

## SUMMARY

# *Aliens' detention or a less intrusive measure?*

Aliens who are no longer allowed to remain in the Netherlands are responsible for their own departure. If they make no effort to leave independently, the authorities may decide to place them in aliens' detention. In practice, this decision is made by an assistant public prosecutor of the Aliens Police. This measure may only be used (a) if there is good reason to assume that the alien withdraws from government supervision during the departure procedure and (b) if there is an actual chance of departure. In addition, due to its serious nature, the measure may only be imposed or continue in effect if there are no alternatives of a less far-reaching nature. In other words, aliens' detention is a measure of last resort.

The Advisory Committee on Migration Affairs (ACVZ) has investigated how the decision-making process relating to aliens' detention works in practice. Its inquiries focused on the question of when an alien who has already been admitted to the Netherlands<sup>1</sup> is placed in detention and whether one of the existing alternatives is deployed. The advisory report contains recommendations which could ensure that there is sufficient scope within the decision-making process to choose the least intrusive, yet (with a view to departure) most effective option.

To answer these questions, the ACVZ charted the legal criteria governing the decision-making process and how the process works in practice. It interviewed assistant public prosecutors working within the Aliens Police and case officers of the Repatriation and Departure Service (DT&V), at a number of reception and detention centres. In addition, it organised an experts' meeting attended by representatives of the relevant government agencies, attorneys, judges and representatives of other social and international organisations active in this field. Finally, the Ministry of Security and Justice provided figures relating to the use of aliens' detention and alternative measures.

### **Developments in the application of aliens' detention**

The ACVZ observes that the 'last resort principle' has in recent years improved. The number of aliens placed in detention has declined. This is in line with the position taken by the assistant public prosecutors interviewed by the ACVZ: they are less likely to place a person in aliens' detention than a few years ago. In addition, the State Secretary for Security and Justice has recently announced that he intends to reduce capacity in aliens' detention centres.<sup>2</sup>

During the last government's term of office, four pilot projects were launched aimed at offering an alternative to detention. The trials carried out were very limited in scale, but the information available supports the view that pilot projects are likely to be used in the future to further reduce the number of placements in aliens' detention and to shorten their duration.

### **Problems identified relating to the imposition of aliens' detention**

The ACVZ identified a range of legal, policy and practical problems which demonstrate

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1 Detention at the border under section 6 of the Aliens Act 2000 is not discussed here.

2 From 1691 to 933 places. See Parliamentary Papers, House of Representatives, 2012/13, 24587, no. 490.

that it cannot be guaranteed, in current practice, that aliens' detention will only be used as a last resort and that the least intrusive measure will always be chosen.

*The assistant public prosecutors have insufficient time and information*

First, the assistant public prosecutors do not always have sufficient time in practice to consider all the possible alternatives when deciding on aliens' detention. This is primarily the case when an alien is held on suspicion of illegal residence. In such cases, the Aliens Police has only six hours in which to decide whether the person is to be placed in aliens' detention or not. An additional factor is that the work of assistant public prosecutors has become increasingly complex in recent years, although there is no specialised training to compensate for this.

Furthermore, the assistant public prosecutors have in practice little overview of the alternatives available, particularly in comparison with the Departure and Repatriation Service. Yet the latter agency assumes that the assistant public prosecutor has considered all the alternatives before deciding to place a person in aliens' detention. At the same time, the assistant public prosecutor assumes that after placement in detention the Departure and Repatriation Service will explore whether another measure would suffice.

*Data in ICT systems are not always reliable and up-to-date*

The respondents indicated that the ICT systems used by the different partners in the immigration system, like the Immigration and Naturalisation Service (IND) and the Departure and Repatriation Service, do not always share information adequately. This means that the information is not always up-to-date and reliable, with the risk that a person may be wrongly placed in aliens' detention.

*Interests of the alien not always protected*

There are insufficient safeguards protecting the interests of the alien in decision-making on detention. This is because, without understanding the full consequences, aliens in practice almost always give permission for the detention hearing to begin before their attorney arrives. In addition, the defending counsel rota service does not function well, particularly in the large cities. As a result, aliens are regularly detained before the attorney has been informed that his/her client has been held for questioning. In this way, the alien is deprived of the opportunity to prepare for his hearing and the assistant public prosecutor fails to receive information that is relevant to the decision whether to impose a less intrusive measure.

*The legislation does not specify the circumstances in which aliens' detention may not be imposed*

The legislation contains no grounds on which aliens' detention may not be imposed, or which provide a basis for deciding whether a person is unfit for detention. Observing the 'last resort principle' therefore depends to a large extent on the question of how case officers make use of the discretion allowed by the legislation. A related problem, in the ACVZ's view, is the fact that the performance of the Aliens Police is assessed on the basis of the number of transfer files sent. Such files are sent at the moment the person concerned is placed in detention.

## **Problems identified in relation to continued aliens' detention**

*Aliens are not always released from detention at the appropriate time*

Although the regulations state that aliens' detention must cease once there are no longer any grounds for it, the ACVZ ascertains that this does not always happen in practice. The interviews with the Departure and Repatriation Service showed that case officers mainly assess whether continued detention would be approved by the courts, not whether it is

still effective. The question of whether an alien could be offered an alternative only arises if during the departure interview it transpires that the alien has had a 'change of heart' and is prepared to cooperate in his departure. In this way, the initial decision is rarely fully reconsidered in the rest of the procedure. Furthermore, the courts make a relatively reticent assessment of whether a less intrusive measure could achieve the same aim, which does not encourage the Departure and Repatriation Service to make a full reconsideration of the continuation of detention either.

The ACVZ's research also shows that in 2012 a number of undocumented aliens were kept in detention while it was clear that their countries of origin would not cooperate in their forced return. Yet their detention was not immediately lifted. Case officers indicated that they sometimes decide that it is possible that the alien in question will cooperate in his return in the future, so there is still a chance of removal. Allowing detention to continue simply in order to compel cooperation is not, in the ACVZ's opinion, a proportionate measure.

#### *Aliens' detention is only an effective instrument in the first three months*

Case officers and attorneys claim that the chance of achieving departure through detention is at its highest in the first three months. The ACVZ's research shows that in this period, aliens' detention can be an effective instrument. In 2012, 81% of aliens held for less than three months had demonstrably left the country. The longer detention continues, the smaller the chance of departure becomes. Of the group that spent over six months in detention, only 17% demonstrably left the country. Departure and Repatriation Service case officers, and attorneys indicated that aliens independently take the decision on whether to cooperate in their departure or not within the first few weeks, after which (if they decide not to cooperate) forced return is the only option. It appears that the only exception is when an alien is given a new incentive to think about his future. For example, an alien who has been detained under the criminal law may decide to cooperate in his departure if it means his early release. Approaches like those of the International Organization for Migration (IOM) and Bridge to Better can also induce aliens to change their minds about leaving.

### **Opportunities for improvement**

#### *Abolish the distinction between asylum and non-asylum*

The availability of alternative measures is partly determined by the distinction between failed asylum seekers and other aliens residing illegally in the Netherlands. This distinction has little to do with how departure can be achieved in the most effective manner in individual cases. 'Effective' in this context means (1) offering the greatest likelihood of departure (2) encroaching as little as possible on the freedom of the alien and (3) incurring the lowest possible costs. In the opinion of the ACVZ, this distinction can be abolished.

#### *Continue to develop alternatives, with less stringent eligibility criteria*

The study reveals little about the effectiveness of new alternative measures, since these have been tested on only a very limited scale with strict criteria governing eligibility. What has been established is that the development of alternatives will give assistant public prosecutors and Departure and Repatriation Service officials more instruments enabling them to comply with the last resort principle.

#### *Improve the effectiveness of existing measures*

Various organisations that facilitate return, like the IOM and Bridge to Better, are successful in inducing a 'change of heart' in aliens who are initially resistant to returning voluntarily to their countries of origin. The approach adopted by these organisations, unlike the Departure and Repatriation Service, is focused on possibilities in the country of origin,

rather than on the impossibility of remaining in the Netherlands. These organisations have their own channels for obtaining travel documents, for instance, if the alien does not have such documents. Departure and Repatriation Service case officers also recognise that some aliens prefer to arrange for their own travel documents without their intervention.

#### *Supervising and assisting aliens who are obliged to leave the country*

In conclusion, the ACVZ observes that there is little continuity in the supervision of aliens who are obliged to leave. Departure and Repatriation Service case officers work at a specific location and hand over the file (including details of the strategy followed and reports of the departure interviews) at the point where the alien is transferred to another location. If the alien is no longer housed at a government location, all supervision ends. As a result, most case officers have only limited opportunities to build a relationship based on trust with the alien. Organisations like Bridge to Better and the IOM are better able to do this. They are not responsible for implementing (forced) return policy and often enter the picture once the alien is already under an obligation to leave. Some countries have adopted a two-track approach. Key to this approach is that from the moment that an alien submits his first application for a residence permit, he is assisted by an independent organisation that prepares him for the two possible outcomes of the procedure: departure or admission. In the ACVZ's view, the government should consider investigating this approach further.

### **Summary of recommendations**

#### **I Invest in the initial stage of the procedure**

1) *Recognise the work of the assistant public prosecutor in immigration cases as a speciality with associated training requirements. Guarantee that there will be a sufficiently large pool of well-trained assistant public prosecutors available twenty-four/seven in the various police regions. Two basic pre-conditions are that they must be able to rely on a well-functioning ICT system containing full and reliable information and that communication between the immigration system partners is improved.*

2) *Make it a statutory requirement for the Aliens Police to wait for a maximum of four hours for an aliens' attorney once that attorney has been informed that his client is being held. The time spent waiting may not count towards the maximum time a person may be held. Ensure there is a good financial arrangement covering legal assistance during the decision-making process regarding detention.*

3) *Introduce the construction of 'provisional detention pending investigation of alternatives'.*

4) *Disconnect the decision to impose an entry ban from the decision to impose detention.*

#### **II Do not make aliens' detention the basic assumption in regulations and policy**

5) *Do not assess the performance of the Aliens Police only on the number of detention orders imposed but also on other instruments deployed and the degree to which the legislation is complied with.*

6) *Make it clear in the regulations that aliens' detention may not be imposed if other adequate but less intrusive measures can effectively be applied.*

7) *Make it a principle of policy that aliens detention is an exceptional measure.*