First draft 'The lack of reasoning in judgments on appeal in asylum cases: efficient, but also fair?'

V.M. Bex-Reimert
A.T. Marseille
M. Wever

1. Introduction

In the Netherlands, the legislator has given the Administrative Jurisdiction Division of the Council of State, the higher appeal court in immigration cases, the option of issue a judgement without stating reasons if the appeal does not raise questions in the interests of legal unity, legal certainty and the development of the law. This discretionary power of the High Council of State is laid down in Article 91, paragraph 2 of the Dutch Aliens Act 2000.

The introduction of this limited form of appeal must be viewed in the context of the immigration system as it was. Before the introduction of the Aliens Act 2000, no higher appeal was possible in migration cases. Although the introduction of the possibility of a higher appeal was a conscious choice, the legislator also tried to drastically reduce the number of higher appeal cases by introducing competences of the High Council of State that would limit the amount of workload. An example of such a competence is possibility of handling a court case without a hearing. The introduction of these instruments was prompted by the legislator's assumption that the introduction of higher appeal in migration cases would lead to high number of appeal cases. The assumption was that in , virtually all migration cases where a visa or residence permit was denied, an appeal would be lodged.

Ever since the introduction of the option to issue a judgement without giving reasons , there has been discussion about the competency itself and the use of it by the High Council of State. The usage has been opposed not only by lawyers, but also by legal scholars and judges of lower immigration courts. Although the number of migration cases predicted by the legislator was far from being reached, the High Council of State made generous use of its discretionary power to issue judgements without giving reasons. This led to increasing criticism towards the High Council of State. In response, on 3 April 2019, the Council of State issued two almost identical summary judgments where it explained in which cases it chooses to give reasons for judgments and in which cases it does not. In addition, in May and November 2019, the High Council of State organised meetings in which discussions were held with members of the lower judiciary, the legal profession, the Immigration and Naturalisation Service (INS), the government organisation that deals with residence permits and visa, and scholars about the application of Article 91(2) of the Dutch Aliens Act 2000 (afterwards: Aliens Act 2000). In these meetings, the application of Article 91 (2) was reflected upon and improvements were considered.

In addition, in the summer and autumn of 2019, there were internal discussion on how the High Council of State could respond to the criticism. This led to the start of the Project Insightful Judgement (Pilot 91-2) in 2020. The underlying idea of this project is that in some cases the motivation will contain one sentence in which it is explained why why the appeal has not been successful. In that way, some of the criticism was met but, by only using one sentence, it was also

guaranteed that immigration cases can still be efficiently disposed of on appeal. Instead of issuing judgements without stating reasons, a standard sentence will be added. There are five options. In the first option, reference is made to a previous judgment in which the same legal question has already been dealt with. In the second option, the High Council of State points out the fact that although there is an error in the judgment of the district court, this does not lead to a different judgment because the rest of the reasoning of the district court judgment can independently support the judgment of the district court. The third option refers to the situation in which there is hardly any criticism of the court's judgment laid down in the notice of appeal. The fourth option refers to the fact that the court has found a lack of care or a lack of substantiation and the State Secretary can remedy this independently of the appeal. Finally, there is a fifth option, in which the Council of State points out that the State Secretary is trying to rectify on appeal what he should have done at the district court.

This paper reports on the evaluation of the Pilot conducted by the University of Groningen. This evaluation includes a numerical study into how often the High Council of State makes use of the various options (options 1-5) that are available, as well as a study into the effectiveness of this Pilot. Research was carried out into the experiences of users of the judgments. These included legal aid workers, decision makers of the INS, judges and legal support staff of district courts that deal with (im)migration cases and judges and legal staff of the High Council of State.

This article is structured as follows. In section 2 we discuss the power of the Council of State to refrain from giving reasons for judgments in immigration cases in which an appeal is declared unfounded. Paragraph 3 describes what the pilot project at the Council of State entails, while paragraph 4 deals with the research design. In sections 5 and 6 we present the results of our study. Section 5 concerns the frequency with which the different pronunciation modalities are applied. We focus in particular on a comparison between the appeal of the State Secretary and that of the foreign national. Section 6 deals with the question of how the various parties involved in the pilot appreciate it. In doing so, we focus on views within the Aliens Chamber of the Council of State as to whether the pilot should be phased out, perpetuated, or expanded. Section 7 contains a brief conclusion.

2. The power not to give reasons for decisions on appeals under Aliens Act 2000

Legal protection procedures concerning decisions based on the Aliens Act 2000 deviate in a number of respects from the regular procedures that are regulated in the General Administrative Law Act.

One of the most striking deviations concerns the ruling on appeal. Article 91 of the Aliens Act 2000 provides as follows.

1. The Administrative Jurisdiction Division of the Council of State may confine itself in its ruling to an assessment of the grievances raised.
2. If the Administrative Jurisdiction Division of the Council of State finds that a submitted grievance cannot lead to annulment [of the judgment of the District Court], it may limit itself to this finding when stating the grounds for its ruling.

Article 91 (2) of the Aliens Act 2000 implies that if the Council of State declares an appeal to be unfounded, its it is not obliged to give reasons for its ruling. This provision is an exception to the general principle in legal proceedings that judges must give reasons for their decisions.

Until the entry into force of the Aliens Act 2000 on 1 April 2001, immigration law in the Netherlands did not provide for appeals in two instances. The procedure consisted of an appeal in the first and only instance to the District Court. With the introduction of the Aliens Act 2000 the Council of State serves as the appellate court.

According to the Explanatory Memorandum to the Aliens Act 2000, the reason for the introduction of Article 91 (2) was the fear of overburdening the Council of State. The expectation was that the Council of State would annually have to deal with some 13,000 cases under aliens act. However, that expectation has as of yet not materialized. The annual average over the period 2011-2020 is 7600 cases, well below the 13,000 assumed in the Explanatory Memorandum. The figure below shows the number of cases brought before the Council of State per annum.

Figure 2.1 Expected and actual number Alien Act cases at the Council of State

3. The Pilot 91-2

It is the policy of the Council of State that if an appeal is unfounded, no reasons will be given for the decision, unless the appeal contains questions that need to be answered in the interest of legal unity, legal development and/or legal protection (in general). In two very extensively reasoned judgments of 3 April 2019, the Council of State explained its policy on the application of Article 91 (2) of the Aliens Act. In these judgements it also responded to the criticism of the application of article 91(2) of the Aliens Act, in particular to the question of the extent to which the application is in accordance with Articles 6 and 13 ECHR and Article 47 EU Charter.

The lively discussion on this subject in did not come to an end with those rulings. For this reason the Council of State launched the 'Pilot 91-2'. This pilot means that in certain cases in which Article 91 (2) of the Aliens Act 2000 is applied, a brief explanation will be given as to why the appeal is unfounded. To this end, the Council of State has established five short standard considerations, the last two of which can only be used if the appeal is lodged by the State Secretary:

1. ‘The appeal is about a legal question that was previously answered by the Council of State (judgment of [date], [ECLI number] about ...). The appeal offers no reason to judge differently in this case.’
2. ‘A reason in the judgment of the District Court has not been contested with a grievance, whereas this reason alone can uphold the judgment of the District Court.’
3. ‘The appeal hardly contains any concrete criticism of the judgment of the district court. Therefore, the appeal evidently does not succeed.’
4. ‘The State Secretary contests the finding of the courts , however the error can easily be rectified without altering the material outcome of the case.’
5. ‘On appeal, the State Secretary tries to rectify what he should have done at the District Court. That is not what the appeal in the Aliens Act 2000 is meant for.’

In addition to the short standardized considerations, the Council of State also introduced judgements which contain an concise statement of reasons. This means that in rulings of the Council of State in which the judgment of the District Court is confirmed even though a grievance against the judgment was rightly submitted, it is briefly motioned why the appeal is unfounded after all.

All in all, there are three possible outcomes when an appeal is declared unfounded: *(1)* a judgment in which section 91 (2) of the Aliens Act 2000 is applied and therefore does not contain a statement of reasons for the ruling that the appeal is unfounded, *(2)* a judgment in which section 91 (2) of the Aliens Act 2000 is applied, but which nevertheless one of the five standard considerations or an ‘abbreviated statement of reasons’ and *(3)* a judgment in which section 91-2 of the Aliens Act 2000 is not applied and which contains a full statement of reasons for the ruling that the appeal is unfounded.

4. Research Design

In order to determine how often the Council of State applies each of the various varieties, we were given access to the the internal database containing all judgments that the Council of State rendered in 2020 in Aliens Act 2000 cases. In addition, we drew a very generous sample of the judgments of the Council of State in aliens cases published on www.rechtspraak.nl..

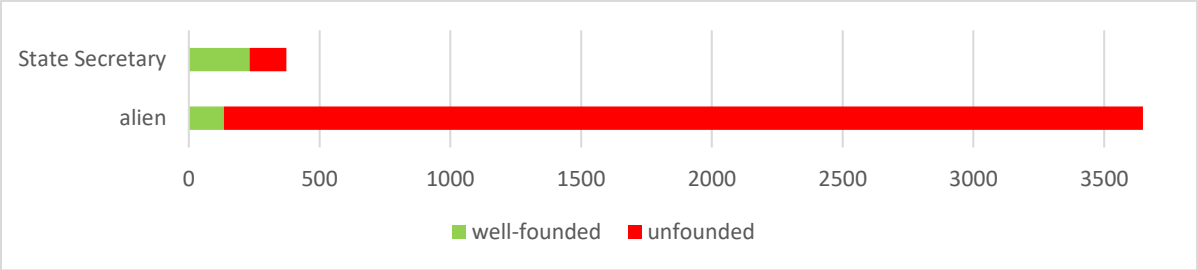
In order to find out how the parties involved in immigration appeals to the Council of State value the Pilot 91-2, we conducted nineteen qualitative semi-structured interviews with the four parties involved in immigration appeals (legal aid counsellors, INS-employees, District Courts officials (judges and support lawyers) and State Councillors and lawyers that work for the Council of State). In addition, the four involved parties were invited to participate in a web-survey about their experiences with the Pilot. The web surveys were completed by a total of 259 persons: 98 legal aid counsellors, 55 INS employees, 44 judges and lawyers at the District Courts and 62 State Councilors and lawyers at the Council of State.

5. Frequency of use of the varieties of judgments

Based on the information we collected about the different varieties of judgments, it is possible to paint a picture of the use of the various judgments that the Council of State uses when it declares an appeal in an aliens case to be unfounded.

Figure 5.1 shows how many of the appeals to the Council of State come from the State Secretary and from an alien and how often each of them were successful.

Figuur 5.1 Fequency and result of appeal

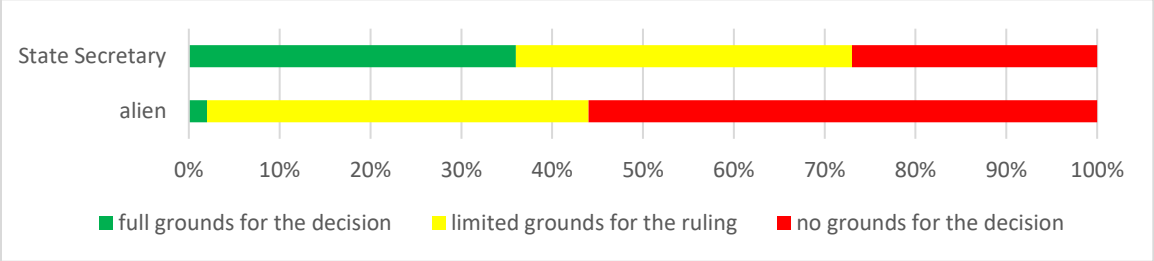


The figure shows, first of all, that a much larger proportion of the cases brought before the Council of State involve an appeal from the alien. Of the total number of appeals, 91% were brought before the court by aliens, 9% by the Secretary of State. Second, it can be seen that the likelihood that an appeal raised by the Secretary of State is successful is much higher (62%) than the likelihood that an appeal raised by an alien (4%) is successful. Finally, it can be seen that if the Council of State corrects the judgment of the District Court, it does so more often in response to an appeal by the State Secretary (63% of the appeals declared well-founded were appeals brought by before the Council of State by the State Secretary).

How often does the Council of State select each of the three possible varieties of judgement when an appeal is unfounded? In 97% of those cases it applies Article 91 (2) of the Aliens Act 2000, in only 3% of the cases the judgment is fully reasoned. Of the judgments in which Article 91 (2) of the Aliens Act 2000 is applied, 43% contain one of the standard considerations or ‘a concise statement of reasons’, but the majority (57%) contains no reasons at all.

Figure 5.2 compares judgments in which the State Secretary's appeal was declared unfounded with judgments in which an alien's appeal was declared unfounded.

Figuur 5.2 Appeal unfounded: to what extent is the ruling substantiated?



The figure shows, first of all, that if an appeal by the State Secretary is declared unfounded, the Council of State refrains in 36% of the cases from applying Article 91(2) of the Aliens Act 2000 and nevertheless provides full reasons for the decision. If a foreign national's appeal is unfounded, Article 91(2) of the Aliens Act 2000 this is only the case in 2% of the cases. Therefore, the odds that the

Council of State uses its power to give reasons for the decision despite the fact that the appeal is unfounded is almost twenty times greater for an unfounded appeal by the State Secretary than for an unfounded appeal by an alien.

In addition, the figure shows how often in an unfounded appeal in which Article 91 (2) of the Aliens Act 2000 is applied, the decision is nevertheless motivated to some extent. In appeals by the State Secretary in which Article 91 (2) of the Aliens Act is applied, this happens relatively more often (in 58% of those cases) than in appeals by aliens (in 43% of those cases). All in all, appeals by aliens twice as often involve a non-motivated Article 91 (2) Aliens Act 2000 ruling (56% of appeals by aliens versus 27% of appeals by the State Secretary).

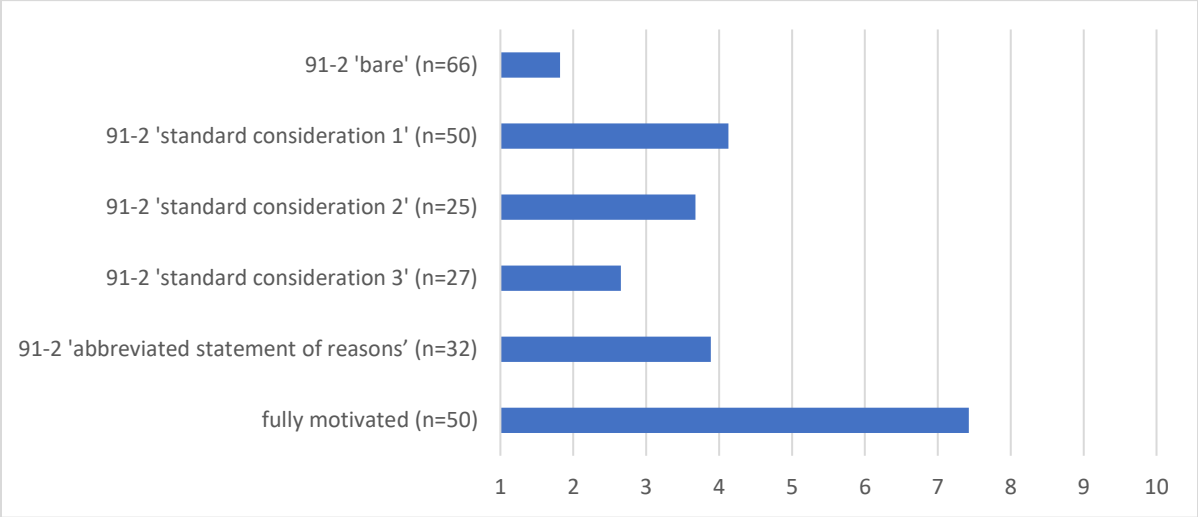
6. Experiences with the Pilot 91-2

This section addresses the question of how the four different parties involved in Alien Act 2000 cases rate the Pilot 91-2.

6.1 Legal aid counsellors

We can be brief about the legal aid counsellors: they are very negative about the functioning of the Council of State. The Pilot 91-2 has hardly changed this. The negative appreciation is shown in their response to the question to rate different varieties of judgments, as shown in Figure 6.1.

Figuur 6.1 Rating of legal aid counsellors for different types of judgments (rate 1-10)



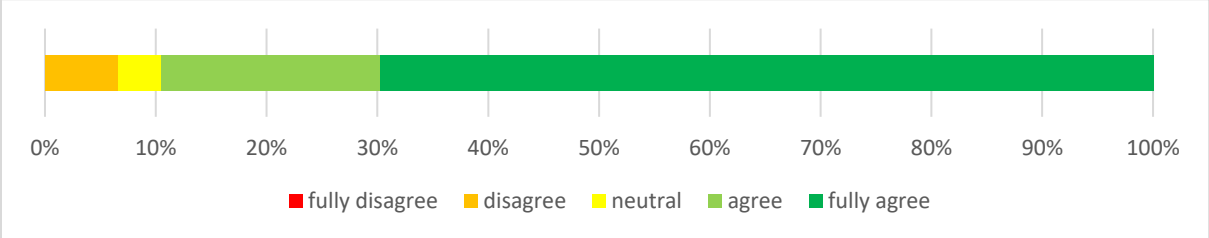
The figure shows that the 'bare' 91-2 verdict scores a 1.8 out of 10, the three categories of standard considerations a 4.1, 3.7 and 2.7 out of 10 and the 'abbreviated statement of reasons' a 3.9. Only the fully motivated ruling receives a satisfactory score: 7.4 out of 10.

The average response to questions about the quality of the statement of reasons of the 'abbreviated statement of reasons', about the consistency of the choice of the Council of State between the various disposal modes and about the extent to which the Pilot 91-2 meets the criticism from the 'field' about the lack of a statement of reasons in judgments in which the appeal is declared unfounded, is also (very) negative. Furthermore, legal aid counsellors do not experience more procedural justice as a result of the pilot and the overall performance of the Council of State as aliens

court scores clearly insufficient with this group, both for the period prior to the pilot as well as for the period since the pilot, although the appreciation for the second period is slightly higher than for the first period (the appreciation rises from 3.6 to 4.4).

The negative attitude of the legal-aid counsellors – and a potential explanation for the answers to almost all questions put to them – is most succinctly expressed in the reaction – illustrated in Figure 6.2 – to the proposition that a decision on the basis of Article 91 (2) of the Aliens Act 2000 does not do justice to the interests and fundamental rights of the alien.

Figuur 6.2 Statement: 91-2 judgment does not do justice to interests/fundamental rights of the alien (n=76)

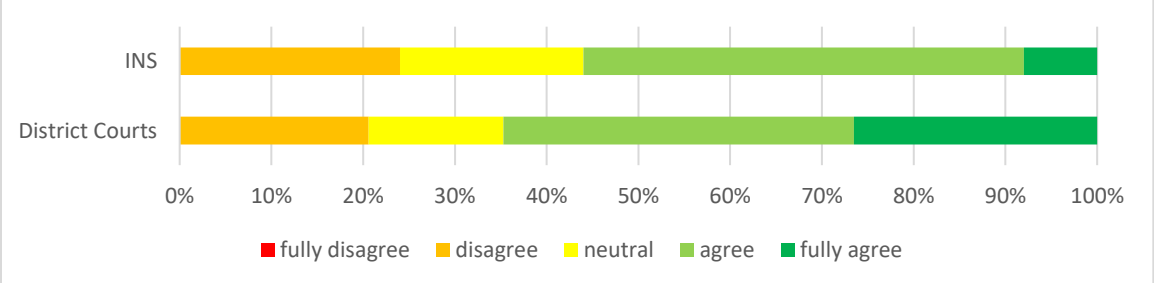


6.2 INS and districts courts

Employees of the INS and judges and jurists of the courts are in all respects more positive than the legal aid counsellors. Employees of the INS, for example, give a clearly higher score to the different varieties of judgments (although they also qualify the 'bare' 91-2 judgment with a 3.3 as seriously inadequate) and they assign much higher marks to the general functioning of the Council of State than the legal assistance counsellors do. The functioning of the Council of State prior to the pilot scored 7.1 with the INS staff, and 7.5 since the introduction of the pilot. As for the judges and lawyers of the district courts, the general appreciation of the Council of State is slightly lower than in the INS (prior to the pilot: 6.5, as from the pilot: 7), but considerably higher than in the legal aid councellers that work on behalve of the aliens.

It is remarkable, however, that on average the INS employees also react rather negatively to the proposition that the application of Article 91 (2) of the Aliens Act 2000 does not do justice to the interests and fundamental rights of the foreign national. On that point there is a high degree of agreement between INS staff and judges and legal experts of the court, as can be seen in Figure 6.3.

Figuur 6.3 Statement: 91-2 judgment does not do justice to interests/fundamental rights of aliens (n=??)



56% of the INS staff, 56% and 65% of the judges and lawyers of the district courts (totally) agree with the statement. In both cases only a limited group disagrees with the statement, and no-one disagrees at all.

6.3 Council of State

State Councillors and lawyers at the Council of State are the most positive about the functioning of the Council of State and about the Pilot 91-2. Respondents of the Council of State rated the functioning of the Council of State before the pilot with a 7.4 and since the pilot with a 7.6. Respondents of the Council of State are also significantly more positive about the consistency in choosing not to give reasons for a ruling, or giving limited or complete reasons. Less than 20% of the legal aid counsellors agreed (completely) with that statement, but more than 70% of the respondents at the Council of State did so. Finally, the response to the statement that a 91-2 judgment does not do justice to the interests and fundamental rights of the foreign national is also markedly different. Nearly 90% of legal aid counsellors (totally) agreed, while 65% of respondents at the Council of State (totally) disagreed with that statement.

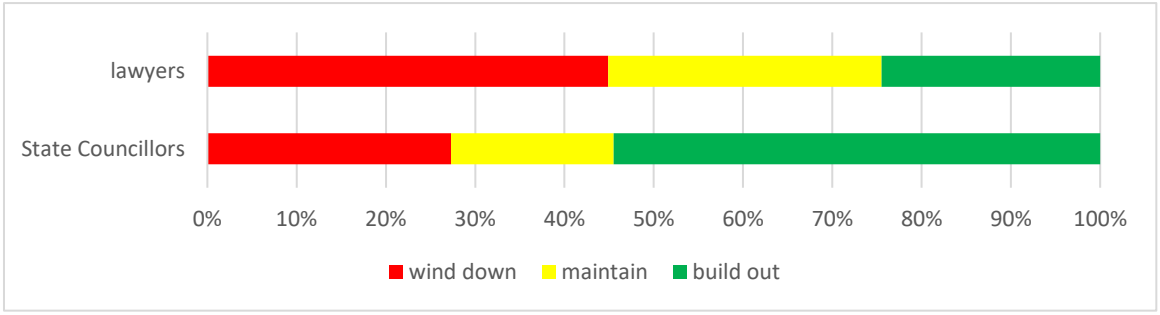
Because the Council of State must decide whether to phase out, maintain, or expand the pilot, we also asked respondents a series of questions about the level of support for each of those options.

Continuing the pilot?

To find out how State Councellors and lawyers of the Council of State envision the future of the pilot, we asked them which of the following three statements they agreed with most: the Pilot 91-2 should be phased out; the Pilot 91-2 should be maintained in its current form; the Pilot 91-2 should be expanded.

Of the respondents, 42% chose to phase out, 28% chose to maintain, and 30% chose to expand. Figure 6.4 shows that legal assistants and state boards have different views on this.

Figuur 6.4 Pilot 91-2 wind down, maintain or build out? (lawyers vs State Councillors)



The figure shows that almost half of the lawyers chose to wind down the pilot, while more than half of the State Councillors opted for expanding it. In addition, work experience appears to be important. Of those who have been working in the Aliens Chamber of the Council of State for a relatively short time, 47% are in favour of expanding the pilot project, while 57% of those who have been working in the Aliens Chamber for a relatively longer time are in favour of phaising out the pilot project. The support for expanding is highest among State Councillors who have been working in the Aliens Chamber for less than 5 years (5 out of 5) and lowest among lawyers who have been working there for 5 years or more (2 out of 27).

Reflection of Councillors of State/laywers on the question: phase out, maintain or expand?

We gave respondents the opportunity to explain their answer to the question of whether the pilot should be phased out, maintained, or expanded.

Skepticism about the need for the pilot
The explanations show again that there are very different views on the necessity of the pilot. Some of the respondents do not see it very strongly:

> "I don't think aliens are disproportionately disadvantaged by a 91-2, because that just means the District Court did a good job."

Skepticism about the usefulness of the pilot is quite often linked to the desires of the legislature:

> "The authority to not give reasons for rulings was an explicit choice of the legislator to cope with the large numbers of appeal cases and to distinguish sharply which cases do or do not lend themselves to a reasoned judgment in the interest of legal unity and development. No intermediate form fits this concept."

It is regularly noted that in deciding whether to stop or continue with the pilot, the wishes of the parties involved in the appeal process are crucial.

> "Continue only it if the legal aid counsellors, the INS and the District Courts are happy with it."

There are also dissenting opions, which are addressed below, when dealing with suggestions for improvements.

Problems in Implementation
Apart from the fundamental question of how the pilot relates to the task of higher appeal judges in alien cases, the responses frequently reflect on how the pilot functions in practice and what could be improved. A number of respondents identify problems with the application.

> "The application rules are very rigid. Many appeals fail because of the factual circumstances in an individual case. Then a 'bare' 91-2 would be obvious, but you may only choose that after you have explained why none of the categories apply. (...) Because you may only refer to one grievance in category 1, it takes (a lot) of time to explain which judgment is the most appropriate one. And if several decisions of the Council of State must be read in conjunction, it still becomes a 'bare' 91-2, because you may only refer to one decision. If these application rules were less rigid, it would save time in many cases."

This quote reveals three problems: the criteria are rigid, decision making about whether and if so which standard consideration should be added to a 91-2 ruling is time consuming, and the result is far from always of added value to parties. On top of that...

> "... that the abbreviated explanation usually does not cover all grievances; the State Councillor/lawyer picks out the most important ones. Also, the explanation is mainly given in cases that have no chance beforehand (...). Precisely cases in which the notice of appeal is of better quality (but the complaint was not rightly submitted) are disposed of with a 'bare' 91-2. That is the upside-down world. Rather, we should be providing more clarification in cases that do have the potential to raise questions in the legal profession."

There are also concerns about consistency in the application of the various categories.

> "Because of the pilot, there is less consistency: both lawyers and State Councillors apply the building blocks differently. (...) We explain to the incompetent legal aid provider why we apply 91-2 It is precisely the better appeals, where there is really something special going on, appeal and the debate continues, or in cases where the District Court is principled on an issue, where I can imagine there is disappointment with a 'bare' 91-2."

Possible Solutions
One proposed solution to the problems identified is to move away from the use of standard considerations in 91-2 rulings. Instead, considerations should more often be written out in abbreviated form.

> "The categories have little added value when there is a good ruling from the District Court. It makes more sense to write out briefly if one or more of the court's considerations are incorrect, but the dictum of the court's ruling is correct. It benefits the District Court more and it also shows that what was argued on appeal makes sense."

Some respondents want to go a step further. The Council of State should give full reasons for more rulings. Several reasons are cited for this. For example:

> "91-2 does not exist for other administrative law cases. This is fundamentally unfair. It entails a more limited appeal right for migrants including EU citizens from other member states compared to Dutch litigants."

One possibility is to make better use of the so-called 'endnotes' in which the analysis of the appeal case written down by the lawyers that support the State Councellors.

> "Another radical form should be chosen, which comes down to including in the judgment, in (very) abbreviated form, the part of the 'endnote' that relates to the main grievance of the appeal case."

Workload
In many observations and suggestions in response to the open question to the State Counselors and lawyers at the Council of State, the workload plays a role. Not only when reflecting on the possibility of expanding the pilot, but also in observations about the current working method.

> "The pilot leads to a significant increase in workload, particularly because of the obligation to send certain categories past the unit coordinator and the obligation to go through all categories in the 'endnote' before the conclusion may be drawn as to which category applies."

From the quote, it can be concluded that the workload is partly determined by the fact that deciding on the application of one of the categories requires a rather hefty protocolized work process.

7. Conclusion

The Council of State has the power under Section 91(2) of the Aliens Act 2000 to issue rulings without giving any reasons. Powers must always be exercised within the bounds of reasonableness. In determining these limits it is important that the authority of article 91, paragraph 2 of the Aliens Act 2000 was granted to the Council of State on the assumption thatit would have to deal with about 13,000 appeals each year and also that it is an essential characteristic of the administration of justice that judges give reasons for their decisions. Seen in this light, the power of article 91 (2) of the Aliens Act 2000 calls for a cautious application, especially now that the numbers of cases brought before the Council of State for has developed rather differently than was expected. It is therefore not surprising that the Council of State has started looking for ways to do more justice to the interest of the parties involved in proceedings before the court.

How should that search be continued,? As far as we are concerned, returning to the situation as it was prior to the pilot is not an option for two reasons. The first reason is that, in view of the number of cases that the Council of State handles, it cannot be said that it exercises the power of Article 91 (2) of the Aliens Act 2000 within the bounds of reasonableness. A reasoned judgment is given in only 3% of the unfounded appeals. Secondly, our the study shows that there is a strong preference among the different parties involved in the appeal for more and more extensively reasoned judgments.

Continuation of the pilot in its current form is not an option either as far as we are concerned. Due to the inflexible application of the standard considerations the information value of those judgments is much lower than it could be, while consistency is not achieved in the eyes of the most important category of users, the legal-aid counsellors of aliens whose appeal has been declared unfounded. A second reason is that precisely the appeals that are most deserving of a reasoned verdict, are now often still disposed of with a ‘bare’ 91-2 verdict, because they do not fit into any of the available standard considerations. A third reason is that if an appeal is unfounded, the secretary of state gets a reasoned ruling 20 times more often than an alien. From a procedural justice perspective, this difference is unacceptable.

The results of this study lead us to the conclusion that the pilot should be expanded. Providing reasons for rulings in which the appeal is declared unfounded should be the rule, instead of the exception. We have the firm belief that, in view of the caseload and the capacity of the Alien Council of State, this change is feasible. It will require less emphasis on the (at present sometimes seemingly all-dominant) pursuit of consistency and that more use is made of the thorough ‘endnotes’ as building blocks for the substantiation of the judgments.

By almost never giving reasons for its decision in the event of an unfounded appeal, the Council of State has extremely limited its task as the appellate court in aliens cases on insufficiently convincing grounds. The change that was initiated with the introduction of Pilot 91-2 therefore deserves to be expanded upon with vigour. If unfounded appeals are also provided with a statement of reasons, more justice can be done.