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Report on the Netherlands

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CONTENTS

1.	MIGRATION IN THE NETHERLANDS: FIGURES, LAW AND POLICIES	5
1.1	Migration and rules regulating the flows of regular entry of aliens	5
1.1.1	Migration: a brief historical overview and some figures	5
1.1.2	Source of Dutch immigration law	8
1.2	Re-admission agreements	9
1.3	Co-operation between social services and associations	10
2.	REASONS FOR THE EXCLUSION OF ALIENS FROM NATIONAL TERRITORY	12
2.1	Illegal entry in the national territory	12
2.2	Illegal stay	13
2.3	Breach of other rules regulating entry and residence	15
2.4	Rejection of the asylum application	16
2.5	Expiration of the right to asylum	17
2.6-		
2.9	Expulsion as a method of protecting the security of the state or public order	18
3.	STATUS OF ALIENS SUBJECT TO EXCLUSION ORDERS	21
3.1	Civil rights	21
3.2	Social rights	21
4.	EXCLUSION AND EXPULSION <i>DE JURE</i>	23
5.	EXCLUSION AND EXPULSION <i>DE FACTO</i>	25
5.1	Enforcement of the expulsion order: different varieties	25
5.2	Accidents	26
5.3	Measures of detention	26
5.3.1	Kinds of measures	26
5.3.2	Treatment of aliens detained	27
5.3.3	Defence guarantees	28
5.4	Penitentiary detention	28
5.5	Obstacles to enforcement of expulsion orders	28
5.6	Incentives to voluntary departure	28

6.	LEGAL RECOURSE	31
	6.1-	
	6.4 Remedies against administrative decisions	31
	6.5 Appeal against a detention order	32
	6.6 The right to defence	33
	ANNEX	34

REPORT ON THE NETHERLANDS

A comparative study of member states on immigration law,
with special reference to deportation and administrative detention

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1. Migration in the Netherlands: Figures, Law and Policies

1.1 Migration and rules regulating the flows of regular entry of aliens

1.1.1 MIGRATION: A BRIEF HISTORICAL OVERVIEW AND SOME FIGURES

In the 1950s and 1960s, the immigration to the Netherlands consisted mainly of labour immigrants, originating from the Mediterranean countries and from the former Dutch colonies Indonesia, Surinam and the Antilles. Most immigrants were young men, coming to the Netherlands in order to make money and to return to their country of origin after some years. This kind of temporary labour immigration was stimulated by Dutch companies as well as by the government. Companies developed a strategy to recruit workers first in Italy, Spain and Portugal, later in Yugoslavia and Greece, and finally also in Turkey and Morocco. The Dutch government mediated in this process and facilitated the access to the Netherlands of tens of thousands of labour immigrants.¹

Although the initial intention of labour immigrants was to return to their country of origin after some time, in many instances their stay was prolonged. Government politics allowed the additional labour force to remain in the country, thus partly solving the tightness in the labour market. When in the 1970s, due to economic decline, the demands for labour diminished, the active recruitment policy by the government was stopped. By then, the immigrants had integrated to a too large extent to justify sending them back; public opinion opposed to the initial plans of the government in that direction. At the same time

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1 J. Lucassen & R. Penninx, *Nieuwkomers, nakomelingen, Nederlanders: Immigranten in Nederland 1550-1993*, Amsterdam: Het Spinhuis 1994, p. 53.

a second category of immigrants to the Netherlands appeared: family members of the above mentioned group. Contrary to the labour immigrants, this new group arrived in the country with the intention to stay for many years, if not forever.²

Part of the immigrant workers from Greece, Spain and Portugal in the sixties in fact were fleeing the dictatorial regime of their country of origin. The newly established restrictions on labour immigration made this asylum related immigration more visible in the seventies. Apart from family reunion, asylum indeed became the main method to enter the country. At the same time, political upheavals and civil wars uprooted many people, adding to the amount of asylum requests in many European countries. In the Netherlands, asylum figures rose sharply after 1985 and have grown steadily since, with incidental peaks. In 1994 for example more than 52,000 asylum requests were submitted, this peak being caused by the war in the former Yugoslavia and the restrictive asylum policy in Germany.

The increasing number of asylum requests has caused a considerable increase of the absolute number of requests being rejected. A small percentage of asylum seekers are officially recognised as convention refugees. But many more receive temporary or permanent protection on the basis of another residence status. In the 1990s, approximately 50% of all applicants were not granted asylum at all.³

This, however, does not imply that all rejected asylum seekers are actually expelled. For many years, expulsion of aliens, who either did not apply for or had been refused admission, was not a priority in Dutch politics. The core of the policy was that return is the responsibility of the alien concerned: when the administration refused permission to stay and the court had affirmed this decision, this is where the involvement of the administration ceased. It was up to the alien to actually leave the country.⁴

In recent years, efforts to expel aliens in an active manner have been intensified. The actual figures indicating the (forced) return of aliens can be derived from this schedule:⁵

2 *Idem*, p. 7.

3 Ph.J. Muus, *Migration, Immigrants and Policy in the Netherlands. Recent trends and developments*, Sopemi report, Utrecht: ERCOMER 1998.

4 As expressed in Article 15d Aliens Act.

5 Source: Centraal Bureau voor de Statistiek, *Allochtonen in Nederland*, Den Haag 1998, as mentioned in H.B. Winter, 'Terugkeer als onderdeel van het asielbeleid: Feiten, begrippen en context', in: H.B. Winter, A. Kamminga & M. Herweijer, *Een grens gesteld. Een eerste evaluatie van het Nederlandse terugkeerbeleid*, Deventer: Kluwer 1999, p. 9 and IND, *Beslist Gewogen, Annual report 1998*, Den Haag 1999, p. 46.

Figure 1: Aliens reported as returned 1993-1998

	1993	1994	1995	1996	1997	1998
Rejected asylum applicants	7,186	13,293	14,509	16,481	18,873	14,342
Other aliens	13,043	17,892	25,515	34,983	43,119	41,399
Total	20,229	31,185	40,024	51,464	61,992	55,741

Although public debate mainly focuses on the rejection of asylum applications and the consequences of forced return of this category of applicants, it seems that the increased efforts of the Dutch government to get aliens to return have mostly resulted in the departure of other aliens.

The increase in rejected applications and political pressure to intensify deportation have led to an increase in the absolute numbers of aliens reported as having departed, but has not caused a higher percentage of people actually leaving the country.⁶ In-depth research of the figures of 1997 shows that from the 19,000 asylum seekers who were reported to return to their country of origin, only 22 % (4,400 persons) actually did in a government-controlled way. Three quarters of these returns were realised by forced departure.

The last quarter were registered as having left the country at an external border crossing. The remaining 15,000 aliens were not expelled. Some observers estimate that up to fifty percent of these people remained in the Netherlands, without status, deprived of all kinds of basic rights (see par. 3).⁷ Others point to alternative options:

*'The majority of asylum seekers who have to depart from the country, leave only their registered address, while their destination remains unknown. Partly they will have left the country for other (European) destinations, but a growing number of asylum seekers who have lost their case go into hiding and continue their stay in the Netherlands illegally, sometimes supported by church-committees, other organisations and volunteers.'*⁸

In this respect, it is worthwhile to distinguish the types of 'expulsion' of rejected asylum seekers that constitute the figures mentioned in figure 1.

⁶ *Idem*, p. 11.

⁷ A.J.R.M. Vermolen, 'Het Terugkeerbeleid: Te veel gericht op dwang, te weinig op medewerking', in: H.B. Winter, A. Kamminga & M. Herweijer, *Een grens gesteld. Een eerste evaluatie van het Nederlandse terugkeerbeleid*, Deventer: Kluwer 1999, p. 95.

⁸ Ph.J. Muus, *Migration, Immigrants and Policy in the Netherlands. Recent trends and developments*, Sopemi report, Utrecht: ERCOMER 1998, p. 14-15.

Figure 2: Expelled asylum seekers and types of expulsion

	1993	1994	1995	1996	1997	1998
Check of address after announcement	3,952	8,658	8,792	11,089	14,423	10,636
Expulsion	2,156	2,849	3,366	3,553	3,265	2,618
Controlled departure	1,078	1,786	2,351	1,839	1,185	1,088
Total	7,186	13,293	14,509	16,481	18,873	14,342

1.1.2 SOURCE OF DUTCH IMMIGRATION LAW

The distinction between Dutch nationals on the one hand and aliens on the other was first made in the Dutch Aliens Act of 1849. Under this law, aliens had to be admitted when they had enough money and were respectable. Once admitted, aliens could not easily be expelled anymore.⁹ The Aliens Act of 1965 was the first codification of the increasing limitations and growing administrative requirements for admission. Compensating for these impediments to residence rights, the Act also introduced the principle that there should be secure residence rights for certain groups of aliens and a system of administrative and judicial remedies. The Act is still in force today, however has been amended several times and has been supplemented by the so-called 'Aliens Decree' (*Vreemdelingenbesluit*) and the 'Aliens Circular' (*Vreemdelingencirculaire*). Repeatedly in the legislation, it is being stressed that it is the responsibility of the alien to return. This core principle is amplified by the emphasis on another central issue, stated by the minister of Justice: the fact that a residence permit is not granted to the alien, automatically means that the alien has the obligation to leave the territory of the Netherlands.¹⁰ This principle has been codified in the Aliens Act, Articles 7(1) and 7a(1). The Grand on Aliens Affairs of the District Court in The Hague (*Rechtseenheidskamer*; see *infra* par. 6.1-6.4) confirmed in its judgement of 19 October 1997 that with these provisions, the legislator lays the principal responsibility for the departure from the Netherlands with the alien, not with the administration.¹¹ Currently a proposal for a new Aliens Act is pending in Parliament. Given the controversial novelties of the Bill, impeding even further the chances of aliens to be admitted to the country, the new Act will probably not be in force before the year 2001.

9 A. Kuijjer & J.D.M. Steenbergen, *Nederlands Vreemdelingenrecht*, Utrecht: NCB 1999, p. 17.

10 Tweede Kamer 1996-1997, 25386, nr. 1.

11 Aliens Chamber District Court The Hague (*Rechtseenheidskamer*) 19 October 1997, AWB 97/6853.

1.2 Re-admission agreements

The Netherlands is involved in the following instruments (treaties, schemes, negotiations) regarding the return of aliens:¹²

Formal treaties:

1. Benelux¹³ Treaty (1960)
2. The Netherlands-Switzerland (1969)
3. Benelux-Germany (1966)
4. Benelux-France (1964)
5. Benelux-Austria (1965)
6. Benelux-Romania (1995)
7. Benelux-Slovenia (1992)
8. Schengen-Poland (1991)
9. Benelux-Bulgaria (1998)
10. Benelux-Estonia (1998)

In preparation:

1. Benelux-Armenia
2. Benelux-Croatia
3. Benelux-Latvia
4. Benelux-Lithuania
5. Benelux-Slovakia
6. Benelux-Czechia

Protocol of return co-operation:

1. The Netherlands-Morocco (1994)
2. The Netherlands-Ethiopia (1997)
3. The Netherlands-Angola (1997)

Return programmes:

1. The Netherlands-Somaliland (1997)
2. The Netherlands-Sri Lanka (1997)

12 The agreements with member states of the EU have lost most of their relevance since the Schengen and Dublin Agreements came into force. It is beyond the scope of this article to explain the differences between the different categories of agreements mentioned. Cfr. the Finnish proposal for a Regulation determining the obligation of Member States to re-admit third country nationals, OJ C 353/6 of 7.12.1999.

13 The Benelux is a close inter-governmental co-operation between Belgium, the Netherlands and Luxembourg.

Since the Treaty of Amsterdam came into force, the EC Council of Ministers has the competence to make rules under community law and conclude agreements on forced return and re-admission (Art. 63(3)(b) EC Treaty). However, this competence has not yet been used. Therefore the Dutch government continues its efforts to conclude more re-admission agreements and to implement those already existing.¹⁴

The reasons for the high expectations about the effects of re-admission agreements are difficult to identify, given the disappointing results of the last years. The treaties have, so far, not led to a significant number of aliens returning. In many cases, the relevant non-EU countries are not willing to accept the return of their own nationals, let alone the transit or return of aliens having illegally transited their territory.¹⁵ Under the framework of the 'Protocol of return co-operation' with Ethiopia for example, the authorities of Ethiopia have so far refused to give out a laissez-passer for rejected asylum seekers who have stated not to return voluntarily. Also the agreement between the Benelux and Slovenia has so far proven of little relevance for the admittance, to the territory of the latter, of aliens having crossed the territory illegally. The criteria as to the time that has elapsed since the illegal transit and other requirements of an administrative nature in many cases preclude the obligation of Slovenia to readmit from arising and, hence, seriously harms the effectiveness of the agreement.¹⁶ Many return agreements for example contain the provision that the request for re-admission must be made within one year after the alien has entered the Netherlands. In this time frame of one year, the person's application for refugee status or other residence permit should be considered properly. Given the duration of an asylum procedure in the Netherlands (three years is no exception), this provision will in many instances constitute a barrier to the application of these agreements.

1.3 Co-operation between social services and associations

Due to the new Linkage Act (*Koppelingswet*) that entered into force in 1998, all information on the residence status of aliens is now easily accessible to the officials implementing the social security legislation. The Act excludes illegal aliens from any right to social benefits, health insurance etc.¹⁷ Some details on this law will be discussed below, in par. 3. The deterioration, resulting from the Linkage

14 Tweede Kamer 1998-1999, 26646, nr. 1, p. 13.

15 R. Fernhout, 'Terug- en overnameovereenkomsten: Mogelijkheden en onmogelijkheden', in: H.B. Winter, A. Kamminga & M. Herweijer, *Een grens gesteld. Een eerste evaluatie van het Nederlandse terugkeerbeleid*, Deventer: Kluwer 1999, p. 83.

16 *Idem*, p. 87.

17 The 'principle' was enshrined in Art. 86 Aliens Act.

Act, of the position of the alien whose asylum request or request for another permit has been rejected, has caused many initiatives in society to alleviate the fate of these illegal aliens. Doctors continue the treatment of aliens although they are not covered by a health insurance; churches offer shelter and food and private families in some cases open the doors to their houses to host families that have been expelled from state-governed reception centres. Some people maintain that it was the expectation that private initiatives to alleviate the plight of the illegal aliens would arise in society, which has made it easier for the government to adopt the law.

2. Reasons for the Exclusion of Aliens from National Territory

We start this chapter with a general remark about the concept of ‘illegality’. The distinctive ‘illegal alien, illegal entry, illegal stay, etc.’ has acquired citizenship in the Dutch vocabulary probably some thirty years ago. The law as such did and does, however, not use this distinctive at all. Consequently, the only way to grasp the legal implications of the concept of ‘illegality’ is by assuming that every alien who does not reside in the national territory on a legal basis may be considered as ‘illegal’. At the same time it is still true, to paraphrase George Orwell, that some illegal aliens are ‘more illegal’ than others. This double vantage point is, in principle, still valid, – despite the fact that in the past decades the changes in the Dutch immigration policy (and in many of the by-laws, ordinances and circulars) have been vast and multiple. The Linkage Act in 1998 introduced the concept of ‘lawful residence’ in Article 1b of the Aliens Act (see par. 2.2 below).

2.1 Illegal entry in the national territory

As far as the *entry* is concerned, the first and main basic principle still is that every alien has the right to enter Dutch national territory, provided the alien has a valid document for boarding crossing and the stay is allowed on the grounds as set forth in the Aliens Act. Which are these grounds? Here, we can give just the rough schedule. The right to admission is guaranteed, of course, to those aliens who already have a residence or establishment permit, but also to those asylum-seekers who were given only a conditional permit (*voorwaardelijke vergunning tot verblijf*)(see infra par. 2.5) and, finally, to those aliens who are entitled to a visa-free stay not exceeding three months or to a short stay on the basis of a tourist visa or a transit visa. See infra par. 2.2. Aliens who claim to be refugees may only be refused entry in case the frontier police have received special instructions from the Minister of Justice. The second principle follows from the first, and simply lays down the obligation for the alien whose admission has been refused to leave the territory immediately.¹⁸ This obligation is suspended if the refused alien has filed an application to stay on a permanent basis. In that case, however, the alien may be detained – irrespective of his or her motives for the permit to stay (see infra par. 5.3.1). So, the entry of an alien who has crossed the Dutch borders without complying with these rules must be considered ‘illegal’.

‘Illegal’ entry as such is – for the alien involved – not a criminal offence; neither is illegal residence as such. Others, such as transport companies or individuals who assist the ‘illegal’ and/or undocumented alien to reach or cross the

¹⁸ See Article 7 and 7a Aliens Act.

Dutch borders, are however liable to heavy penalties. The last years have shown a substantial rise in criminal law suits against persons suspected of making profit assisting aliens in illegally entering the country (*mensensmokkelaars*).¹⁹ Unconditional prison sentences of a number of years and substantial fines are no exception. In the first major case against the KLM, the airline company has appealed its criminal conviction to pay a huge fine. The company in January 2000 concluded an agreement with the Ministry of Justice on how to implement the company's role in frontier control.

It should be noted here that one of the recent amendments to the Aliens Act (Article 16 a, in force since December 1998), although not dealing directly with the (il)legality of the entry, has a serious impact in this field. In principle, an alien who wants to stay in the Netherlands for a period exceeding three months, already needed a visa for long term residence (*machtiging tot voorlopig verblijf*). This visa must be applied for at the Dutch diplomatic mission in the country of origin or habitual residence. The gist of the new Article 16 a is that an application for an extended stay which is filed by an alien who did not (yet) obtain the leave to enter may be turned down without investigating the background of the case. Needless to say, there are a number of exceptions to this rule, the most important ones exempting EU nationals and asylum-seekers. During the debates in Parliament, no bones were made about the fact that the purpose of this new regulation was to create an easy instrument to regulate outside the Dutch territory the influx of potential immigrants, – notably of those coming from the second and the third world.

Consequently, it is conceivable that an alien whose entry in itself was completely lawful, will find his or her prolonged stay in the Dutch territory unlawful because of an event which took place during the lawful phase of the sojourn, such as the meeting of a future (marriage) partner. In situations like this, there is no way out but 'the way out', in order to fulfil the formalities in the country of origin. Whether or not this law and state practice is always compatible with the human rights, especially as embodied in (Article 8 of the) European Convention on Human Rights and Fundamental Freedoms, is a question on which the courts are still divided.

2.2 Illegal stay

Establishing the (il)legality of the *residence* of an alien can be much more complicated than determining the legal nature of his or her entry. The main reason is that the law lays down not only a wide range of modalities of lawful stay, but also that individuals or groups who cannot be brought under one of these

19 A special provision creating a new crime was introduced in the Penal Code (Article 197a) in 1996.

modalities sometimes turn out (in some cases after many years) to have a valid claim for a residence permit after all. Before this claim is accepted, the alien concerned may sometimes live for a considerable period in 'no man's land'. His or her stay in The Netherlands is unlawful, but the stay is nevertheless tolerated or accepted 'de facto' (*gedoogd*). This dual approach of a universal problem which is difficult to solve is by many Dutch considered to be typically Dutch. The ambiguity of this approach takes sometimes a bizarre shape indeed. What to think of local authorities providing funds to private associations to support aliens whose presence is unlawful, and who are supposed to leave?

According to Article 1b of the Aliens Act, introduced in 1998, the residence of an alien in the Dutch territory is only lawful if he or she qualifies under one of the following main categories:

- those who are officially admitted, albeit conditionally (it is noted here that the prevailing Dutch law still knows a number of different status, depending on the motive of the alien to live in The Netherlands and/or the time he or she has been living here already);
- those who have applied for admission, pending the decision (provided that the right to stay pending that decision in the Dutch territory is granted either by law or by the court);
- those who reside in the Dutch territory in the visa-free period of 3 months, as long as they comply with the general conditions (such as sufficient financial resources and constituting no threat to the public order);
- those whose expulsion has been ordered, but who cannot be expelled because of obstacles based on the legislation.

Despite the terms of the law and the firm commitments made by politicians, recent history has shown that an immigration policy defined as strict cannot be carried out without periodical regularisation of illegal aliens. The main reason seems to be that the consequence of the law is, in the end, thought not acceptable from a political or moral point of view. So, in the last 25 years, consecutive Dutch governments have yielded on at least four different occasions to measures aiming to solve the 'problem' of the illegal aliens 'once and for all'. The second-last measure in this field was provoked by a judgement of the Dutch Supreme Administrative Court (*Afdeling Bestuursrechtspraak van de Raad van State*) in 1995,²⁰ and the last in 1999 – at least partially – by judgements of other courts. The legal pattern of these measures has been always fairly identical. Sufficient proof had to be delivered that the 'illegal' had been living

20 Dutch Supreme Administrative Court (ABRvS), 20 January 1995, *Rechtspraak Vreemdelingenrecht 1995*, 38 and A. Kuijer, *Ongeregelde regularisatie, De stand van zaken in het 'witte-illegalenbeleid'*, *Migrantenrecht 1996*, p. 183-188 and p. 210-217.

and working in The Netherlands for a considerable period of time, so that it could be assumed that the individual had made a substantial contribution to Dutch society. And, of course, the 'illegal' should have no criminal record. Within the scope of this contribution it is impossible to elaborate on the intricate legal issues these measures entailed. It is remarked, however, that every time a measure of this kind was taken it gave cause to extended and sometimes bitter legal fights, – and hunger strikes.

It is a well-known phenomenon that procedures about applications for (some kind of) a permanent residence status may involve a lot of time. Notwithstanding continuing efforts of the government agencies involved (and of the courts) to reach their decisions within a reasonable time, the procedures tend to become longer. This development is the origin of the so called three-years-policy (*driejarenbeleid*). The Aliens Circular contains since 1995 a rule (inspired by the Aliens Chamber of the District Court of The Hague) to the effect that those aliens who have been living for at least three years in uncertainty about the outcome of their application, qualify, in principle, for a regular residence permit.²¹ In the past years, the extent of and exceptions to this rule developed into one of the most complicated bodies of Dutch immigration law. Hence it is impossible here to go into detail. We only note that one of the conditions to be met is that the reason for non-implementation of the expulsion order must be related to the purpose for which the alien originally entered the Netherlands.

2.3 Breach of other rules regulating entry and residence

Under Dutch immigration legislation, unlawful stay as such constitutes no criminal offence. Non-compliance with the obligation of the alien, to report with the authorities to provide information and to comply with an order do constitute a criminal offence (Article 44 Aliens Act). Generally, the authorities will prefer to stimulate the departure of an alien having no residence right, rather than institute criminal procedures for behaviour that under the legislative system has been termed as a relatively minor offence.

2.4 Rejection of the asylum application

Leaving aside the problems related with the implementation of the Convention of Dublin, the picture may be sketched as follows. Officially, there is no difference between the legal position of the rejected asylum-seekers and of those who were unsuccessful in a not asylum-related application. For a variety of practical reasons the situation of the former group is, however, much more complicated. The process of removing a former asylum-seeker from the territory is nearly always, if possible at all, a very troublesome affair indeed. The

21 Aliens Circular A4 /6.22.

Netherlands do not maintain diplomatic relations with some of the most important 'asylum-seekers producing countries' (e.g. Afghanistan, Somalia). Since only a small minority of the rejected persons came to Europe with valid travel documents, it is impossible to get travel documents if they claim to originate from a country the Netherlands has no diplomatic relations with. Moreover, direct expulsions to these countries are as a matter of fact impossible. But even if it has been established that the rejected asylum-seeker has come from a country which is not unwilling to issue (new) travel documents (Iran, Sri Lanka, Ethiopia), the actual removal is always time-consuming, and in lots of cases far from simple. On the domestic side e.g., the authorities have to deal with a multitude of bureaucratic obstacles. These people, for whom *de jure* the possibility of expulsion exists, are *de facto* protected against expulsion by technical obstacles. Since 1995 the routing is laid down in a special policy document, called 'Plan of Steps' (*Stappenplan beëindigen opvangvoorzieningen*).²² One of the assumptions of this routing is that the willingness of the alien to co-operate with the inevitable will increase when he or she is offered concrete (and even financial) help. Often it is, to say the least, doubtful whether this assumption is valid. More than incidentally, the possibilities of an actual removal diminish by circumstances like health problems or wide attention in the press. Often the former asylum-seeker actually disappears before the expulsion can be effectuated. One can only speculate about his or her present or future whereabouts. To sum up: according to recent figures the follow-up of a rejected asylum-related claim has, in terms of visible effects, had only limited success: less than a quarter of all rejected asylum seekers who were reported to have left the country were actually expelled by force (par. 1.1.1).

Next to the persons who cannot be expelled on technical grounds, a category of persons can be identified whose application has been rejected but who cannot be expelled on so-called 'administrative grounds'. In these cases, policy arguments stop the administration from actually expelling the alien. These policy arguments are the result, for example, of the unsafe and insecure situation in the country of origin: Afghanistan, Angola and the Democratic Republic of Congo are examples of countries where currently no rejected asylum seekers are sent back to because of these 'administrative reasons'. On 1 May 1999, more than 5,000 rejected asylum seekers were registered as still living in state-governed reception centres. In 780 cases the alien could not be expelled for 'administrative reasons'. Approximately 1,000 rejected asylum seekers were waiting for a normal expulsion to take place; in their cases there were no ad-

22 Tweede Kamer 1995-1996, 19637, nr. 145, as amended in Staatscourant 1999, nr. 53, 17 March 1999.

ministrative or technical grounds impeding the expulsion. This leaves a group of more than 3,200 aliens whose expulsion is difficult to realise because of 'technical reasons'.²³ Annex I contains more detailed figures on the countries of origin of these categories.

No wonder this part of the Dutch immigration policy is a source of constant (and growing) frustration for those who are responsible for defining its official aims and whose task it is to carry them out. The reaction is, in a way, predictable. If, after years of procedures and huge and costly efforts of the government agencies and the judiciary, it turns out to be impossible to implement a final decision which is negative for the applicant, at least some of the authorities involved will probably have the feeling that they have made fools of themselves. Not to mention the general public. And because redefining the aims of the immigration policy seems still to be out of the question, it is in a way understandable that ever more drastic ideas surface. To mention only one recent example: the Dutch Under-Minister for Justice conceived the plan to make it a criminal offence for a rejected asylum-seeker not to co-operate sufficiently with his removal.²⁴ The practical consequences of this idea, however, seem not thought over in full. Bringing thousands of have-nots to trial, get them convicted – if necessary again and again – and detaining them in detention-centres which have not yet even been built, has to be regarded as a project which can hardly be called realistic.

The more so if it is taken into account that the solution desired by the authorities is – for many of the future convicts – objectively impossible. Even if an Afghan ex-asylumseeker would co-operate, where would he or she obtain the necessary travel documents to reach Kabul? Of course, Article 3 ECHR sets a limit to the extent to which this plan can be implemented in practice.

2.5 Expiration of the right to asylum

Although the Dutch Aliens Act in Article 15(3) allows for the withdrawal of a refugee status if the circumstances in the country of origin have changed for the better, this provision has been applied by the authorities with extreme reluctance. Remarkable as this attitude may be, for the purpose of this contribution is not necessary to dwell on its causes. Instead, a few words about a related phenomenon: the withdrawal of the conditional residence permit (*voorwaardelijke vergunning tot verblijf*).

According to Article 12 b of the Aliens Act, in force since 1994, a conditional permit may be given to an alien who has applied for a status of some kind if the Minister of Justice feels that a forced deportation to his or her coun-

23 Tweede Kamer 1998-1999, 26646, nr. 1, p. 6.

24 Tweede Kamer 1998-1999, 26646, nr. 1, p. 11.

try of origin would be particularly harsh for the alien, in view of the general situation in that country. An alien who has been in the possession of such a conditional permit for three consecutive years, is entitled to a regular residence permit, *de jure* valid for one year but *de facto* renewable and eventually giving a permanent residence right. If the obstacles for the deportation do no longer exist the conditional permit may be withdrawn during the first three years. The powers which have been attributed to the Minister of Justice are great in this respect. In the recent past, the Aliens Chamber of the District Court of The Hague has ruled in a series of judgements that it follows from the division of checks and balances in the Dutch constitutional order that the judiciary has to respect the judgement of the Minister of Justice in this field.²⁵ Only if there is a clear violation of any rule of law the courts will intervene. Consequently, examples where the courts have ruled that the Minister of Justice used his powers in this respect incorrectly, are rare indeed.²⁶

It has been said that the instrument of the conditional residence permit has been used by the administration as an expedient alternative for the refugee status. Whether this is true or not, the popularity of this instrument seems to be over its summit. In the recent years many of the countries for which a 'vvtv-policy' had been announced (if sometimes only for specific groups) found themselves taken off the list again. This is e.g. true for Iranians, the Sri Lanka Tamils, Liberians, many of the Somalia war victims, 'Northern' Sudanese and, recently, those non-Kurdish Iraqi's who cannot be expected to (re)settle in Northern Iraq. We put it that one of the consequences of this trend is probably that the Justice Department will have to scrutinise the merits of the story of the individual asylum-seeker more in detail than before.

Once the conditional residence permit is withdrawn (and the court had no objection), the same practical difficulties arise as described *supra* under 2.4.

2.6-2.9 Expulsion as a method of protecting the security of the state or public order

There is an ongoing public debate in the Netherlands as to the justification of the expulsion of a lawfully admitted alien for the reason of protecting public order. In the seventies, the highest administrative Court posed the restriction that only final convictions to prison sentences, actually to be served, were accepted as a justification to expel the alien concerned.

25 For example: Aliens Chamber The Hague (*Rechtseenheidskamer*) 3 June 1999, *Jurisprudentie Vreemdelingenrecht 1999*, 163; Aliens Chamber The Hague (*Rechtseenheidskamer*) 13 September 1999, *Nieuwsbrief Asiel- en Vreemdelingenrecht 1999*, 129/130.

26 For example: District Court Zwolle 5 August 1999, *Nieuwsbrief Asiel- en Vreemdelingenrecht 1999*, 145.

The court also determined that the administration had to take into account the length of the lawful residence when deciding to expel an alien. In 1979 the government determined that second-generation aliens were only to be expelled after conviction of a serious crime threatening Dutch society. Two years later this principle was extended to every alien with residence of 10 years or more.²⁷

In the Aliens Circular, the concept of the 'sliding scale' was introduced. The theory behind the 'sliding scale' can be described as follows: the longer the period the alien has lawfully resided in the country, the more serious the breach of public order needs to be to give rise to the possibility for the administration to expel him.²⁸ In this view a special justification is needed to not only punish the alien with a criminal sanction but to apply for the same behaviour an administrative sanction (i.e. expulsion) as well. During the first three years of legal residence in the Netherlands, an alien can only be expelled when he or she has been sentenced to eighteen months of prison, actually to be served (in other words: a suspended sentence does not jeopardise one's residence permit). After five years of lawful residence, expulsion may only be considered on the basis of a prison sentence of which over 24 months must be served. At the upper end of the sliding scale, it has been determined that expulsion of an alien with residence of ten years may only be ordered after a conviction to 60 months of prison sentence and solely in cases of serious violence or drug trafficking; after fifteen years only on the basis of a sentence of over 96 months. At the high end of the scale it is determined that an alien cannot be expelled anymore on grounds of public order after twenty years of residence in the Netherlands.²⁹

A simple application of this 'sliding scale' is not sufficient. The authorities also have to take into account the personal circumstances of the particular case. Strong ties of the alien with the Netherlands (family ties; education, history of employment), the lack of any remaining tie with the country of origin, the situation in the country of origin and the consequences of being returned there, the extent to which the alien involved speaks the Dutch language, might all be reasons for the administration to waive the possibility to withdraw a residence

27 C.A. Groenendijk, E.Guild & H.Dogan, *Security of residence of long term migrants. A comparative study of law and practice in European countries*, Strasbourg, Council of Europe 1998, p. 53.

28 Aliens Circular 1994, A4 / 7.7.3. See also the Appendix to the Aliens Circular 1982, where it was stated that 'every aliens, having lawfully resided in the Netherlands during several years, will be considered to have gained strong ties with the country. While determining the scales in this gliding scales, this has been taken into account'.

29 Aliens Circular 1994, A4 / 4.3.2.2.

permit on the basis of the sliding scale.³⁰ The administrative courts keep a close eye as to the way the administration uses its powers under the Aliens Circular. Especially the implementation of the right to respect for family life, as formulated in Article 8 ECHR, is closely guarded, which means that the administration always has to strike a balance between the family rights of the alien and the interest a state has in expelling him.³¹

This policy however has not prevented the expulsion of a very small number of aliens, notwithstanding their residence during many years and/or strong family bonds in the country. This treatment, perceived by the persons concerned and their families as 'double punishment', has indeed found approval of the administrative courts. The courts have held that there is no 'double punishment', since the decision to withdraw the convicted person's permit to reside in the country is a measure taken on the basis of the Aliens Act and in the interest of public order, and not a penal reaction to the behaviour of the alien.³²

The sliding scale is applicable to all aliens lawfully remaining in the country. Under Dutch law no special categories have been identified as *per definitionem* representing a social danger. Only specific behaviour of an alien can lead to the withdrawal of his residence status and his expulsion; his nationality, religion or any other general feature can never lead to the general conclusion that this constitutes an actual threat to society.

Under Dutch law, four categories of aliens have absolute protection against expulsion:

1. Family members with the statutory right to remain, as long as spouses live together and children are younger than 18;³³
2. Aliens with residence rights in the Netherlands for more than 20 years;
3. Second generation aliens (i.e. born in the Netherlands or admitted for family reunification) with residence for more than 15 years;³⁴
4. In a special Act it has been determined that Moluccan immigrants will be treated as Dutch nationals in almost all respects.³⁵

30 A. Kuijer en J.D.M. Steenbergen, *Nederlands Vreemdelingenrecht*, Utrecht: Nederlands Centrum Buitenlanders 1999, p. 291.

31 C.A. Groenendijk, E. Guild & H. Dogan, *Security of residence of long term migrants. A comparative study of law and practice in European countries*, Strasbourg: Council of Europe, p. 53.

32 A. Kuijer en J.D.M. Steenbergen, *Nederlands Vreemdelingenrecht*, Utrecht: Nederlands Centrum Buitenlanders 1999, p. 279.

33 This statutory right was based on Art. 10 Aliens Act and Art. 47 Aliens Decree. Since 1994 this status can no longer be obtained.

34 Aliens Circular 1994, A4 / 4.3.2.2.

35 Act on the Legal Status of Moluccans (*Wet op de rechtspositie van Molukkers*) of 9.9.1976, *Staatsblad* 1976, no. 672.

3. Status of Aliens subject to Exclusion Orders

3.1 Civil rights

Once it has been established that an alien remains in the country unlawfully, the firmness of the administration vanishes. As explained supra in paras. 1.1.1 and 2.4, the actual act of forced departure does not take place in many cases. Consequently, a considerable number of illegal aliens and aliens who do not have a permit but whose temporary residence is tolerated by the government for different reasons, remain in the country with an uncertain legal status. Which human rights are applicable under Dutch law to the aliens who have already received an order to leave the country? All human rights granted to “everyone” under the ECHR also apply to illegal aliens, as long as they are on Dutch territory or under the jurisdiction of the Dutch authorities. Also, most rights enshrined in Dutch constitutional law apply to illegal aliens. In the Constitution certain fundamental rights however are granted to Dutch nationals only, such as the right to elect and be elected in Parliament (Article 4); the right to a free choice of employment (19); the right to social benefits (Article 20).

3.2 Social rights

The most far-reaching provision, in terms of social rights, the government has taken to regulate the legal position of aliens who have already received an order to leave the country, is undoubtedly the Linkage Act. The Linkage Act came into force on 1 July 1998. Contrary to what its title suggests, the Linkage Act is not one Act, but a collective name for 25 amendments to all kinds of Acts, regulating the rights of persons remaining in the Netherlands to all kinds of social assistance. The collection of amendments is commonly referred to as ‘the Linkage Act’ (*‘de Koppelingswet’*). It stipulates that the residence right of every person who does not have the Dutch nationality should be checked, when he or she appeals for a collective benefit, such as social security, unemployment benefits, medical care, education (when it concerns an adult), public housing, etcetera. To this end, the Aliens Administration System (*Vreemdelingen Administratie Systeem*) has been linked to the Basic Administration of the local authorities on Personal data (*Gemeentelijke Basisadministratie Persoonsgegevens*). There are only a few exceptions to the general rule that an alien who does not have a residence right, is excluded from collective benefits. In case of an emergency, medical care will be given, as well as in case of pregnancy. Education is available to illegal aliens younger than eighteen years. Finally, legal aid is available to all aliens, even those illegally in the country.

When an illegal alien applies for a collective benefit, the check of his data and residence right will lead to a denial of the benefit applied for and not to the obligation for the authority concerned to report the person to the police.

The Linkage Act has far reaching consequences. When an alien for example forgets to renew his residence permit, the Linkage Act is applicable to him as well. Also, those aliens whose asylum request has been rejected but who are not being expelled yet because of administrative grounds (see supra par. 2.4) will no longer have the right to social assistance. This creates the controversial situation that the person concerned remains in the Netherlands with the consent of the authorities, however does not receive the means to support him- or herself nor his or her family. The same situation is created by the Linkage Act for those asylum seekers who have submitted their first application for asylum and who have received permission to await the first decision of the administration in the Netherlands.³⁶ Because of the negative effects of the Linkage Act, especially in the case where medical reasons have brought the administration to delay the expulsion of the alien concerned, some 'reparation' amendments have been made to alleviate the negative effects. Also, some local authorities have refused to implement some of the elements of the Linkage Act in cases where this implementation would cause a difficult situation for the alien concerned living in the municipality.

Among others, the President of the District Court of The Hague in a landmark decision on the Linkage Act has restricted some of its effects. A few months after the Linking Act came into force, he decided that the exclusion from social benefits of an alien, who was awaiting the final decision in his asylum request, constituted a violation of the European Convention on Social and Medical Assistance.³⁷ In the mean time, the President of the District Court of Amsterdam has held that the consequences of the Linkage Law constitute a violation of the European Convention on Social Security.³⁸ Currently, provisions of international treaties, such as Article 14 of the European Convention on Human Rights, Article 16 of the ILO Treaty, Article 26 of the International Covenant on Civil and Political Rights, Article 11 of the International Covenant on Economic, Social and Cultural Rights are being invoked in judicial procedures against the implementation of the Linkage Act.³⁹ Decisions on the question whether the consequences of the Linkage Act are tenable under international law are therefore to be expected shortly.

36 P.E. Minderhoud, *Sociale voorzieningen als instrument voor migratiebeleid*, Nijmegen: Centrum voor Migratierecht 1999, p. 2.

37 President District Court The Hague 7 October 1998, 98 / 1056, *Rechtspraak Vreemdelingenrecht* 1998, 82.

38 President District Court Amsterdam 17 November 1998, AWB 98/8069 ZW, *Rechtspraak Vreemdelingenrecht* 1998, 77.

39 P.E. Minderhoud, *Koppelingswet*, Nijmegen: Centrum voor Migratierecht 1999 (unpublished lecture).

4. Exclusion and Expulsion *de jure*

Although every alien who finds himself unlawfully in the territory of the Netherlands has the duty to leave, the authorities are not obliged to issue an expulsion order for every alien belonging to this category: the 'principle of opportunity', which governs the criminal prosecution, is dominating this field too. If, however, the authorities have come to the conclusion that there should be an expulsion, a formal expulsion order is often indispensable. This order – by its nature a written mandate to the local police charged with the execution of the order – is subject to the appeals mentioned *infra* in par. 6. In everyday practice, the significance of the expulsion order is limited. In the proposal for the new Aliens Act the expulsion order has disappeared.

The official order banning the return to the Netherlands (*ongewenstverklaring*) plays, on the contrary, an important role in the immigration policy. This order is a decision by the Under-Minister of Justice (*Staatssecretaris van Justitie*), not by a court, in which it is stated that the alien is undesirable in the Netherlands because of his criminal record, making his mere presence in the territory a crime punishable to six months (Article 197 Penal Code). The order is subject to the normal administrative and judicial remedies. It is standard jurisprudence that this order is a measure in the interest of public order, – and not punitive: see also *supra* par. 2.6 – 2.9. Because of the drastic consequences (one has only to think about aliens born or educated here, or about aliens with families for whom leaving the country comes down to a collapse of their world) it is logical that in many of these cases it is obligatory that the opinion of the Advisory Committee on Aliens Affairs (*Adviescommissie Vreemdelingenzaken*: ACV) is requested and that the potential *persona non grata* is heard by this independent committee). Obviously, the process of decision making comes down to the finding of a proper balance of the interests of the community as a whole and the interest of the individual who finds himself at stake. A well-known and ever-growing series of judgments of the ECHR in Strasbourg – not to be discussed here – illustrates the importance of art. 8 of the Convention in this respect.

The official banning order can be based, according to Article 21 of the Aliens Act, on different grounds. The ground which is used most frequently is the circumstance that he or she has been convicted for a intentionally committed crime for which the maximum punishment is at least three years. So, according to the law the actual amount of punishment is irrelevant: an alien may be declared undesirable if he or she has been convicted on different occasions to small-term sentences because (e.g.) of shoplifting. In practice the rules related to the length of the prison sentence, mentioned in par. 2.6, apply here as well. The banning order can be lifted upon request by the alien, if he or she has re-

sided outside the country for at least ten years, if the conviction was for serious violent crimes or hard drugs-trafficking. In the case of other convictions, this period is reduced to five years.⁴⁰

Apart from the banning order, the administration also has a less heavy instrument to monitor undesirable aliens: an alien may be simply (and informally) registered as undesirable in the Dutch police register or in the Schengen Information System, so that he or she may be refused at the border (or expelled when found within the country) without much ado. But unlike the alien who is under an official a banning order, the alien does not commit an offence by simply being in the Netherlands.

40 Aliens Circular A5 /6.4.

5. Exclusion and Expulsion *de facto*

5.1 Enforcement of the expulsion order: different varieties

As explained before in paras. 1.1.1 and 2.4, only in a minority of the cases the execution of the expulsion order is carried out by the police, and indeed amounts to actual deportation to a country where the alien is accepted. In the majority of the expulsion cases, a – sometimes merely administrative – check at the last known address is deemed sufficient. If the alien is not found, or simply does not react on a written invitation or summons to report with the local authorities (or bothers to mail a postcard, indicating that he or she left the country – irrespective of the question whether he or she actually *did* leave) he or she is labelled ‘m.o.b.’ (short for *met onbekende bestemming vertrokken* or: left with destination unknown).

In the statistics, this last type of administrative operation is also counted among the expulsions. One of the reasons the hands of the ‘strong arm’ are considerably tied is to be found in a judgement of the Benelux Court.⁴¹ This Court qualified as illegal the method, previously used by the Dutch police (and mentioned already in ‘Das Totenschiff’ by Ben Traven), consisting in putting the expellee on the train to Belgium, knowing that the first stop was Antwerp – without informing the Belgian authorities. On the other hand, the ‘disadvantage’ of the loss of this instrument must not be exaggerated. After all, a fair part of these expellees were back in the Netherlands the very day of the expulsion.

In case the immediate expulsion is not thought necessary or appropriate (or outright impossible), the execution of the expulsion order can be deferred, sometimes for a considerable period of time. The way this instrument has been used in the past years has recently caused some interesting debates. The point is that deferred enforcement of the expulsion order was also used by the government in situations where some thought that a refugee status would have been more appropriate – or at least the introduction of a policy to issue conditional residence permits. The Aliens Chamber of the District Court in The Hague came in 1998 in its well-known Kosovo-judgement to the conclusion that a period of eight months during which execution orders had been deferred was not compatible with the system of the Aliens Act.⁴² It is true that at the time of the enactment of the last amendments of the present Aliens Act a consensus in Parliament existed to the effect that the grey zone between granting a permit and executing the expulsion order of an expellee had to be reduced to the unavoidable minimum. On the other hand, it is generally accepted, also by the

41 Benelux Court, 15 April 1992, *Rechtspraak Vreemdelingenrecht* 1992, 6. The unlawfulness of the method of expulsion at stake in this decision has been generally affirmed under the Schengen Implementing Agreement and the Dublin Convention.

42 District Court The Hague 17 November 1998, *Rechtspraak Vreemdelingenrecht* 1998, 17.

courts (see supra par. 2.5.), that the administration should be given basically a free hand in choosing the proper instrument to deal with situations with obvious political overtones.

In the light of the Kosovo-judgment, the government agencies will have to strike in the future a more careful balance between the different available instruments in case of manmade humanitarian catastrophes. In particular, they will have to avoid the temptation of taking recourse to an instrument of which the main character is that the agencies do not commit themselves in either direction, – and that the individuals involved remain in a legal limbo for a longer period than is strictly necessary.

5.2 Accidents

Accidents during the enforcement of an expulsion order have been relatively rare in recent Dutch history. The last serious incident occurred in 1992, when a Rumanian deportee who resisted violently his deportation, nearly died of suffocation when the frontier police tried to silence the man with tape over his mouth in order to ‘facilitate’ his actual deportation. The expulsion never took place. Instead, the man got irreparable brain damage because of lack of oxygen, was paralysed for the rest of his life, and got a residence permit and a financial compensation in the end. The incident had one positive side-effect. An official commission was appointed by the government to investigate the events leading to this drama and to formulate recommendations with the explicit view to prevent disasters of this kind in the future.⁴³ Apparently, these recommendations, once published, have generally been followed.

It goes without saying that these recommendations – as any humane expulsion policy – have their price. Given the massive resistance of some expellees, the frontier police sometimes do have no option than to abstain from expulsion for the time being, and sometimes altogether. There can be no doubt, according to us, that these evils, being the lesser ones, are to be preferred by far to the more rigid forms of maintaining law and order.

5.3 Measures of detention

5.3.1 KINDS OF MEASURES

The Aliens Act contains several types of measures to restrict or detain aliens. Some of these measures can only be applied to asylum-seekers, others are applicable to all aliens who are not admitted to the country or who have been refused a residence permit. Article 17a requires asylum-seekers to be availa-

43 Commissie Van der Haak, *Humane uitzetting: een paradox?*, Report presented to the Under-Minister of Justice, The Hague, 6 May 1993.

ble for processing their request. When an asylum-seeker does not fulfil this requirement, his request may be declared inadmissible (Article 15b(1d)). If within four weeks an application for asylum is declared inadmissible or manifestly unfounded the asylum-seeker may be ordered to remain at a specified place, generally a reception centre (*Onderzoeks- en Opvangcentrum*, OC): Article 18a. If it is necessary to ensure his expulsion,⁴⁴ the asylum seeker may even be detained (Article 18b).

Article 7a Aliens Act allows the refusal of (further) entry to aliens without a permission to stay, who arrive at an airport or sea-port; it mainly concerns aliens who arrive at Schiphol airport and do not have the required passport or visa. When they do not leave immediately after being refused entrance, they may be ordered to stay at a specific place, generally an OC (Article 7a(2), or even – in cases spelled out in the Aliens Circular⁴⁵ – be detained on the basis of Article 7a(3) Aliens Act.

When there are concrete indications that a person is staying in the Netherlands illegally he or she may be asked to identify himself: Article 19(1). If his identity can not be established immediately, he or she may be detained for interrogation for six hours on the basis of Article 19(2), which term may be prolonged for 48 hours when there are grounds to assume that the person detained is not allowed to stay: Article 19(3) Aliens Act.

Finally, an alien may be taken into custody with a view to deportation (*vreemdelingenbewaring*) ex Article 26(1) Aliens Act, but only on individualised grounds: there have to be indications that he or she will try to avoid deportation. It is difficult to discern a clear difference between the criteria that justify detention based on Article 18b and Article 26, with the sole exception that Article 18b is only applicable to (certain) asylum-seekers.

5.3.2 TREATMENT OF ALIENS DETAINED

Detention based on Article 7a(3) or Article 18b can only be executed in places with a so-called 'privileged regime' (see Article 7a(4) and (5), and Article 18b(2), as spelled out in a Regulation, the *Reglement regime grenslogies*. Detention ex Article 19 will in general take place at a police station (Article 73 Aliens Decree). Detention ex Article 26 Aliens Act (*vreemdelingenbewaring*) may also take place at a police station, with a maximum of ten days. From then on it may be executed at a place indicated in Article 7a or 18b Aliens Act, but also in a penitentiary, with a stricter (penal) regime.

44 Which means that there are concrete facts pertaining to the asylum-seeker justifying his detention.

45 Aliens Decree B7 / 14.

5.3.3 DEFENCE GUARANTEES

As required by Article 5(2) of the European Convention on Human Rights (ECHR),⁴⁶ an alien who is detained will be informed about the grounds of detention immediately, in general in the formal written detention order (Article 74(2), Article 83 and Article 87a Aliens Decree). The possibility to start proceedings to have the lawfulness of a detention determined by the District Court (Article 5(4) ECHR) is guaranteed in Articles 34a-35 Aliens Act and Articles 82-87a Aliens Decree. Article 73(1) and Article 82(4) Aliens Decree require the administration to inform the alien as soon as possible that he or she can ask for (free) assistance of a lawyer during the predetention hearing. The right to (free) assistance by a lawyer during the entire habeas corpus proceedings is specified in Articles 34b-34h Aliens Act.

5.4 Penitentiary detention

In Dutch immigration law there is no such thing as penitentiary detention as a specific penal measure for aliens.

5.5 Obstacles to enforcement of expulsion orders

The obstacles to the enforcement of expulsion orders have been discussed in paras. 2.4 and 5.1 supra.

5.6 Incentives to voluntary departure

Together with the International Organisation for Migration (IOM), the Dutch government in 1991 established a 'Return Office'. Aliens who want to return to their country of origin voluntarily, may request this office to facilitate their return by supplying financial support for the travel home and for (educational or commercial) initiatives in the country of origin. It is only a very small minority of the rejected asylum seekers and other aliens who apply to the Return Office for help: in 1998 a total of 884 persons actually returned with the assistance of the Return Office.⁴⁷

Another policy instrument used in the Netherlands, that is based on the principle of voluntariness (i.e. presupposing the will to return that needs to be stimulated to actually lead to a voluntary return) is the method of 'facilitated return'. A first example of an instrument of facilitated return is the return programme operated by the Netherlands in co-operation with the authorities of Somaliland. According to a special bilateral agreement the IOM is responsible

46 Article 5 ECHR has direct effect in Dutch law.

47 J. van Andel, 'De mogelijkheden en beperkingen van de gefaciliteerde terugkeer', in: H.B. Winter, A. Kamminga & M. Herweijer, *Een grens gesteld. Een eerste evaluatie van het Nederlandse terugkeerbeleid*, Deventer: Kluwer 1999, p. 72.

for the implementation of the programme. The amount of money to support the travel and commercial and educational activities upon return have been set in the agreement, as well as the practical assistance the returnee can expect in the application for travel documents. In Somaliland an IOM representative will receive the returnee and facilitate the reintegration of the person and his or her family in local society. In the first year of the agreement (1998), a mere seven Somalians have expressed an interest in the programme. None of them has so far actually returned,⁴⁸ partly because the necessary travel documents are not available.

The second example of a Dutch policy instrument facilitating return, is the Pilot Project Facilitated Return Rejected Asylum Seekers from Ethiopia and Angola. In this case Dutch NGOs were consulted in the drafting period of the agreement between the Netherlands and the countries mentioned, in order to enhance acceptance of the return project in Dutch society and to involve the expertise of the NGOs. Along the lines of the above mentioned agreement with Somaliland, the project draws the interest of potential returnees by promises of financial and other support once the person has returned. In order to prepare the person, he or she is offered a specially designed course, for example to learn how to start his or her own business in the country of origin. In the first year, only nine persons returned under the scheme to Ethiopia. Because of the upheaval of the war in Angola, none rejected asylum seeker returned there and the programme can be said to be existing primarily on paper.

In his most recent policy paper on the issue, the Minister of Justice discusses the return programmes. As one of the main reasons for the failure of the return programmes the Minister identifies the perception the rejected asylum seeker has of his flight situation and of the possibilities to return safely and dignified to his country of origin.⁴⁹ The minister therefore suggests an alternative approach: rather than striving for voluntary return, the alien should be made to realise that a prolonged stay in the Netherlands is no realistic option. This means that the alien will be told, in an early stage of the procedure, that a negative outcome will lead to his/her expulsion from the state-run reception centre where he or she has been accommodated so far. Only aliens cooperating in their actual return, may remain in the reception centre during the period the return is being arranged. Before the alien is actually expelled from the reception centre, the possibilities of forcibly expelling him from the country (for example with the aid of available travel documents) will be assessed. When these possibilities do not exist, the alien is presumed to leave the country on his own after the access to state governed reception centres is denied to

48 *Idem.*

49 Tweede Kamer 1998-1999, 26646, nr. 1, p. 5.

him. The proposed 'stick' in case the alien is uncooperative is the criminal prosecution discussed in par. 2.4 above.

6. Legal Recourse

6.1-6.4 Remedies against administrative decisions

Under Dutch law, every decision or (other) act from the authorities under the Aliens Act which affects the legal position of an alien can be subject to legal recourse. The system of national remedies consists in the first place of two forms of appeal, normally spoken consecutively to be used; in asylum-cases in which the alien is detained the first stage is not available. The first remedy, called 'bezwaar', is an 'internal' administrative appeal with the administration itself, and directed against the authority who took the disputed decision. The maximum procedural guarantee to be obtained at this stage is the – not binding – opinion of the Advisory Committee on Aliens Affairs (*Adviescommissie Vreemdelingenzaken: ACV*) – an independent commission of experts appointed by the Minister of Justice. This Commission has e.g. to be consulted in asylum-cases in which the applicant has made likely, to a certain degree, that he or she is to be considered a Convention refugee, and the Minister of Justice nonetheless considers to dismiss the appeal. The second remedy is a judicial appeal with the Aliens Chamber (*Vreemdelingenkamer*) of the District Court. Most appeals are heard by one judge. In landmark cases a special chamber (*Rechtseenheidskamer*) convenes; the judgements delivered by this chamber are not legally binding on other courts, but will be generally followed by the rest of the judiciary. There is no further appeal. In exceptional situations the courts have the power to do what the authorities should have done.⁵⁰ Also, the courts are instructed by law to make, if possible, a final decision in the administrative appeal if this is still pending.⁵¹

The Aliens Act provides in Article 32 that only in two small categories of cases the appeal has suspending effect. However, if the governmental agency is not willing to let the alien stay in the country pending the outcome of one of these remedies, the individual concerned can seize the President of one of the five district courts dealing with cases under the Aliens Act. These judges have the power to issue an interim injunction ordering the immigration authorities to refrain from the action they had in mind. Normally the President will only use this power if the alien has, in his opinion, a fair chance to win his case in appeal.

In 1998 the Aliens Chambers at the five District Courts made a total of 35,350 decisions, out of which 13,160 judgements were made in appeal cases

50 Article 8:72(4) General Act on Administrative Law (*Algemene Wet Bestuursrecht*).

51 Article 33b Aliens Act.

and 10,750 decisions on requests for interim injunctions, including decisions on appeal against detention orders.⁵²

The abovementioned two remedies are available against all administrative decisions (apart from detention orders where special remedies apply). Hence, a separate appeal is possible against an official order banning the return of the alien and against an expulsion order. However, the remedies are seldom used separately, because of the standard policy of the government agency to promise the alien that a separate procedure to obtain a court order to refrain from expulsion pending the procedure is not necessary – if the court agrees to deal with the case speedily (which the courts have done thus far).

6.5 Appeal against a detention order

The Aliens Act does not specify a period that has to be expired before the alien can appeal for habeas corpus with the court: he may at any time file the appeal. The Act does not put a time limit within which the court has to decide on the appeal. However, case law suggests that some four weeks is the maximum; beyond this the detention will be declared unlawful, and the alien will be released.⁵³

When it concerns a first appeal, the alien must be heard by the court within two weeks (Article 34a(2) Aliens Act); if this provision is violated, the court will in general order the release of the alien.⁵⁴

If the court comes to the conclusion that substantive legal requirements – time limits, proportionality, the requirement of concrete indications for the illegal character of the stay, etc. – or procedural guarantees (such as the obligation to inform the alien that he can get a lawyer to assist him at the hearing) have been breached, this will result in the release of the alien (cf. Article 5(4) ECHR): see Article 34a(5) Aliens Act. However, such a conclusion does not necessarily result in financial compensation. When the requirement is of a merely formal nature, there is a tendency amongst the courts to regard the release of the alien as sufficient compensation in view of Article 5(5) ECHR. The inconsistent case law of the Court of Appeal of The Hague, competent to hear appeals in these cases, has as yet not clarified this issue.

As already indicated above, the courts have set certain minimum standards. We will mention a few relevant ones. Detention ex Article 19 Aliens Act will only be allowed when there are individualised grounds for suspecting that

52 Aliens Chamber District Court The Hague, *Jaarverslag 1998*, The Hague 1999, p. 32.

53 District Court Den Bosch 26 April 1994, *Rechtspraak Vreemdelingenrecht 1994*, 66.

54 District Court The Hague 20 July 1994, *Rechtspraak Vreemdelingenrecht 1994*, 70. Maybe this is also the case when it concerns successive appeals: District Court Den Bosch 22 July 1997, *Rechtspraak Vreemdelingenrecht 1997*, 64.

the alien is not allowed to stay here.⁵⁵ Detention ex Article 26 Aliens Act (*vreemdelingenbewaring*) may only take place at a police station for a maximum period of ten days.⁵⁶ It may in general not last more than six months.⁵⁷ Detention ex Article 18b (and also ex Article 26) is not allowed on categorical grounds, but must be justified on the basis of individualised facts.⁵⁸

6.6 The right to defence

Every alien is entitled to choose his or her own counsel. If he or she is detained, the service of counsel is paid from public funds. In other immigration cases where the alien is unable to pay for a lawyer, the lawyer appointed by the court or the Legal Aid Board, will also be paid from funds provided by the Ministry of Justice, with the exception of a relatively small retribution of the alien. In asylum cases, the alien is either exempt from paying or needs to pay a small retribution of *f* 110,-.⁵⁹

Finally, it is important to note that the alien who uses his or her legal remedies will never run the financial risk of having to pay the costs of the trial (or of his adversary). All he has to pay, apart the retribution to his lawyer, is – in case of an appeal to the court – the court fee (*f* 50,-). No court fee is required in appeals against detention (Article 33f Aliens Act).

55 District Court Nieuwersluis 15 January 1997, *Rechtspraak Vreemdelingenrecht 1997*, 61.

56 District Court The Hague 11 May 1994, *Rechtspraak Vreemdelingenrecht 1994*, 68.

57 District Court The Hague 21 August 1997, *Rechtspraak Vreemdelingenrecht 1997*, 65.

58 District Court The Hague 4 July 1996, *Rechtspraak Vreemdelingenrecht 1996*, 69.

59 Article 35(2)(3) Act on Legal Assistance (*Wet op de Rechtsbijstand*) and Article 11(a) Decree on financial support criteria legal assistance (*Besluit draagkracht criteria rechtsbijstand*).

Annex

Rejected asylum seekers, living in state-governed reception centres and categorised according to the question who can be expelled and who cannot, on the basis of 'administrative' and 'technical grounds': Situation on 1 May 1999.⁶⁰

Administrative grounds impeding expulsion:

Afghanistan	35
Angola	176
Burundi	4
D.R. Congo	244
Yugoslavia	305
Rwanda	15
Total	779

Technical grounds making expulsion difficult:

Algeria	218
China	322
Egypt	5
Eritrea	10
Ethiopia	202
Iraq	306
Iran	766
Liberia	74
Lebanon	49
Sudan	66
Somalia	720
Sri Lanka	184
Syria	162
Stateless Palestinians	150
Total	3243

Rejected asylum seekers without administrative or technical impediments to their expulsion

(no figures per nationality available)

Total 1033

⁶⁰ Source: Tweede Kamer 1998-1999, 26646, nr. 1, p. 7.