

Mayors' Discretion in Decisions about Rejected Asylum Seekers

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1. Introduction

In October 2018, the mayor of Riace, a small Italian town in southern Italy, was put under house arrest over claims that he had set up an illegal operation to prevent asylum seekers being deported. In the years before his arrest, Mayor Domenico Lucano had gained international fame for welcoming hundreds of refugees to Riace. Prosecutors issued a statement saying that their investigation had brought to light 'the unscrupulousness of Mr Lucano, despite his institutional role', in organising marriages of convenience between Riace citizens and asylum seekers, to secure the latter's stay in Italy. Civil society organisations expressed concern about the arrest, and anti-mafia writer Roberto Saviano wrote in a Facebook post that the goal of Lucano's actions was 'not profit, but civil disobedience' and that this was 'the only weapon we have to defend not only the rights of migrants, but everyone's'.¹ Another writer, Gioacchino Criaco, said Lucano was an honest man but that the 'rules on the reception and management of migrants are too tangled, and administrators often find themselves caught in a dilemma between a humanitarian choice and a legal one'.²

During her long and extremely productive academic career, Elspeth Guild has published on law and law making processes in the field of migration and asylum at a variety of levels and in a variety of arenas, critically examining the role of a wide variety of actors – state and non-state, national, supranational and intergovernmental actors – involved in these processes. In this contribution, we will focus on an actor which, as far as we have been able to establish, has more or less escaped Elspeth Guild's attention. We will examine how mayors in the Netherlands perceive and use their discretion in situations involving rejected asylum seekers or other migrants whom the national government considers to be 'unlawfully present aliens'.

In several European countries, mayors have stood up for (rejected) asylum seekers. The position of mayors in different countries differs and so do their formal and informal powers and competences. In Italy, mayors are elected and enjoy large autonomy and independence. In the Netherlands, mayors are appointed by the national government. They are not as autonomous and independent vis-à-vis the national government as elected mayors. However, they too may be required to decide about offering support to rejected asylum seekers.

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¹ Ylenia Gostoli, 'Italy's pro-refugee mayor Domenico Lucano arrested', *Al Jazeera News*, 2 October 2018. Retrieved from <https://www.aljazeera.com>.

² 'Pro-refugee Italian mayor arrested for "aiding illegal migration"', *The Guardian* 2 October 2018. Retrieved from <https://www.theguardian.com>.

In 2018, the expulsion of Afghan asylum seekers to their country of origin led to societal unrest in Tytsjerksteradiel, a village in the north of the Netherlands and the location of a reception centre for rejected asylum seekers. The municipal council and several NGOs urged the mayor to refuse to cooperate with the expulsions. Mayor Jeroen Gebben responded that he would be exceeding or abusing his discretion if he did so, because the matter fell within the competence of the national government.³

There have also been cases where mayors in the Netherlands helped rejected asylum seekers to go into hiding to prevent their expulsion, or where they instructed the police not to cooperate in an expulsion.

In 2012, Mayor Els Boot (Giessenlanden) instructed the police not to provide assistance in the expulsion of an Afghan asylum seeker. She said she feared disastrous consequences for his wife and children if the man was expelled. 'As a mayor, I am bound by my duty of care for every resident in my municipality. I cannot stand by and watch the drama unfold if I can prevent it', she stated.

Mayors apparently have different perceptions of their discretion or, in terms of Dworkin's hole-in-the-doughnut analogy, different ideas about the content and tightness of the 'belt of restriction' surrounding their discretion. In this contribution, we will examine how mayors in the Netherlands have responded to two types of situations involving rejected asylum seekers or other unlawfully present migrants:

1. Mayors may be asked (by local actors like members of the municipal council, NGOs or individual citizens) to resist the expulsion of unlawfully present migrants. This often concerns (families with) children who have grown up in the Netherlands.
2. Mayors may be asked to provide shelter and other forms of support to unlawfully present migrants who cannot be expelled and who have been found living on the street or causing a public nuisance.

In both situations, mayors are asked to act against or depart from the policies of the national government. How do they respond? Do they take action, and if yes, what types of action, and how do they justify their responses? Do they consider them as falling within their discretionary space? In brief, how do mayors perceive, define and use their discretion? As we are interested in how mayors perceive their discretion, we do not distinguish beforehand between weak and strong discretion, or between discretion and autonomy.⁴ To use once more Dworkin's hole-in-the-doughnut analogy, we assume

³ 'Wat kan de gemeente doen tegen uitzettingen van afgewezen asielzoekers?', *Friesch Dagblad* 18 August 2018. Retrieved from <https://frieschdagblad.nl>.

⁴ The concept discretion has been defined in different ways. According to Van Leeuwen, Tummers & Van der Walle (2017, p. 2), 'discretion can be broadly conceptualized as decision-making power over sort, quantity, and quality of sanctions and rewards during policy implementation'. According to Evans & Harris (2004, p. 871, 881), 'discretion should be regarded as a series of gradations of freedom to make decisions'. See also Eule (2014, p. 57), commenting on Lipsky's (1980, 2010) distinction between discretion and autonomy.

that mayors may have different ideas about both the content (they may refer to different sets of rules) and the tightness (they may see more or less room for manoeuvre) of the 'belt of restriction' surrounding their discretion.

To answer the above questions, we analysed newspaper reports of local cases that occurred in the years 2011–2018. We conducted a search of all Dutch news in *Lexis Nexis*, an online database of newspaper articles, using the search terms *burgemeester** AND *nietgeprocedeerd**. This yielded 551 results. After excluding double hits⁵, we had 361 results left. Further selection was done by reading the articles: 295 articles turned out to be relevant. Next, 16 more relevant articles were found by way of the snowball method and a Google search.⁶ All in all, we analysed 311 newspaper articles. Moreover, we interviewed four mayors. One of them had also been chair of the committee for asylum affairs of the Association of Netherlands Municipalities. Another one had also been the responsible minister for some years.

2. Backgrounds

In the Netherlands, mayors (*burgemeesters*) are the head of the municipal government. There are 355 municipalities in the Netherlands. They are responsible for various public services. The mayor chairs both the municipal council, whose members are elected by the general populace, and the council of mayor and aldermen (*College van B&W*), which is the executive board of the municipality. The members of this executive all have their own portfolio. The mayor's portfolio always includes public order and safety. Whereas the aldermen are elected and can be voted out by the municipal council, the mayor is appointed by the national government and therefore cannot be removed from his office by the municipal council. Nearly all mayors are members of political parties, but they are expected to be impartial. Mayors are responsible for public order and safety in the municipality. For this purpose, they have authority over the police. They cannot be instructed about the use of their powers in this respect by the municipal council, they can only be called to account about their actions afterwards.⁷

Although there has been a trend toward decentralising powers from the national government to the municipalities, powers and competences in the field of migration and asylum law have remained with the national government. Over the past decades, the treatment of rejected asylum seekers has been a continuous matter of debate between the national government and municipalities. Under the Aliens Act 2000, rejected asylum seekers are obliged to leave the country and their entitlement to reception ends four weeks after their asylum application has been turned down. In practice, however, many do not voluntarily leave and are not forcibly expelled either. Some of them end up on the streets in municipalities. Municipalities are responsible for providing social support, but the so-called Linking Act, which entered into force in 1998, prohibits them from providing support to unlawfully present aliens.⁸ The municipalities (through

⁵ If the same article was published in different newspapers with joint editorial offices, we selected the article in the main journal. When an article with the same title was published twice in the same newspaper, we selected the longest version.

⁶ We thank Mienke de Wilde for searching and selecting relevant articles.

⁷ Voermans & Waling 2018, p. 106.

⁸ Pluymen 2008, p. 36.

the Association of Netherlands Municipalities, of which all municipalities are members, and LOGO, a platform of municipalities which offer shelter to rejected asylum seekers) argue that rejected asylum seekers should be offered reception facilities until their departure or expulsion, to prevent problems in the field of public order and safety and public health. Moreover, they argue that if the national government does not take its responsibility in this respect, municipalities are allowed or even obliged to provide at least a minimal form of shelter, often referred to as 'bed, bath and bread'.⁹ The national government wants the municipalities to stop providing shelter as it will encourage rejected asylum seekers to stay in the country unlawfully.¹⁰

Another disagreement concerned the authority over the police in relation to expulsions of rejected asylum seekers. Whereas the national government took the position that the authority lies with the minister of Justice and Security, many mayors thought they could instruct the police not to provide assistance with an expulsion to prevent public unrest in their municipality.¹¹ In 2012, forty mayors signed a letter in which they supported the refusal of Mayor Els Boot to call in the police for the expulsion of an Afghan asylum seeker.¹² The mayors argued that the minister's interpretation of the Police Act was incorrect. The minister then commissioned an expert opinion from legal scholars. They concluded that the authority over the police in relation to expulsions lay exclusively with the minister, and that save in very exceptional circumstances, mayors could not forbid the police to assist with expulsions.¹³

The municipalities also called for a regularisation scheme for asylum seekers who had been in the country for many years. In 2007, after years of discussion, the national government agreed to a one-off regularisation scheme, the so-called *Pardonregeling* (amnesty scheme), on condition that the municipalities would stop offering shelter to rejected asylum seekers who did not fulfil the conditions of the scheme. In 2013, again under pressure from, among others, municipalities, the national government agreed to a special regularisation scheme for long-term resident children, the *Kinderpardon* (children's amnesty scheme). In January 2019, the government agreed to loosen the conditions of the scheme.

The municipalities have thus achieved some successes. However, the problem of rejected asylum seekers ending up on the streets in municipalities has not been solved; it has remained a bone of contention between the national government and municipalities. The national government has used a variety of means and arguments to persuade municipalities to stop providing shelter to rejected asylum seekers, from emphasising the importance of uniform government action and denying mayors' discretionary powers in these matters to threatening municipalities with financial penalties.

The national government does not exclude rejected asylum seekers entirely from reception facilities. An exception is made for families with minor children. They are

⁹ Cf. Kos, Maussen & Doomernik 2015, p. 9.

¹⁰ ACVZ 2012, 2018; Winter et. al. 2018.

¹¹ ACVZ 2012.

¹² Rob Pietersen, 'Burgemeester belet uitzetting Afghaan', *Trouw* 27 March 2012. Retrieved from <https://www.trouw.nl>; '40 burgemeesters tegen uitzetten', *Binnenlands Bestuur* 1 April 2011. Retrieved from <https://www.binnenlandsbestuur.nl>.

¹³ Advies van prof. mr. dr. J.G. Brouwer en prof. mr. dr. A.E. Schilder inzake 'het gezag over de politie bij uitzetting van vreemdelingen' van 24 september 2012 (bijlage bij 19637, nr.1588). Retrieved from <https://zoek.officielebekendmakingen.nl/blg-191055>. See also Brouwer & Schilder 2012.

entitled to reception in special family centres. Other rejected asylum seekers are offered reception in a special centre, with a freedom-restricting regime, for a maximum of twelve weeks, under the condition that they cooperate with their expulsion. In 2014, the European Committee for Social Rights (ECSR) ruled that the Dutch government had violated its obligations under the European Social Charter by refusing reception facilities to rejected asylum seekers and other unlawfully present migrants.¹⁴ According to the ECSR, the provision of emergency assistance could not be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion. This judgment led to a period of legal uncertainty, as the government indicated that it would not comply with the ruling and the Committee of Ministers of the ECSR was vague about whether unlawfully present migrants fell within the scope of the Charter. In 2015, the two highest administrative courts in the Netherlands ruled that the government might make the provision of reception facilities to rejected asylum seekers conditional upon their cooperation with their expulsion.¹⁵ In 2016, another judgment was passed by the Judicial Division of the Council of State, stating that municipalities had no specific power to provide shelter to unlawfully present migrants and that there was no legal or international duty upon municipalities to do so. The highest administrative court thus departed from the ECSR.¹⁶

In the meantime, deliberations between the national government and the municipalities continued, and in November 2018, a new agreement was reached. In five large municipalities, reception facilities for rejected asylum seekers will be opened. The results will be evaluated after three years and if the reception facilities lead to more voluntary departures, another three facilities will be opened. Both the national government and the municipalities will contribute financially.

3. Legal and Moral Arguments for Taking Action on Issues Involving Rejected Asylum Seekers

Municipalities are a decentralised tier of the government, and as heads of these decentralised governments, mayors are bound to follow the laws and policies of the national government. It is the national government, more specifically the state secretary of Justice and Security, that decides whether a country is safe to return to for migrants who are not allowed to stay in the Netherlands. Mayors are expected to follow the national government in this regard. As Kos et al. pointed out, from the viewpoint of the national government, municipalities are formally a 'chain partner' or a 'cooperation partner' when they provide space or land for the reception centres that are owned and run by the national government, but 'they are expected to be 'cooperative' when it comes to other aspects of policy implementation for which they take no formal responsibility'.¹⁷

¹⁴ *Conference of European Churches (CEC) v. the Netherlands (decisions on the merits)*, Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 10 November 2014.

¹⁵ CRvB 26 November 2015, ECLI:NL:CRVB:2015:3834; ABRvS 26 November 2015, ECLI:NL:RVS:2015:3415. See also Terlouw 2016, p. 4.

¹⁶ ABRvS 29 juni 2016, ECLI:NL:RVS:2016:1782 and ECLI:NL:RVS:2016:1783.

¹⁷ Kos, Maussen & Doornik 2015, p. 362.

The Dutch aliens law grants hardly any discretion to mayors when it comes to providing police assistance in cases of expulsion and refusing shelter to unlawfully present migrants. Nevertheless, mayors could in theory find at least three types of arguments in the law to argue that it falls within their discretion to refuse police assistance or to (continue to) provide shelter:

- Firstly, mayors could argue that the municipality's duty of care toward vulnerable people, as laid down in the Social Support Act (*Wet maatschappelijke ondersteuning*), and their responsibility for public order and safety allows or even obliges them to act.¹⁸ Particularly with regard to offering shelter, mayors could argue that they exercise their powers in the field of public order and security reasonably if offering shelter prevents people from wandering around, destitute, on the streets.¹⁹
- Secondly, mayors could argue that they have an independent responsibility to protect human rights as laid down in international treaties, such as the right to human dignity in Art. 1 of the EU Charter of Fundamental Rights and the right of *non-refoulement* of Art. 33 of the Refugee Convention. In 2012, the Association of Netherlands Municipalities together with the Dutch section of Amnesty International published a brochure on the meaning of human rights for municipalities. According to this brochure, both national and local governments and individual government officials have the responsibility to respect, protect and promote human rights as formulated in human rights treaties and the Constitution. Moreover, the Netherlands has a monist system: Arts. 93 and 94 of the Dutch Constitution determine that international law provisions have preference above national laws.²⁰
- Thirdly, mayors could refer to inconsistent jurisprudence. For example, with regard to offering shelter, there was a period of diverging case law after the judgment of the European Committee for Social Rights. Mayors who decided to support unlawfully present migrants, could thus argue that they were not acting *contra legem*, but in conformity with legal obligations resting on them.

Our newspaper search and interviews with mayors did not yield clear examples of mayors using the latter two arguments. Of course, these arguments may well have been used in, e.g., letters to the state secretary, but we did not find them in interviews given to journalists. Among the four mayors we interviewed, one mayor did refer to 'fundamental human rights' and 'people's right to a dignified treatment', but he had doubts about using them as a basis for concrete action.²¹

We did find many examples of the first argument, i.e. mayors arguing that their responsibility for public order and safety allowed or obliged them to act.

In 2015, Mayor Frits Naafs (Utrechtse Heuvelrug) claimed that he had the authority to offer shelter to rejected asylum seekers – to prevent them falling into anonymity, illegality and criminality – as the reception of homeless people fell within his competence. This would not be necessary if the national government ensured that rejected asylum seekers did not stay here unlawfully, he stated.²²

¹⁸ Zwaan & Minderhoud 2016, p. 897; De Jong et. al. 2017.

¹⁹ ACVZ 2018, Bijlage 1; ACVZ 2012.

²⁰ *Goed bezig. De betekenis van mensenrechten voor gemeenten* 2012.

²¹ Interview M2 (2018, November 23).

²² Naafs blijft asielzoekers steunen (2015, April 30). Retrieved from <https://nieuwsbladdekaap.nl>.

All four mayors we interviewed stated that their responsibility for public order and safety gave them discretion to take action for rejected asylum seekers. However, two of them added that this discretion was sometimes misused or improperly used by colleagues. The first mayor considered refusing police assistance for expulsions to be 'improper use of the powers mayors have for the purpose of protecting public order, in cases when the public order is not at stake'.²³ The second mayor stated that mayors sometimes 'choose the easy route' by supporting protests against an asylum seeker's expulsion, as the final decision did not lie with them, but with the state secretary. In this respondent's view, 'it is easy to claim that you have discretion if the final responsibility for the bigger issue does not lie with you'.²⁴ The third mayor stated that nearly all laws and regulations contained 'a safety net', i.e. provisions that made it possible to deviate from the letter of the law if the spirit of the law required it.²⁵ The mayors talked about their discretionary space in a rather loose way, without referring to specific provisions or laws or regulations. The fourth mayor explained that he thought he had a large discretionary space but would rather not know if it was not as large as he thought, and that he would use it anyway.²⁶

Some mayors are prepared to act (or accept that they may act) *contra legem* when supporting rejected asylum seekers. These mayors invoke different arguments. Our newspaper search yielded examples of four types of arguments.

- Mayors may experience the legal norms as unjust or in contradiction with moral norms such as the right to have rights,²⁷ or religious norms such as 'love your neighbour like you love yourself'.
- They may regard national policies vis-à-vis rejected asylum seekers as failing and argue they have to step in where the national government fails to take responsibility. They may also think that municipalities are best aware of and best equipped to solve problematic situations involving rejected asylum seekers.
- They may feel they have a special responsibility toward rejected asylum seekers in their municipality, which may be strengthened by pleas from schools, neighbours, football clubs, etcetera, that claim that the migrants concerned have become part of the community.
- They may not agree with the decision that was made in the refugee status determination procedure and/or with the expulsion decision.

The first three arguments are most common and they are often combined. The following example is interesting because the mayor concerned differentiated between law and policy.

In the context of the debate on reception facilities for rejected asylum seekers, Mayor Annemarie Penn-te Strake (Maastricht) said she did not have a problem with acting contrary to national policies 'if the interest of the person concerned serves a higher purpose than the implementation of policies that lead to distressing situations. That is the space I take, it is not my job to look

²³ Interview M1 (2018, November 19).

²⁴ Interview M2 (2018, November 23).

²⁵ Interview M3 (2018, November 28).

²⁶ Interview M4 (2019, February 15).

²⁷ Arendt 1968, p. 177.

away', she said. However, she differentiated between law and policies. She would not be prepared to break the law, except in the extreme case that by doing so she could save a human life, and she would resign immediately afterward.²⁸

In 2016, Mayor Jos Heijmans (Weert) helped a Syrian asylum seeker and her four young children to hide in a monastery to prevent their expulsion to Germany (and prevent them being separated from relatives in the Netherlands). 'I let my heart prevail over the rules', he explained, and: 'As a mayor, you have to intervene when people fall victim to the rules.'²⁹

All four mayors we interviewed were of the opinion that there are situations where it might be necessary to exceed one's discretionary powers and/or to break the law. 'Necessity knows no law', the first respondent said, and: 'Conscience, not law, is the highest norm for me.' However, he added that he would go that far only in 'cases of life and death'.³⁰ The second respondent referred to 'fundamental human rights' and 'people's right to a dignified treatment'.³¹ The third respondent said that mayors often acted without formal power or authority, 'because as a mayor, you want to solve problems'. He did not feel the need to justify his actions by referring to the law: 'I feel I'm authorised to do what I deem necessary if the national government does not perform its duties properly.' In his view, if people were not granted a residence permit they should be expelled, and if they could not be expelled they should be granted reception. 'You cannot just accept that people fall between two stools. That is inhuman.'³² The fourth respondent likewise described himself as a problem solver, but he also referred to the Second World War to explain why he felt authorised to do what he deemed necessary to prevent people from living on the streets.³³

4. Choices and Justifications

In our newspaper search, we found a large variety of actions taken by mayors to support rejected asylum seekers. With regard to resisting deportations, actions taken ranged from writing letters to the state secretary to withholding police assistance for removing rejected asylum seekers from their houses and helping families to hide. With regard to offering shelter, we found a series of joint (public) lobbying activities by mayors, aimed at changing national policies. But we also found a range of actions to support rejected asylum seekers in the municipality concerned, for example by providing shelter to specific groups of vulnerable rejected asylum seekers; providing shelter for a specific period of time (e.g., one month or in wintertime); permitting a tent camp

²⁸ Marten Muskee (2018, June 1). Burgemeester Annemarie Penn-te Strake van Maastricht: 'We mogen soms wel iets dapperder zijn'. Retrieved from <https://vng.nl>.

²⁹ Burgemeester Weert: 'Onderduiken hielp voor Syrisch gezin' (2018, September 3). Retrieved from <https://www.nporadio1.nl>.

³⁰ Interview M1 (2018, November 19).

³¹ Interview M2 (2018, November 23).

³² Interview M3 (2018, November 28).

³³ Interview M4 (2019, February 15).

and offering bins and mobile toilets;³⁴ terminating reception facilities but offering money to the migrants concerned;³⁵ providing financial support to NGOs that offered shelter.

Mayors make different choices with regard to what actions to take. Some mayors offer actual support to rejected asylum seekers, others try to convince the state secretary to use his discretionary power. Some participate in joint (public) lobbying efforts aimed at changing policies, others prefer to conduct silent diplomacy for asylum seekers in their municipality.³⁶

Mayor Jeroen Gebben (Tytsjerksteradiel) said he used 'silent diplomacy' to prevent the expulsion of Afghan asylum seekers. However, going against the policy of the national government was not his style: 'This mayor will not resort to administrative disobedience, I have been appointed by the government.'³⁷

In 2014, Mayor Harald Bergmann (Middelburg) asked the state secretary to grant residence permits to an asylum seeker family with children. The family's application for residence permits under the children's regularisation scheme had been rejected. The same mayor had refused to sign a letter in which (over 300) mayors had urged the state secretary to extend the children's regularisation scheme.³⁸ The mayor explained that signing that letter would have been a political act which did not suit a mayor.³⁹

If mayors are prepared to take action in individual cases, their choices with regard to whom to support do not differ that much. Proximity plays a role in the sense that mayors may feel they have a special responsibility toward rejected asylum seekers in their own municipality. Political philosophers have pointed to the arbitrariness of proximity as an argument for responsibility (of states for refugees), but they hold that migrants must be offered the opportunities of citizenship once they have been taken in. Presence on the territory is regarded by them as a basis for membership of the community.⁴⁰ In actual life, whether rejected asylum seekers in a municipality are regarded as members (or as deserving membership) of the community depends on their integration.

³⁴ In 2013, Mayor Eberhard van der Laan (Amsterdam) legitimised his decision to permit a tent camp by stating that he regarded it as a demonstration; the decision to provide bins and mobile toilets was legitimised referring to public health and public order.

³⁵ Hanne Obink, '225 euro rijker, maar opnieuw op straat', *Trouw* 31 May 2013. Retrieved from <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:58J5-D9F1-JC8W-Y00H-00000-00&context=1516831>.

³⁶ Cf. Van der Leun & Bouter 2015, p. 149.

³⁷ 'Wat kan de gemeente doen tegen uitzettingen van afgewezen asielzoekers?', *Friesch Dagblad* 18 August 2018. Retrieved from <https://frieschdagblad.nl>.

³⁸ 'Oproep burgemeesters aan staatssecretaris Teeven' (2014, May 21). Retrieved from <http://www.logogemeenten.nl/dossier-kinderpardon>.

³⁹ 'Burgemeester op de bres voor asielzoekersgezin' (2014, June 6). Retrieved from <https://www.omroepzeeland.nl>.

⁴⁰ Walzer (1983, p. 62) states that 'every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship.' Miller (2016, p. 83-84) sees proximity (presence on the territory) as one of the bases for responsibility for refugees. See also Gibney (2004, p. 31) on membership and identity.

This is illustrated by the aforementioned letter of appeal, in which over 300 mayors had urged the state secretary to extend the children's regularisation scheme. The concluding sentence was: 'For the municipalities, these children already are well integrated citizens of their town or village. It would be good to formalise this by granting real residence permits.'⁴¹

Cases of children who grew up in the Netherlands (the Dutch speak of them as being 'rooted') have also been prominent in the media. In several cases, the state secretary ultimately decided to use his discretionary power and grant residence permits. More generally, visibility and the circumstance of a neighbourhood, school, community standing up for the migrants concerned, may help to prevent their expulsion.⁴²

All four mayors we interviewed had written letters to the state secretary for rejected asylum seekers in their municipality, in most or some cases with success, they said. One respondent explained that he only wrote such letters for asylum seekers who were well integrated, working or studying and participating in the local society. Moreover, they had to be of irreproachable conduct. Later on he added that he also found it relevant if people were traumatised and vulnerable.⁴³ Another respondent explained that he had once made his support conditional on the migrant concerned improving his Dutch language proficiency, because otherwise he could not credibly argue that the migrant (who had been living in the municipality for eighteen years) was well integrated in the community.⁴⁴ The third respondent explained that he had to be convinced that the decision deserved reconsideration because there were special circumstances that had not been taken into account when the asylum application was rejected. The same respondent was critical about 'some colleagues who too easily say yes when they are asked to write a letter', thereby shirking their responsibility and passing the buck to the secretary of state. However, he also thought that mayors should get a larger say in decision-making processes about rejected asylum seekers. He called it 'completely ridiculous' that the national government claimed to be in a better position to assess the situation of a rejected asylum seeker who was living in a municipality than the municipality concerned.⁴⁵ The fourth mayor described one situation in which he would have liked to have had the state secretary's discretionary power. It concerned a vulnerable rejected asylum seeker who had lived for years with a private person, an inhabitant of the town who had offered him shelter.⁴⁶

⁴¹ 'Oproep burgemeesters aan staatssecretaris Teeven' (2014, May 21). Retrieved from <http://www.logogemeenten.nl/dossier-kinderpardon>.

⁴² Schrover (2018, p. 459) speaks of a 'restrictionist paradox': voters vote for a restrictive policy, but protest against deportations of those who have been given a face.

⁴³ Interview M3 (2018, November 28).

⁴⁴ Interview M4 (2019, February 15).

⁴⁵ Interview M2 (2018, November 19). This was also proposed by the Advisory Committee on Aliens Affairs (ACVZ) in 2011. The committee pointed at the German example of the *Härtefall Kommissionen*, which consisted of representatives from the relevant state ministries, local authorities, regional and local civil society organisations and a single independent member. The ACVZ advised setting up a similar advisory body in the Netherlands, to examine from various perspectives cases in which the use of discretionary powers was requested on the basis of exceptional circumstances (ACVZ 2011, p. 65).

⁴⁶ Interview M1 (2018, November 19).

5. Concluding Remarks

Mayors can, to a certain extent, be compared to street-level bureaucrats. Like street-level bureaucrats, they have more proximity than the policymakers at the national level to the people targeted by the policies. Like them, they have a certain amount of discretion and they may select between 'deserving' and 'undeserving' rejected asylum seekers. However, unlike street-level bureaucrats, mayors do not implement law and policies as a primary task. Moreover, they do not have the task of applying rules to individual cases.

Many mayors are confronted with rejected asylum seekers living in their municipality, and with requests to support them. Dutch aliens law gives mayors little or no formal discretion as regards resisting expulsions or offering shelter, but they can derive room for manoeuvre from other national laws, in particular the Municipalities Act (*Ge-meentewet*) and the Social Support Act, and international human rights law. Mayors who refer to the law and their formal discretion, mostly refer to their responsibility for public order in their municipality as laid down in the Municipalities Act. Other mayors (or the same mayors in different situations) accept that they may be exceeding their discretion when supporting rejected asylum seekers. The vague nature of what mayors' discretion exactly entails explains partly why we see differences between mayors in their approaches to problems involving unlawfully present migrants and in their perceived discretion in this regard.

Another explanation can be found in the specificities and complexities of the policy domain concerned. Expulsion sometimes proves to be hardly possible. The idea that people whose claim for a residence status has been rejected will leave the country is largely a fiction and it is the municipalities (and mayors) who are confronted with the consequences of the failing expulsion policy. In addition, both expulsion and refusing reception touch upon basic human rights, which makes the issue very sensitive. Mayors can therefore hardly stay neutral, and doing nothing is also a decision. Moreover, quite a few mayors disagree with national policies especially when it concerns the expulsion of children who were born and raised in the Netherlands, or refusing shelter to people who have not been deported.

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