

Where there's a will but no way

Advisory report on the application of the policy on aliens who, through no fault of their own, cannot leave the Netherlands of their own accord

The 'no-fault' policy under which a residence permit may be granted to aliens who, through no fault of their own, cannot leave the Netherlands is regarded by many as problematic. The impression exists that it is virtually impossible to meet the conditions governing the granting of such a permit. It is mainly failed asylum seekers and other aliens residing illegally in the Netherlands who apply under this policy. To be eligible for a 'no-fault permit', the alien must have made every effort to leave of his own accord but must have failed in this endeavour. The no-fault permit is a regular permit: asylum-related grounds can play no role in the no-fault policy.

Conditions governing the issue of a no-fault permit

A no-fault permit will be issued if *all* of the following conditions are met:

- 1) the alien has attempted to leave of his own accord by:
 - a) demonstrably applying to the mission of the country or the countries whose nationality he possesses, or the country or countries where he was previously habitually resident as a stateless person, and/or other countries which can be expected, on the basis of all facts and circumstances, to grant him admission; and
 - b) trying in some other way to obtain documents attesting to his identity and nationality which will enable him to obtain (replacement) travel documents in order to leave the Netherlands ; and
- 2) he has contacted the International Organization for Migration (IOM) to facilitate his departure, and the IOM has stated that it cannot effect his departure as he claims not to be in the possession of travel documents; and
- 3) he has asked the Departure and Repatriation Service (DT&V) to act as intermediary in obtaining the necessary documents from the authorities of the country to which it is possible for him to go and the Service's efforts on his behalf have met with failure; and
- 4) there is a coherent complex of facts and circumstances on the basis of which it can be concluded that the person concerned, through no fault of his own, cannot leave the Netherlands. These must be objective, verifiable facts and circumstances relating personally to the alien concerned that are supported in principle by documents; and
- 5) he is living in the Netherlands without a residence permit and does not meet the conditions for the issue of a different residence permit.

A no-fault permit can be granted on request or at the initiative of the authorities. In both cases, on the basis of a compelling recommendation from the DT&V, the Immigration and Naturalisation Service (IND) assesses whether the above conditions have been met. Issue on the initiative of the authorities only takes place within the framework of an asylum application. If in the course of the departure process, the DT&V concludes that

the alien cannot leave the Netherlands through no fault of his own, it will submit the case, together with a compelling positive recommendation, to the IND.

The study

The ACVZ interviewed representatives of implementing agencies, municipal authorities, NGOs and lawyers. It also commissioned a brief survey by the European Migration Network of any comparable arrangements in other EU member states. IND files were also examined.

The results of the survey show that most EU member states have no specific legislation governing aliens who are obliged to leave the country but claim they are unable to do so through no fault of their own. The ACVZ therefore decided not to pursue comparative research any further.

Main problems and conclusions

It emerged that although the number of cases is low, it is not unusual for an alleged country of origin or previous place of residence to refuse to cooperate in the return of an alien. In such cases, the no-fault policy offers a solution. Were it to be abolished, facts and circumstances related to the inability to return to a country of origin or previous place of residence could only be taken into account within the framework of a request for application of discretionary powers, which is not intended or appropriate for this purpose. Given the aim of this policy – to provide grounds for residence to persons who wish to depart but are unable to do so – and the fact that the file study showed that the ultimate outcome of procedures is in accordance with this aim, the ACVZ sees no reason to expand the scope of the no-fault policy to include other target groups.

The study revealed the following problems relating to the first four conditions. There are no difficulties with regard to the fifth condition.

Condition 1: the alien has attempted to leave of his own accord

The alien has to show that he has applied to the diplomatic mission of his country of origin or previous residence in connection with his departure. This can only be taken to mean that he must demonstrate that he actually approached the relevant mission. Aliens regularly claim they are unable to provide evidence because, as a result of a refusal to cooperate on the part of the authority in question, they cannot prove that they have visited the mission. In practice, it is sometimes deemed sufficient if the alleged visit is convincingly established. In view of the conservative approach adopted by missions in providing information about or confirming a visit by an alien, the ACVZ finds the burden of proof resting on aliens in this respect too heavy. It is of the opinion that the wording of this condition should be brought into line with practice.

The alien is also expected in this context to try in some other way to obtain documents attesting to his identity and nationality which will enable him to obtain replacement travel documents. The study showed that it is difficult to verify such efforts or to ascertain what they actually consisted of. The DT&V and IND often disregard this requirement. For these reasons, the ACVZ recommends changes to both the wording of this condition and to practice.

Condition 2: the alien has contacted the IOM to facilitate his departure

This condition is not always consistently applied. The ACVZ has examined a number of cases in which although the alien had not complied with this requirement, among others, it was concluded that he was not at fault in being unable to leave the Netherlands. The ACVZ also notes that the way in which this condition is currently applied in fact reveals nothing about the degree to which the alien has genuinely exerted himself to leave of his own accord with the help of the IOM.

Condition 3: the alien has asked the DT&V to act as intermediary, to no effect

If the alien has failed to obtain a (replacement) travel document from the authorities of his country of origin or previous residence through his own efforts, he can ask the DT&V to act as intermediary. Municipalities, civil society organisations and lawyers believe that the DT&V plays a fairly passive role in mediating between aliens and the mission of their country of origin or previous residence. The Service itself sees its primary role as that of bringing the alien and the relevant authorities in contact with each other. The uncertainty about the DT&V's role has possibly arisen because there is no definition of 'mediation' in the policy.

If mediation by the DT&V does not lead to the alien being able to depart, the DT&V submits the case with a compelling recommendation to the IND. In that recommendation, besides giving its views on the results of mediation, the DT&V determines on the basis of the first three conditions whether there is a coherent complex of facts and circumstances on the basis of which it can be concluded that the person concerned, through no fault of his own, cannot leave the Netherlands (currently condition 4). In practice, there is a lack of clarity concerning the exact division of responsibilities between the DT&V and IND, in that both agencies assess, in part, compliance with the same conditions. Since 9 December 2010 the IND rejects no-fault applications immediately if it is not already clear that the alien has met the first three conditions. In the opinion of the ACVZ, it is contrary to the provisions of the General Administrative Law Act to reject incomplete applications without giving the alien the opportunity to supply the missing information.

The examination of IND files also revealed that before 9 December 2010, the IND was not consistent in its treatment of cases in which a mission failed to respond to an application for a (replacement) travel document. In some cases, the position adopted was that a response from the mission could not be expected within the foreseeable future and that the alien had therefore complied with the conditions governing the issue of a no-fault permit. In other cases, however, the IND concluded on the very same grounds that the alien had not met the conditions. From the perspective of legal certainty therefore, decision-making practice was undesirable.

Condition 4: coherent complex of facts and circumstances

The study makes it clear that this condition is of decisive importance in the assessment of no-fault applications, while in fact its scope is undetermined. The ACVZ understands that a genuine willingness to leave on the part of the alien is of crucial importance in answering the question of whether the alien has done what reasonably can be expected of him in terms of efforts to obtain travel documents or documents attesting to his identity and nationality. Although it found no indications in the files that this happens on a large scale, the ACVZ concludes from the interviews it conducted that in practice, the alien's willingness to leave is commonly interpreted in terms of psychology or intention. This is

contrary to the provision that a no-fault application is assessed on the basis of objective, verifiable facts and circumstances. Partly on this basis, therefore, the ACVZ sees grounds for a clearer delimitation of this 'open norm' in the condition.

Finally, the ACVZ has difficulty with the way in which the IND has examined applications in light of the grounds for refusal since 9 December 2010. Since that date, an assessment in light of the substantive conditions of the no-fault policy only takes place if there are no grounds for refusal. This way of operating is out of step with the optional nature of some of the grounds for refusal, since that optional nature entails a weighing of interests in which all relevant facts and circumstances of the individual case must be taken into account. This means that the application cannot be assessed in light of the grounds for refusal until the question of compliance with the substantive conditions for granting a permit has been answered.

For a complete overview of the conclusions, please see the full report.

Recommendations

On the basis of its study, the ACVZ would make the following recommendations. For further details, please see the full report.

- I *Maintain the no-fault policy. Do not extend it to include other target groups. Adapt the policy and its implementation in the following ways.*
- II *Adapt the wording of the first condition as follows:
'The alien has tried to leave of his own accord. He has demonstrated or convincingly established that he has applied to the mission of the country of origin or previous place of residence'.*
- III *Adapt the wording after the second bullet point in the explanatory note to the first condition as follows:
'The alien is expected to try in some other way to obtain documents attesting to his identity and nationality (...), unless a written or oral declaration from the diplomatic mission shows that the person concerned will not be issued with a replacement travel document even though the authorities do not doubt his identity and nationality, as claimed by him.'*
- IV *a) Include in the explanatory note to the second part of the first condition a non-exhaustive list of the types of documents that could be used to support the claimed identity and nationality; and

b) Add to this the requirement that for each alleged attempt to contact the mission, the alien must submit at least a copy of the letter or email containing the request together with proof of dispatch.*
- V *Abolish the condition that the alien must have contacted the IOM to facilitate his departure and the IOM has stated that it cannot effect his departure as he claims not to be in the possession of travel documents.*
- VI *a) Adapt the wording of the third condition as follows:
'he [the alien] has asked the DT&V to submit a request on his behalf for a (replacement) travel document to the authorities of his country of origin or of another country which can be expected, on the basis of all facts and circumstances, to grant him admission, and this request has not led to the desired result;*

b) Include in the explanatory note to this condition the stipulation that the DT&V will also indicate, in the framework of this request and on the basis of all available information, what supporting documents, if any, the alien can reasonably be expected to try to obtain, possibly with the help of third parties;

c) Make an overview available, preferably on the websites of the DT&V and the Ministry of Foreign Affairs of information on the conditions set by countries of origin governing the issue of (replacement) travel documents.

VII a) Clearly define in the Aliens Act Implementation Guidelines 2000 (Vreemdelingen­circulaire 2000) the relationship between the powers and responsibilities of the DT&V and IND in the assessment of no-fault applications;

b) Include a specific provision that in its official report with a compelling recommendation to the IND, the DT&V will determine whether there is a coherent complex of facts and circumstances, as referred to in condition 4, on the basis of which it can be concluded that the person concerned, through no fault of his own, cannot leave the Netherlands.

VIII a) End the practice pursued since 9 December 2010 of directly refusing no-fault applications if it has not been established that all the first three conditions for issue of a residence permit have been met, without giving the alien the opportunity to submit the information and documents needed for the assessment of the application and without the IND having gathered the necessary knowledge concerning the relevant facts and circumstances on the basis of which a decision on the merits of the application can be taken;

b) Instead, proceed to an assessment of the merits of the no-fault application once it has been established that the alien has met the formal requirements for submitting an application;

c) For this purpose, have the IND first decide whether the application is manifestly unfounded. This is the case when:

- there are one or more imperative grounds for refusal;*
- the alien has been issued with a residence permit or meets the conditions for issue of a different residence permit; or*
- it is already clear that the alien has not demonstrated or convincingly established that he has applied to the diplomatic mission of his country of origin or previous residence;*

d) In the event that the deadline seems likely to be exceeded, suspend for another six months the statutory six-month period in which a decision must be made, with the alien's consent, if it emerges from an (interim) notification from the DT&V that the fact that no decision on the application for a (replacement) travel document has been received from the relevant authorities is not attributable to the alien;

e) Assess again, before the end of the suspension, on the basis of a (new) official report from the DT&V and of objectively verifiable facts and circumstances whether the lack of a decision from the authorities on the application for a (replacement) travel document is attributable to the alien;

f) Deny the application if this is the case, but issue the no-fault permit if this is not the case.

- IX *Adapt the wording of the fourth condition as follows:
'On the basis of objective, verifiable facts and circumstances relating personally to the alien concerned that are in principle supported by documents, the DT&V has established that there is a coherent complex of facts and circumstances on the basis of which it can be concluded that the person concerned, through no fault of his own, cannot leave the Netherlands. This is in any event the case if:*
- 1) A written or oral declaration from the diplomatic mission shows that the alien will not be issued with a replacement travel document, even though the authorities do not doubt his identity and nationality, as claimed by him; or*
 - 2) It has been established that the alien will not be issued with a replacement travel document by the authorities of his country of origin or previous residence, and these authorities have not stated that they have doubts about his identity and nationality, as claimed by him.*
- It will not be assumed that a no-fault situation exists if the alien:*
- has refused to draw up the handwritten declaration required for the submission of an application for a (replacement) travel document in which he informs the authorities of his country of origin or previous residence that he wishes to return of his own accord;*
 - failed to appear, without giving reasons, at the appointment for his presentation in person to the authorities of his country of origin or previous residence;*
 - during presentation in person to the authorities of his country of origin or previous residence made an explicit oral statement that he was not prepared to return of his own accord.*
- X *Do not deny no-fault applications without assessment in light of the substantive conditions if one or more of the counter-indications formulated as optional grounds for refusal are present, but weigh the interests involved on the basis of all relevant facts and circumstances in the specific case.*
- XI *Abolish the assessment made in light of the no-fault policy on the initiative of the authorities in asylum procedures.*