

Asylum Legal Aid Lawyers' Professional Ethics in Practice

A Study into the Professional Decision Making of Asylum Legal Aid Lawyers in the Netherlands and England

(summary)

Tamara Butter

Summary

Aim and Approach

The way in which asylum lawyers do their work, especially when operating within a state's legal aid system, is a topic of continuous debate.¹ Legal aid lawyers are criticised for not putting in sufficient time and effort in assisting their asylum-seeking clients and for 'cherry picking' profitable cases, as well as for undermining the law and 'playing the system' by starting procedure after procedure in so-called 'hopeless cases'. Doing so excessively burdens the administrative and judicial system as well as the legal aid budget. The discussions and criticism about the ways in which asylum legal aid lawyers do their work are essentially about how these lawyers deal and should deal with the different (and at times competing) interests at stake when assisting their asylum seeking clients under the legal aid scheme: these are questions of lawyers' professional ethics.

The particulars of asylum seekers as a clientele, the politically sensitive, complex and sometimes ambiguous nature of asylum law combined with the organisational aspects of both the asylum and legal aid system (the institutional context) in which lawyers operate make the practice area of publicly funded asylum law ethically challenging. Previous research and contributions of lawyers who engaged in discussions on the provision of legal aid in asylum cases have shown that this institutional context in which lawyers operate, may cause ethical pressures.² Lawyers have described the difficulties in providing what they consider high quality legal assistance under the circumstances in which they have to work.

The central aim of this study was to obtain a better understanding of asylum legal aid lawyers' 'professional ethics in practice', i.e. how these lawyers as members of the legal profession balance the different interests at stake when assisting their asylum seeking clients under the state's legal aid scheme, and to explore the role of the institutional context in that regard. In order to reach these aims, I examined the *professional decision making* of asylum legal aid lawyers in two different institutional contexts.

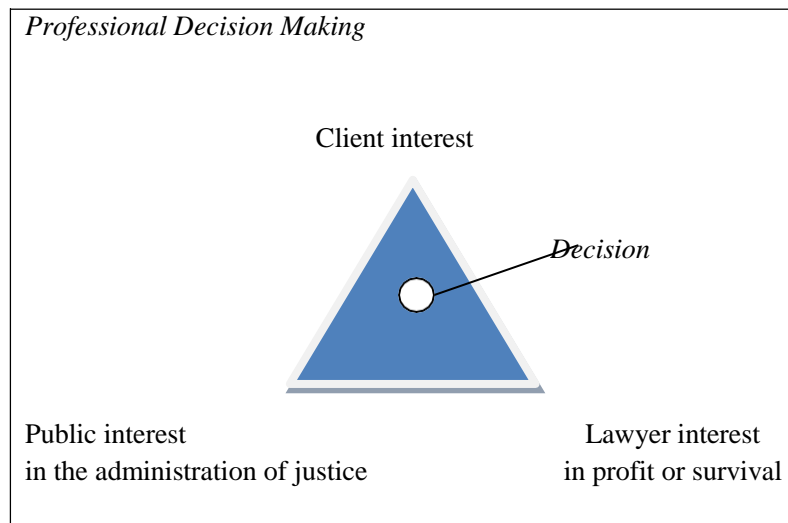
1 See e.g. 'Asieladvocaten "strooien zand in de machine"', *NRC*, 20 december, 2001; Laemers & De Groot-van Leeuwen (2004); Jacobs et al. (2006); Sillevius Smitt (2012); Butter, Laemers & Terlouw (2013); 'Asylum seeker charities are just playing the system, says Woolas', *Guardian*, 18 November, 2008; <http://www.irr.org.uk/news/asylum-seekers-wrongly-refused-legal-aid/>; Sanderson & Sommerlad (2011), p.185 ff.; Gibbs & Hughes-Roberts (2012), p. 20.

2 E.g. James & Killick (2010; 2012); Terlouw (2011); Sommerlad (2008); Webber (2012); Bogaers (2009); Hoftijzer (2003); Koers (2001).

The central question to this research was:

What does the professional decision making of asylum legal aid lawyers look like, how can this be understood and what role does the institutional context play in this regard?

Professional decision making is defined in this study as the ways in which lawyers go about making decisions on ethical issues, that is, what I understand to be in line with Moorhead et al., how they balance the client's interest, the public interest in the administration of justice and the lawyer's interests in profit or survival.³



I adopted an explorative approach in which theoretical notions and existing research were used to gain more insight into the object of study and to direct the setup of this study, the selection of respondents and the analysis. I conducted a multiple case study and studied the professional decision making of lawyers operating in two different institutional contexts: the Netherlands and England. I studied both the contexts in which asylum legal aid lawyers operate as well as the professional decision making of these lawyers through interviewing them. In studying the contexts I examined, in addition to the institutional context, the professional context (i.e. the professional regime to which lawyers are subject), the key specifics of substantive asylum law within the different jurisdictions and the firm context within which asylum legal aid lawyers operate in the two coun-

3 Following the definition of 'ethical issue' by Moorhead et al. (2012), p. 7.

tries under review. This investigation consisted of an examination of the legal framework and policy documents underlying the asylum and legal aid systems and the professional regime to which bar-registered lawyers are subject; interviews with several relevant actors in the field (including employees of national legal aid authorities, individuals involved in the regulation of the legal profession, employees of not-for-profit organisations involved in asylum procedures and judges in asylum cases); attendance of a lawyer-client meeting, a gathering of asylum legal aid lawyers (NL) and court hearings at the Asylum and Immigration Tribunal, both First Tier and Upper Tribunal (ENG).

The core of the two case studies consisted of an examination of asylum legal aid lawyers' professional decision making through semi-structured, in-depth interviews (22 per case, a total of 44). I selected varied groups of respondents (purposive sampling) and examined their professional decision making in respect of two ethical issues: 'time vs money' and 'hopeless cases'. The former primarily served as a preliminary issue in order to explore the morality versus market pressures legal aid lawyers are confronted with within the particular institutional context in which they operate and the running of a legal aid practice in this context; its purpose was to comprehend the lawyers' interest in profit or survival in the context in which the balancing act takes place. The issue of the 'hopeless case' constituted the central issue through which I examined the balancing act. Following an initial inductive analysis, I analysed and sought to interpret respondents' decision making by employing an analytical framework consisting of four approaches to moral reasoning in legal practice that foreground either the client's interest or the public interest based on role morality or personal morality – adversarial advocacy, dutiful lawyering, moral activism and relational lawyering⁴ – (morality) and its relation to the lawyer's interest in profit or survival (market).

4 Based on the work of Parker (2004).

Analytical Framework for Interpreting Professional Decision Making

MORALITY		
	<i>Role morality (conservative / procedure)</i>	<i>Personal morality (progressive / outcome)</i>
<i>Client interest</i>	Adversarial Advocacy	Relational Lawyering
<i>Public interest in the administration of justice</i>	Dutiful Lawyering	Moral Activism
(vs)		
MARKET		
<i>Lawyer's interest in profit or survival</i>		

Main Findings

Drawing from the analyses of both cases I found that respondents' actual decision making ultimately depends on the particular circumstances of the case; in one situation either the client or the public interest is given more weight and the arguments for doing so may differ, showing different lines of moral reasoning prioritising the client or the public interest based on role morality or personal morality. The particular aspects playing a role are the nature of the case (the nature of the client's claim, the degree of hopelessness *and* whether it is a legal aid or a private case); the stage of the procedure (first instance, appeal, onward appeal); the nature of the client (the degree of vulnerability, whether there are distressing particularities to the client's situation and whether the client is considered 'a genuine refugee').

The circumstances that elicit a shift in focus from the client interest to the public interest are the improper nature of client's claim (e.g. the wish to stall merely to retain reception without any other special circumstances; the client is lying and wants to maintain the lie), an extremely hopeless case, a case being a legal aid case rather than a private case and proceeding at the higher stages of the legal system. In contrast, the circumstances that trigger a shift in focus from the public interest to the client interest are related to the nature of the client, that is, the client being very vulnerable, there being other distressing particularities to his/her situation or the client being 'a genuine refugee'. Furthermore, in addition to a shift in interest focus, the nature of the client (vulnerability, other distressing particularities to his/her situation) and the nature of the case (case in which it 'really matters' and can lead to a change in policy or case law) may lead personal morality (relational lawyering, moral activism) to override role

morality (adversarial advocacy, dutiful lawyering) – either while retaining the focus on the same interest or shifting between interests.

Moreover, the uttering of lines of reasoning based on personal morality when justifying the strategies employed in assisting their clients is connected to lawyers' view about the morality of the law and the legal (asylum) system. Discontent with the applicable legal framework and with the way in which asylum claims are assessed, may lead lawyers to start hopeless procedures which may nevertheless be in the interest of the individual client (relational lawyering) or in the interest of justice because the applicable legal framework is challenged with a view to making the law and the legal system more substantively just (moral activism). In other words, if the lawyer considers that a strict or mere application of the law as it stands produces unjust outcomes, s/he is more likely to let personal morality prevail and operate possibly at the boundaries of what is professionally and legally acceptable.

Even though the joint analysis shows that the circumstances of the case in combination with lawyers' views of the morality of the law and the legal system in the area of asylum law are important in understanding their professional decision making in this particular area of law, the juxtaposition of both analyses, consisting of the examination of two groups of lawyers in different contexts, suggests that the role these aspects play in the actual balancing act is shaped, or at least limited, by both the institutional *and* professional context in which lawyers operate.

Overall, the professional decision making of Dutch respondents is characterised by a focus on the client's interest and, in comparison, the public interest in the administration of justice (in the conservative sense) plays a more prominent role in the decision making of English respondents. Virtually all Dutch respondents explain they are willing to and/or tell about situations in which they assist clients in pursuing certain, what can be termed, hopeless *procedures* – i.e. an application- or court procedure in which the lawyer considers the chance of obtaining legal success *in that procedure* and *at that moment in time* (close to) zero, whereas almost all English respondents explain that this is something they are not willing and/or able to do as a legal aid lawyer – depending, however, on the stage of the procedure. The arguments advanced by respondents to explain their decisions show different lines of legal moral reasoning – the adversarial advocate as well as the relational lawyer and moral activist line of reasoning are relatively more prominent amongst Dutch respondents and the dutiful lawyer line of reasoning is relatively more prominent in English respondents' accounts⁵

5 Moreover, the adversarial advocacy – as well as the moral activism and relational lawyering – seen amongst English respondents is more moderate than amongst Dutch respondents.

– how ‘market’ considerations are at play as well as how both the institutional *and* professional context in which they operate shape or curtail their decision making. I found the following differences between the Dutch and the English institutional and professional context key to understanding this overall difference in focus observed in the professional decision making of Dutch respondents (client ‘s interest) and English respondents (public interest – in the conservative sense).

First, the institutional position of asylum legal aid lawyers. Whereas lawyers providing legal aid to asylum seekers in the Netherlands are assigned the role of the client’s representative, English legal aid lawyers are given the role of gatekeeper of the legal (aid) system. Within the joint setup of the asylum- and legal aid system, Dutch lawyers are appointed to the client with a view to assisting the client in the fixed, fast paced general asylum procedure and can (and are expected to) take non-asylum related aspects into account under legal aid. English legal aid lawyers are made responsible for determining asylum seekers’ eligibility for legal aid. They have to determine from the start whether a case is in scope – generally, legal aid is only available for asylum and deportation matters, not for any other immigration related matters – and conduct a means and merits test. English respondents explain how this sets the boundaries within which they *can* operate as well as how it encourages – especially the responsibility for applying the merits test – a certain attitude and conduct: it incites judging the client(’s case) instead of merely representing the client. The imposition of the gatekeeper role in the English context thus stimulates, or even requires, a focus on the lawyer’s role as a guardian of the legal system to facilitate the public administration of justice based on the applicable legal framework (dutiful lawyering), rather than on the lawyer’s role as the client’s representative in the legal system (adversarial advocacy).

Second, the assignment of these different roles is connected to – and one could argue enhanced or enforced by – the way in which legal aid lawyers are remunerated. Within the way payment in the Dutch legal aid system is organised, the lawyer’s interest in profit or survival often coincides with the client’s interest (i.e. the client may want to try every possibility to have his or her claim accepted and the lawyer receives the legal aid fee when assisting the client to that end), whereas in the English system the lawyer’s interest in profit or survival is put on a par with the public interest in the administration of justice (in the conservative sense, i.e. having cases determined in line with the applicable legal framework and not burdening the legal system with cases in which the chances of success within this framework are (close to) zero – or less than 50%, i.e. do not meet the merits test). The fulfilment of the gatekeeping role is checked during audits (with the possibility of fee withdrawal) and preparing onward appeals and judicial reviews is ‘at risk’ of not obtaining payment if per-

mission to appeal is not granted. In acting as a gatekeeper and being strict on the merits test, the lawyer thus runs the least financial risk: not spending time finding arguments to meet the merits test and no risk of fee withdrawal – or receiving no fee at onward appeals and in judicial reviews – or damaging the relationship with the Legal Aid Agency for wrongfully granting legal aid and the financial implications that might have for the solicitor's business (e.g. ultimately termination of the legal aid contract). This difference in parallel interests is further enhanced by the difference that there is no cap on the number of providers participating in the Dutch legal aid scheme (so increased competition), whereas within the English legal aid system there is a limit on the number of asylum legal aid lawyers. Only contracted providers can provide legal aid in a certain amount of cases. In both Dutch and English respondents' accounts there are many instances in which the moral line of reasoning they adopt (for the Dutch: adversarial advocacy and/or relational lawyering – for the English: dutiful lawyering) coincides with the lawyer's interest in profit or survival: morality and market are in line. However, there are also instances in which these are in tension; it is remarkable in this regard that reliance on these other lines of reasoning (in the Dutch context: dutiful lawyering – and, in some instances, moral activism⁶ – and in the English context: adversarial advocacy, relational lawyering and moral activism) seems to be connected to the firm context within which lawyers operate (i.e. whether one works in the (medium-) larger firms and/or in what could be considered the more well-established firms) and more in particular to having the financial room to actually let morality prevail over market. Especially in the English context – in which there are great differences in firm types and sizes – this seems to be at play. The precise role of the firm context was beyond the scope of this study, but it would be an interesting topic for further research.

Third, the difference in emphasis seen in the way the legal aid systems are set up, i.e. either on the client interest (the Dutch system) or on the public interest – in the conservative sense – (the English system), is also seen in the professional regimes lawyers are subject to in the two countries. Whereas in the Dutch professional framework the principle of partisanship and acting in the client's best interest are emphasised as being central to the lawyer's role, the English professional rules prescribe a focus on the public interest in the proper administration of justice – the code of conduct explicitly prescribes that if two of the core principles come into conflict, the principle which best serves the public interest, especially the public interest in the proper administration of justice must take precedence – and has aspects which stimulate or enforce compliance with

6 E.g. challenging the law by preparing procedures with the ECtHR which take more time than legal aid funding covers.

the lawyer's duties as an 'officer of the court'. These include the institutional division between solicitors and barristers – with the barrister as an additional intermediary who assesses whether a case can be appealed on points of law preventing the lodging of unmeritorious claims at the onward appeal stages – and the possibility of ordering wasted costs if there is an abuse of process.

Finally, in line with this difference in professional regimes ('book law'), the difference in focus is also at play within the national 'legal culture' ('living law') in which asylum legal aid lawyers operate in the two countries.⁷ In the Netherlands, we have seen acceptance of the focus on partisanship and acting in the client's best interest, in particular, by part of asylum legal aid lawyers' community of practice (peer review committee and judges), i.e. within the internal dimension of the legal culture in which lawyers operate.⁸ Within the English legal culture I found this to be less so. Both within its internal dimension (amongst legal professionals) as well as its external dimension (the views and attitudes of general population as projected in the media and through government action) a focus on the public interest in the administration of justice and the 'officer of the court' ideal are held in high regard.

Conclusion

Having studied the professional decision making – i.e. the balancing of the public interest in the administration of justice, the client's interest and the lawyer's interest in profit or survival – of asylum legal aid lawyers operating in two different institutional contexts and having analysed this by employing the analytical framework set out above, I found that the circumstances of the case (the nature of the case, the stage of the procedure and the nature of the client) in combination with lawyers' views on the morality of the law and the legal system in the area of asylum law are important in understanding lawyers' professional decision making in this particular area of law – that is, in how the balancing act ultimately plays out and whether the client's interest or the public interest is given more weight based on role morality or personal morality. Yet, as the juxtaposition of the analyses of the Dutch and the English cases suggests, the role played by these aspects in the actual balancing act is shaped, or at least limited, by both the institutional *and* professional contexts within which lawyers operate. Overall, the professional decision making of Dutch respondents is characterised by a focus on the client's interest and, in comparison, the public interest in the administration of justice (in the conservative sense) plays a more prominent role in the decision making of English respondents and I found the differences between the Dutch and the English institutional context (the characteristics of the

7 Friedman (1997).

8 Friedman distinguishes the internal from the external dimension (1975, p. 223).

asylum and the legal aid system, i.e. the lawyer's institutional position and accompanying payment structures) and professional context (the professional regime and the national legal culture) key to understanding this overall difference in focus.

In line with previous research on lawyers practising in various areas of law, I found that asylum legal aid lawyers' professional decision making involves a continuous balancing between morality and market and that the actual decisions made depend on the particular circumstances of a case and are shaped by the complex interplay of the professional regime, workplace settings, personal identities and values through the 'communities of practice' within which lawyers operate.⁹ In particular, this study has shown that the law's morality and lawyers' views thereof is a factor of relevance and how this plays a role in the decision making of lawyers practising in the field of asylum law. Levin and Mather argued that this factor, i.e. 'the impact of law itself, the normative values and quality of justice embedded in it, and how lawyers think about the law and the system in which they are working' received insufficient attention in research.¹⁰ Studying lawyers within the context of asylum law, as this research has done, in part, helps to fill that gap and shed more light on the role of the law's morality and the extent to which the law and the legal system are considered just. Within the context of asylum and immigration law, the work of Appelqvist and Levin indicated the importance of how lawyers think about the law and the system within which they work for understanding their decision making.¹¹ This research further supports this: we have seen how the law's morality and the extent to which the law and the legal system are considered just plays a role in lawyers' decision making, more in particular, how this is at play in personal morality overriding role morality. We have seen that if the law and legal processes as they stand do not coincide with the lawyer's ideals of justice, respondents may not necessarily, depending on the circumstances of the case, find themselves confined by a duty to the law (not fully 'play by the rules'), but rather use their professional skills as strategies of resistance to the injustice and unfairness they experience, either with a view to making the law and the legal institutions more substantively just in the public interest (moral activism or 'cause lawyering')¹² or to mean something in the life of one individual client, in other words, to achieve personal rather than social change (relational lawyering).

9 E.g. Parker (2004); De Groot-van Leeuwen (1998); Mather, Maiman & McEwen (2001); Levin & Mather (2012).

10 Levin & Mather (2012), p. 365.

11 Appelqvist (2000); Levin (2012).

12 Sarat & Scheingold (1998).

Furthermore, this study nuances the claim, made in the context of studying lawyer decision making within one country, that one of the most significant influences on lawyers' ethical decision making is the practice area in which lawyers work.¹³ Studying the decision making of lawyers practising in the same area of law in two different countries suggests that other aspects are more important. The groups of lawyers under review in this study both practise in the field of asylum law – and the same international and European legal frameworks apply: the Refugee Convention, the European Convention on Human Rights and the EU Directives on Asylum – but we have seen important differences in their professional decision making. As argued above, the differences in institutional context (the characteristics of the asylum and the legal aid system, i.e. the lawyer's institutional position and accompanying payment structures) as well as in professional context (the professional regime and the national legal culture) between the two countries are key to understanding these differences. This research thus substantiates in the asylum law context what has been found in the criminal law context: the importance of the lawyer's place in the legal system, i.e. his or her institutional position and the dependent relationships stemming therefrom.¹⁴

In addition, in connection to the point made on the role of the professional regime and the national legal culture, this study nuances conventional ideas about the lawyer's role in different legal systems. Traditionally, a distinction in legal 'families' is made between countries belonging to the common law (adversarial) and the civil law (inquisitorial) tradition and the role of the lawyer within these legal systems.¹⁵ The so-called 'standard conception' of the lawyer's role (also referred to as the 'hired gun' or the 'adversarial advocate') based on the core principles of partisanship, neutrality and non-accountability, has typically been associated with the adversarial legal systems of common law countries.¹⁶ Through studying lawyers operating in two countries that are traditionally understood to be part of these different legal families, this study, in line with Boon's observations, nuances or even supersedes this idea. Boon pointed out that in the codes of conduct for both solicitors and barristers in England and Wales an attenuated version of the standard conception is seen, as well as that

13 E.g. Levin & Mather (2012), p. 18. However, this may still hold true – in the context in which this claim is made – when studying lawyer conduct within one country as the professional and institutional context would be largely similar within one country.

14 E.g. Blumberg (1967, 1970); Martorano Van Cleve (2012).

15 See e.g. Abel & Lewis (1988, vol. 1), p. 11 ff. Compare Sherr who points within the European context to a clear division between civil law countries and common law countries in respect of the approaches to the rules of the lawyer conduct and professional discipline. Sherr (1998), p. 342.

16 E.g. Parker (2004); Luban (1988).

earlier studies suggest that adversarial advocacy is also not seen in practice in England.¹⁷ This is also what this study has shown: a stronger adversarial stance both in theory (the professional rules) and in practice (in respondents' accounts) in the Netherlands than in England. In other words, the standard conception of the lawyer's role traditionally associated with lawyers' operating within common law (adversarial) systems is in this study seen in the civil law country, the Netherlands, rather than in the common law country, England. It would be interesting to investigate whether this is also seen among lawyers operating in other areas of law in order to determine whether these conclusions are pervasive. Further research on the professional decision making of, for example, corporate lawyers in these countries could shed more light on the lawyer's role in society within these different legal cultures, as these lawyers operate in an area of law with different characteristics: it involves two private parties rather than an individual and a state party *and* the lawyer is paid by the client, not by the state.

To conclude, in the debates about the ways in which asylum legal aid lawyers do their work, they are often portrayed either as leftist activists or as 'fat cat' lawyers exclusively motivated by their own profit. I found that neither one of those images corresponds to the complex and difficult practice of those providing legal aid to asylum seekers. Lawyers' professional decision making involves a continuous balancing between morality and market and the actual decisions made depend on the particular circumstances of a case. In the debates about the way in which asylum legal aid lawyers do their work discussions are often reduced to discussions about quality; the moral dimension – which is crucial to understanding lawyers' decisions – is overlooked. In discussing what good quality entails moral views about the lawyer's role in society are often left implicit. As these views constitute the basis for what providing high-quality legal work requires and may differ amongst the different parties to the debate, these must be made explicit and play a more central role in the debate.

17 Boon (2014), p. 23; p. 30 referring to D. Pannick (1992), *Advocates*, Oxford, Oxford University Press, p. 105.