to be provided for a limited period of up to three months following repatriation. The foreign national then becomes personally responsible for the continuation of that treatment.

Government policy defines an ‘acute medical emergency’ as a situation in which the person concerned is suffering from a disorder or condition which, in the absence of appropriate treatment and based on the current scientific and medical knowledge, will cause death, disability or other serious physical or mental impairment in the short term. A working definition of three months is applied with regard to ‘short term’.

The National Ombudsman is concerned by the Dutch government’s practice of paying for the medical treatment given to unsuccessful applicants following their repatriation. It is likely to erode the concept of an *acute* medical emergency. It would be morally unacceptable for the Dutch government to, say, issue a asylum seeker with a three-month supply of essential medicines in order to expedite his or her repatriation, knowing that a medical emergency will indeed occur once that period has elapsed and the supply of drugs has been exhausted. Such practices may be within the letter of the law and policy, but they fly in the face of their spirit and intent.

4.6 Conclusion

The National Ombudsman finds the complaint with regard to the conduct of the BMA and the IND in the cases submitted by the complainant to be grounded. The National Ombudsman considers both organisations to have acted in a manner which does not meet the statutory requirement of ‘good preparation’.

4.7 Recommendations

In view of the foregoing, and in the interests of ensuring a process of appropriate quality, the National Ombudsman is of the opinion that the BMA should be more critical in its appraisal of information provided by external sources such as the overseas medical advisors and International SOS. For its part, the IND must be more critical in its appraisal of the advisory reports it receives from the BMA. In short, neither organisation must believe everything it is told. The required improvements can only be achieved if the BMA and IND have access to a greater volume of information before a medical opinion is compiled or a decision regarding a permit application is taken on the basis of such an opinion. Once those improvements are in place, there may well be fewer objections and appeals procedures.

The National Ombudsman asks the Minister and State Secretary of Justice and Security to consider:

1. requiring the BMA, its overseas medical advisors, International SOS and Allianz Global Assistance, to produce a full and factual report of all actions taken to obtain the information on which the BMA’s medical opinions are based. This report should at the very least include:
- the names of all persons, institutions or organisations contacted for information
- the frequency and exact times of such contact
- the precise information requested

- the information actually received from the person or organisation
- a statement indicating whether the medical advisor has answered any or all questions based on his own knowledge and expertise, or has referred some or all questions to a third party
- the relevant qualifications and experience of the medical advisor and any third party or parties consulted.

2. implementing measures which will encourage the BMA and the IND to develop a more active and critical approach to the process of gathering information, whereby the contents of both medical opinions and permit decisions are substantiated as fully as possible.
Examples from the cases examined by the National Ombudsman:
- if a medical advisor or International SOS states that a particular drug is available only on special order, the BMA and the IND should ascertain the source of the product (where it is actually ordered from), the delivery time and whether there have been any supply problems during the past year.
- if an essential treatment regime has been reported as unavailable in a particular country but more recent information from a medical advisor or International SOS suggests that it is now available, the BMA and the IND should take steps to determine if, how and why the medical situation in that country has changed, and should state its findings in the medical advisory and the resultant permit application decision.

The National Ombudsman would welcome the opportunity to discuss the foregoing with the Minister and/or State Secretary of Security and Justice.

Yours sincerely,
The National Ombudsman,

F.J.W.M. van Dooren,
Acting Ombudsman

BACKGROUND AND LEGISLATIVE BASIS

Algemene wet bestuursrecht (General Administrative Law Act) 1992

Article 3:2

When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.

Article 3:49

To state the reasons of an order or part of an order, it is sufficient to refer to an opinion drawn up in this connection if the opinion itself contains the reasons and communication of the opinion has been or is given.

Vreemdelingenwet (Aliens Act) 2000

Article 64

An alien shall not be expelled as long as his health or that of any of the members of his family would make it inadvisable for him to travel.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 3

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