



## **REDIAL PROJECT**

### **National Synthesis Report – Netherlands**

#### **First Package National Synthesis Report for the Netherlands: Judicial Control of Exclusion on the Basis of the Return Directive**

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### **1. Article 7 Return Directive: the choice between voluntary or forced return**

#### *1.1. A period for voluntary return and its extension*

According to Article 62(1) of the Dutch Aliens Act, the general rule is that a return decision provides the illegally staying third-country national with a period of voluntary return of four weeks (28 days). Thus, in the Netherlands, there is no case law on the administrative discretion provided for in Article 7(1) RD, seeing that *if* a period for voluntary return is granted, it consists of 28 days. According to paragraph 3 of Article 62 Aliens Act, the period for voluntary return can be extended on the basis of individual circumstances. Against this background it is relevant to note the Council of State has stated that the authorities do not need to check whether the issuing of a return decision *as such* would be in violation of Article 8 ECHR, but that family life can be considered in the context of the granting of a period for voluntary return as provided for in Article 7(2) RD (ABRVS 1 November 2012, 201111708/1/V3). This point of view raises some questions with regard to its conformity with Article 5 RD, seeing that the Court of Justice has held that, when a national authority is “*contemplating the adoption of a return decision, that authority must necessarily observe the obligations imposed by Article 5 RD*” (See *Boudjlida*, C-249/13, para 49).

According to Dutch policy, extension of the period for voluntary can only be granted if the third-country national applies for such an extension in a separate procedure – thus the specific circumstances as provided for in paragraph 2 of Article 7 RD are not taken into account by the authorities on their own initiative. It is questionable whether this practice is in accordance with Article 7(2) RD, especially with the judgment of the Court of Justice in *Boudjlida* in mind. There the Court has held that when adopting a return decision Member States must hear the third country national concerned on the “*detailed arrangements for his return, such as the period allowed for departure*” and “*extend the length of that period appropriately, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and other family and social links*” (C-249/13, para 51). To my knowledge, there is no Dutch case law (yet) on this issue.

#### *1.2. Refusal of a period for voluntary return*

With regard to Article 7(4), which provides for three exceptions to the general rule that the authorities are obliged to provide the third-country national a period for voluntary return, Dutch law and policy has laid down detailed arrangements. Judicial control of the decision by the authorities to abstain from

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granting a period for voluntary return is carried out *ex tunc* (Council of State 31 July 2014, 201400235/1/V3).

In the first place, according to Article 62 Aliens Act, a period for voluntary departure is not granted if a *risk of absconding* exists. In this context it is important to note that Article 7(3) RD, which provides for certain obligations to minimize the risk of absconding during voluntary departure, is not implemented in the Netherlands, where such obligations are only applied to the third-country national in the context of alternatives to detention.

In line with Article 3(7) of the Return Directive, Dutch legislation has defined objective criteria, which may justify the finding that a risk of absconding exists. These criteria have been divided in substantial and non-substantial grounds (Article 5.1b Aliens Decree).

To begin with the first, Dutch law defines the following circumstances as substantial grounds for assuming a risk of absconding:

- The third-country national has not entered the country lawfully, or has tried to do so;
- He has evaded supervision for some time;
- He has received in the past any notification, obliging him to leave the country before the end of a specified period, and has not done so voluntarily;
- He does not cooperate in assessing his identity or nationality;
- He has, with reference to his application for permission to stay in the country, given false or contradictory statements regarding his identity, nationality or his journey to the Netherlands or any other Member State;
- He has gotten rid of travel- or identifying documents, without any need to do so;
- He has made use of false or falsified documents in the Netherlands;
- He has been declared an undesired alien according to Dutch Law, or an entry ban has been issued against him according to the law;
- He has declared that he will not fulfil his obligation to return (as defined in the Return Directive) or his departure to the Member State that is responsible for his application for asylum (according to the Dublin regulation).

Non-substantial grounds are:

- The third-country national does not fulfil one or more obligations, laid down in chapter 4 of the Aliens Act (i.e. the obligation to report to the authorities on a regular basis);
- He has unsuccessfully applied more than once for a residence permit;
- He has no permanent residence;
- He has no sufficient resources;
- He is suspected of or convicted for a crime;
- He has worked although he was not allowed to do so according to the Law.

The difference between a substantial grounds and non-substantial ones, lies in the fact that when the authorities advance a substantial ground to argue that a risk of absconding exist, they do not need to provide further justification in order to prove that this risk exists in the individual case, unless the third-country national shows that the grounds concerned are factually incorrect or in his specific case inapplicable (Council of State 27 February 2014, 201303624/1/V3, see also Aliens Circulaire A3/3). If at least two substantial grounds are applicable, the period for voluntary departure is refused (note that it is *not shortened* but that the authorities *refrain from granting it at all*). Non-substantial grounds may not in themselves lead to the conclusion that there is such a risk. Authorities are therefore obliged to give further explanation. It should be remarked that in ‘normal’ return cases, even two non-substantial grounds may give rise to the conclusion that a risk of absconding exists.

It has been argued before the Council of State that the criteria to assume a risk of absconding are so widely formulated in Dutch law, that the administrative authorities will quickly assume that there is a risk of absconding, and will thus hardly ever grant a period for voluntary removal. In the eyes of the third-country national concerned, these criteria were therefore not in accordance with the Return Directive. However, the Council of State ruled that the Return Directive only requires that these criteria are laid down in (material) law, and that it does not prescribe the material conditions the

criteria have to meet (Council of State 15 June 2012, 201201202/1/V4 – this judgment is uploaded in the database under Article 8, but I think it needs to be under Article 7). However, in light of the subsequent judgment of the Court of Justice in *Zh. and O.*, it is questionable whether the factual reversal of the burden of proof if the authorities invoke the so-called substantial grounds, is in conformity with the strict requirements that the Court sets to the invocation of Article 7(4) by Member States. This is especially so because the Member States, when they refuse to grant a period for voluntary removal, derogate “*from an obligation designed to ensure that the fundamental rights of third-country nationals are respected*” (C-554/13, *Zh. and O.*). What’s more, when we take into account the content of some of these grounds as laid down in Dutch law, (see above), they do not really seem to go beyond the mere fact of illegal stay.

Article 7(4) RD stipulates that a period for voluntary departure can also be shortened or not granted if an application for a residence permit has been dismissed as manifestly unfounded or fraudulent. In the Netherlands, legislation has not yet determined the conditions under which an application by a third-country national can be dismissed on these grounds.<sup>1</sup> As such the authorities cannot invoke them as a reason from abstaining from granting a period for voluntary departure (Council of State 12 April 2012, 201102602/1/V2). However, the Council of State has interpreted the term ‘dismissed’ in Article 7(4) RD as also encompassing the *revoking* of a residence permit because false or incorrect information was provided by the third-country national in the past application process. In that case, not granting a period for voluntary departure was deemed in accordance with the RD by the Council of State, especially taking into account the aim of the Return Directive and the system of return that it lies down (Council of State, 10 July 2014, 201309038/1/V1). Again, this interpretation is arguably not in conformity with the requirement that the derogations to the general rule of voluntary return are to be interpreted strictly (See C-554/13, *Zh. and O.*)

Interestingly, the judgment by the Court of Justice in *Zh. and O.* was the outcome of a request for a preliminary ruling by the Dutch Council of State regarding the third exception to the general rule of voluntary return in Article 7(4): a risk to public policy, public security or national security. The Council of State had referred the cases of *Zh. and O.* for a preliminary ruling because it was not sure whether the application of Dutch policy in their cases was in accordance with Article 7(4) of the Return Directive. *Zh.* had been arrested in the Netherlands while in transit to Canada, and subsequently convicted for possessing a false travel document, while *O.* was detained on suspicion of domestic violence. They both had been issued a return decision without a period for voluntary departure, because according to Dutch law and policy, the fact that an illegally staying third-country national is suspected of or condemned for committing a criminal offence in itself warrants the conclusion that this person constitutes a risk for public policy (Aliens Circulaire A3/3 read together with Article 62(2) under c Aliens Act). The Council of State asked the Court of Justice three questions. In the first place it wondered whether the interpretation of a risk to public policy as laid down in Dutch policy was in accordance with Article 7(4). Secondly, it wanted to know whether other factors, apart from a possible criminal conviction or suspicion, could play a role in establishing that someone posed a risk to public policy in the sense of Article 7(4). Thirdly, it asked whether these other factors should be taken into account when Member States choose between abstaining from granting a period for voluntary departure on the one hand, or merely shortening it on the other (Council of State 23 October 2013, 201112799/1/V3 and 201202062/1/V3).

The answers that the Court of Justice provided in *Zh. and O.* make clear that Dutch law and policy with regard to the refusal of a period for voluntary departure on grounds of public order is in violation with EU law for two reasons. In the first place, it does not pay duly attention to the question whether there is a *genuine, present and sufficiently serious threat*, as required by the Court of Justice. In the second place, by automatically refraining from granting a period for voluntary departure, and not taking into account individual circumstances, it breaches the principle of proportionality and disregards any possible violation of the fundamental rights of the third country national. The implications of *Zh. and O.* for Dutch case law on this specific point (refraining from granting a period

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<sup>1</sup> Which will change shortly on account of the legislation implementing the Asylum Procedures Directive (2013/32).

for voluntary return on the grounds of public policy) have not yet materialised, but they undoubtedly will shortly.

## **2. Article 8 Return Directive: The Obligation to Carry out Removal**

### *2.1. Removal*

According to Article 63 Aliens Act, a third-country national who is illegally staying in the Netherlands can be removed ('uitgezet'). If a period for voluntary return has been granted, such removal can only be carried out *after* the period for voluntary return has expired and the third-country national has not left the country. This is so even if the authorities, by 'ticking the wrong box', have granted a period for voluntary return accidentally and mistakenly. The period for voluntary return can only be changed by officially altering the return decision, which has to be notified in writing to the third-country national (Council of State 28 March 2012, 201201508). Interestingly, the Council of State has defined the concept of removal in a judgment predating the RD, as encompassing all these cases in which *coercion* is used in order to remove the third country national from the Netherlands (Council of State 1 July 2009, 200902298/1/V3). This interpretation has not altered after the RD became applicable, thus the Council of State has ruled that return with assistance by the International Organisation for Migration cannot be seen as removal in the sense of the Dutch Aliens Act (Council of State 11 april 2014, 201401757/1/V3). However, there is no case law on the *necessity* of the measures that are required in order to effect removal, and the step-by-step approach with regard to the *precise* coercive measures undertaken (as the Court of Justice emphasised in C-61/11, *El Dridi*).

### *2.2. Criminalisation and an effective system of return*

The Court of Justice has ruled that the obligation imposed on the Member States by Article 8 RD to carry out the removal must be fulfilled as soon as possible (see inter alia *Achughbabian*, paragraph 45). Criminal sanctions for illegal stay, such as home arrest or the execution of a prison sentence are measures that do not contribute to such swift removal. Therefore they cannot be understood as a 'measure' or a 'coercive measure' within the meaning of Article 8 RD (for example *Sagor*, para 44, *Achughbabian*, para 37). This case law has had important implications for Dutch law and policy, in particular with regard to the criminal offence of staying in the Netherlands while an *entry ban* applies (Article 197 Criminal Code, see also below under section 5). According to the Supreme Court (the highest judicial authority dealing with criminal law cases), the RD does not preclude the sentencing of a third country national on the basis of 197 Criminal Code, if three conditions are met: (1) the third- country national concerned does not have a valid reason for his non-return; (2) all the steps of the return procedure as foreseen in the RD have been applied to him; and (3) the judgment provides a well-argued motivation of the full application of the return decision in the individual case (Supreme Court 21 May 2013, 11/0307).

An example of a case in which the Supreme Court ruled that the application of the return procedure had been fully applied, and the imposition of a prison sentence thus in accordance with the RD, is provided in another judgment. Thus, it found that the following circumstances justified the conclusion that all the steps of the return procedure had been applied, but without success: (a) 11 departure interviews had been conducted by the authorities with the third-country national; (b) the authorities had tried to present him to the Iranian embassy 7 times, which presentations all failed, partly because the lack of co-operation of the third-country national, and partly because of lack of cooperation by the embassy; (c) the third country national had not sought the help of the International Organization for Migration in order to leave the Netherlands; (d) the repeated use of detention had not resulted in the departure of the third-country national, and neither did it result in a change in his uncooperative attitude (Supreme Court 3 December 2013, 12/05522). Note that the last part of the reasoning by the Court with regard to the use of detention seems out of line with the permitted aims of detention.

The cases discussed above concern cases in which a third-country national is sentenced for the criminal offence of staying in the Netherlands while an entry ban applies, and he *has not yet left after the issuing of the return decision* (and accompanying entry ban). This situation should be distinguished from the case in which he has left the Netherlands after the issuing of a return decision, but has re-entered in spite of the accompanying entry ban. In this latter case, the Supreme Court does

*not require* that either *before* the departure of the third-country national concerned, or *after* his re-entry, all the steps of the return procedure as laid down in the RD have been applied (Supreme Court 4 December 2014, 12/05658). Thus, in such cases the criminal judge can sentence the third country national to a prison sentence, *without* examining whether the return procedure has been applied and completed. It remains to be seen whether this case law has to be changed on account of the pending case before the Court of Justice in *Celaj* (C-290/14). However, it is striking that at least according to the Advocate General in this case, the distinction made by national courts between illegal stay as such on the one hand, and illegal stay in breach of an entry ban after re-entry on the other, is irrelevant: the obligation for Member States to remove an illegally-staying TCN persists *as long as the person remains illegally on their territory*.

It may be useful to note that the Council of State has ruled that the criminal judge has exclusive competence to judge about the criminal law consequences of an entry ban. This situation, in which the administrative judge examines the lawfulness of an entry ban without paying attention to possible criminal law consequences of such a ban, is not in violation of Article 47 of the Charter of Fundamental Rights of the EU, because these consequences do not play a role with regard to the lawfulness of the entry ban as such (Council of State 22 May 2013, 201206730/1/V4).

### *2.3. Use of coercive measures: proportionality and fundamental rights*

Conspicuously, there is no Dutch case law on the requirement in Article 8(4) RD, which stipulates that the coercive measures that are applied in order to remove a third-country national who resists removal, need to be proportionate and shall not exceed reasonable force. Nevertheless, these requirements have been codified in Dutch law and policy, already before the implementation of the RD.

Thus, the Aliens Circulaire requires that when coercive measures are used in order to effect removal, the authorities are obliged to examine whether these measures are suitable and necessary. If coercive measures are used in order to make the third-country national board a plane, the captain has to be informed. After the doors of the plane are shut, coercive measures may only be used if the captain consents to such use (Article A/6.7). These requirements are a further elaboration of requirements laid down in formal law, which provides that coercive measures in the context of removal may only be applied if the circumstances reasonably so require, on the grounds of a risk of absconding, or because there is a danger for the safety or the life of the third-country national, for the persons carrying out the removal, or for a third party, or because there is a danger for a grave disturbance of public order. The coercive measure may only be used if it cannot reasonably be expected to harm the health of the third country national (Article 23a of the *Ambtsinstructie voor de Politie, Ambtenaren van de Koninklijke Marechaussee en andere opsporingsambtenaren*).

Dutch case law on coercive measures, such as handcuffs, is limited to the use of these measures when detained third-country nationals are transported (to and from the courtroom, police office, or an embassy). In these cases, the Council of State has ruled that it has to be apparent from the report which is made when handcuffs are applied that the grounds for such use as laid down by law were applicable, and that the use was proportional (Council of State 2 February 2011, 201010863/1/V3; and 20 March 2012, 201102621/1/V3).

## **3. Article 9 Return Directive: the postponement of removal**

### *3.1 Non-Refoulement*

Article 9(1) RD obliges Member States to postpone removal if such removal would violate the principle of *non-refoulement*. Generally, if the return or removal of a third-country national carries a risk to violate *non-refoulement*, or Article 3 ECHR, the person will be accorded with a right to stay in the Netherlands. However, this does not happen in those cases in which the third country national has been provided with a ‘heavy’ entry ban (i.e. an entry ban of more than ten years, and which, in most cases, *excludes the possibility of legal stay in the Netherlands* – see for more on this under section 5 below). This situation will arise in the Netherlands mostly with regard to third-country nationals who have been excluded from refugee status on the basis of Article 1F Refugee Convention, or those that are seen as a serious threat to public order or national security for other reasons. According to the

Council of State – although it does not refer to Article 9 paragraph 2 RD in its case law on this issue – the adoption of a return decision in these cases is lawful, even if there is a *permanent impediment to removal* on the grounds of Article 3 ECHR. Indeed, the only consequence of such an impediment is that the authorities *will not exercise their right of removal as laid down in Article 63 Aliens Act* – but the third-country national remains under the obligation to leave the Netherlands, for example for a third country (Council of State 25 June 2013, 201208588/1/V1).

Even in the case that the authorities concede that the third-country national is not able to leave the Netherlands, and when removal is not possible on the grounds of Article 3 ECHR, the Council of State considers that the adoption of a return decision as such is not unlawful (Council of State 3 December 2014, 201404098/1/V2). This approach, although not in violation of Article 9(2) RD (as removal is in fact postponed), does raise questions as regards the interpretation by the Council of State of term *return* in Article 3(3) RD.

The Council of State employs a similar reasoning when the ECtHR has ordered interim measures. While suspensory effect, either on account of a national judgment, or on account of interim measures by the ECtHR, will generally lead to legal stay, thus also suspending the obligation to return, this is not the case for a third-country national who has been served with a ‘heavy’ entry ban – seeing that such bans preclude the possibility of legal stay in most cases (Council of State, 25 June 2014, 201307320/1/V2). Thus, in the case of an Afghani national, who had been excluded from refugee status on account of Article 1F, interim measures by the ECtHR, although precluding the exercise of the right of removal by the authorities, did not bar the possibility that he could “fulfil the obligation to return by leaving the Netherlands for another country than Afghanistan” (Council of State 30 August 201300216/1/V3).

As mentioned above, in most cases, suspensory effect leads to postponement of the obligation to return (although not always), and the non-exercise of the right of removal. However, the judiciary does not always deal with a request for suspensory effect of an appeal (for example against the dismissal of an asylum application) in time – that is to say, *before* the period of voluntary return has ended. Although this has so far not resulted in the exercise of the right of removal by the authorities, it may raise issues with regard to the ruling of the Court of Justice in *Abdida* (C-562/13). Thus, if an application for asylum is rejected and a return decision is issued, the third country national generally is provided with a period for voluntary departure of 28 days (see section 1 above). According to the law, the third-country national’s basic needs are met during the period for voluntary departure, also so that he can prepare for his return. However, in the gap which may exist between the ending of the period for voluntary departure, and the judgement providing suspensory effect to his appeal, he has *no legally guaranteed right* to have his basic needs met (Council of State 2 May 2012, 201113284/1/V1).

### *3.2. Obstacles to removal on account of medical reasons*

The only exception contained in the Aliens Act to the right of removal of the authorities as laid down in Article 63 is provided in Article 64 Aliens Act: Removal is not carried out for as long as it is, with a view to the health of the third-country national or his family members, not safe to travel. This is called a medical impediment to removal, and it leads to legal stay in the Netherlands for as long as the medical impediment lasts. For an appeal to Article 64 Aliens Act to be successful, the removal would have to lead to a *medical emergency*, a strict assessment in which for example possible future obstacles to obtain medical treatment in the country of return are not taken into account (see for example Council of State, 6 February 2015, 201409155/1/V).

## **4. Article 10 Return Directive: The removal of unaccompanied minors**

Dutch law and policy requires that before the removal of unaccompanied minors is effected, the authorities examine whether adequate reception of the child will be provided in the country of return. As such, the district court of The Hague has ruled that Article 10(2) RD has been satisfactorily implemented in the Netherlands (District Court The Hague, 19 July 2011, AWB 11/20079). The Council of State has distinguished between the taking of a return decision with regard to an unaccompanied minor on the one hand, and his removal on the other – concluding that Article 10(2) RD does not set requirements to the former action by the authorities, but only to the latter (Council of

State 6 June 2012, 201104976/1/V2).

Adequate reception is understood in Dutch policy as every kind of reception – regardless of its form – of which the circumstances are similar to those under which reception is provided to minors that are comparable to the unaccompanied minor who is to be returned. There is a presumption of adequate reception in any of the following circumstances:

- In the country of origin, a family member (up to the fourth degree) is present;
- In the country of origin, the spouse with whom the third-country national is traditionally married (not formally) is present (*this ground seems really quite out of line with international children's rights!*);
- Facts and circumstances show that any other family member, or any other adult can provide adequate reception;
- Reception is provided in a (private) institution, and the authorities consider the reception acceptable in light of local circumstances;
- Country of origin information warrants the conclusion that the authorities of the country of origin take care of reception;
- On the basis of general information it appears that reception of minors in the country of origin is available and adequate.

Adequateness of reception facilities in the context of this policy is assumed if they can provide shelter, food, clothes and hygiene, and if there is access to education and medical care (Aliens Circulaire B8/6.1). If family members are present in the country of return, the authorities are under no obligation to do further research whether reception is in reality provided or whether reception is adequate (Council of State 14 August 2013, 201206377/1/V4; and 14 August 2013, 201202249/1/V4). In the case underlying the latter judgement, it had been argued that the mother of the unaccompanied minor from Afghanistan could not provide adequate reception upon his return because she lived in Iran, and because she lived together with his uncle who had abused the minor before. Apart from the fact that the Council of State seems to gloss over the question to which country this unaccompanied minor is to be eventually returned (Iran or Afghanistan), it is striking that it concludes that the mother is able to provide adequate reception *because* she has managed to make the minor flee Iran without the knowledge of the uncle.

## **5. Article 11 Return Directive: Entry bans**

### *5.1. Implementation of Article 11 in law and policy*

Article 11 RD is implemented in Articles 66a and 66b of the Aliens Act, and Articles 6.5 – 6.5c Aliens Decree. Article 66a paragraph 1 codifies the *obligation* to issue an entry ban in the case that a third-country national has not left the Netherlands during his period for voluntary return, or if he has not been provided with a period for voluntary return. In these cases, the entry ban generally consists of 2 years. It can either be issued at the same time that the return decision was issued, or – if it is issued because the third-country national has not obliged with his obligation to return – it can be based upon the previously taken return decision that declared his stay illegal (Council of State 9 October 2013, 201306001/1/V4). In any case, no entry ban can be issued if the authorities have not taken a return decision – in these cases, the court will annul the entry ban (Council of State, 26 July 2012, 201203465/1/V3 en 201203402/1/V3, see also Council of State 25 July 2013, 201202502/1/V3).

Article 66a paragraph 2 provides the minister with the discretion to issue an entry ban in those cases in which an third country national is issued with a return decision which provides for a period for voluntary departure. It has been argued before the Council of State that the issuing of an entry ban, which, as we shall see below, makes staying in the Netherlands a criminal offence, is incompatible with the simultaneous allowing for a period for voluntary departure. However, according to the Council of State, there is no legal provision that forbids the minister to exercise his discretion to issue entry bans in those cases in which a period for voluntary departure has been granted (Council of State, 23 January 2014, 201302843/1/V3). Moreover, it reaffirmed in this latter case that the assessment of the criminal law consequences of an entry ban fall exclusively within the competence of the criminal

judge. Thus, the administrative judge who rules about the lawfulness of the adoption of an entry ban as such cannot deal with the criminal law implications of such entry bans (See also Council of State 22 May 2013, 201206730/1/V4, mentioned above in section 2.2.).

### 5.2. *A difference between heavy entry bans and light entry bans*

Dutch law differentiates between the legal consequences of two sorts of entry bans – in legal practice designated as light and heavy entry bans. According to Article 66a paragraph 6, a light entry ban means that a third-country national *cannot have legal stay* in the Netherlands, except in the following three situations:

- In the first place, the third country national against whom a light entry ban is issued has legal stay during a first application for international protection which has not yet been decided upon by the authorities;
- In the second place, he can have legal stay if there is a medical impediment for removal (as discussed above in section 3);
- In the third place, he can have legal stay if the judge has provided interim measures – that is to say that removal is to be postponed until his appeal has been decided upon.

A heavy entry ban means that the third country national can only have legal stay in one situation (article 66a paragraph 7):

- During a *first* application for international protection which *has not yet been decided upon* by the authorities (Council of State 9 July 2013, 201204559/1/V1 and 2012077531/1/V1).

This means that even in the case that interim measures have been ordered by the ECtHR, the third-country national who has been issued with a heavy entry ban cannot have legal stay in the Netherlands (Council of State 25 juni 2012, 201103520/1/V3).

Such a heavy entry ban can only be issued in the following circumstances (Article 66a paragraph 7 Aliens Act):

- If the third country national has been convicted for a crime which can be sentenced with a prison sentence of more than three year, or if he has been sentenced to a hospital order on account of a crime);
- If he poses a danger to public policy or national security
- If he poses a serious threat to public policy, public security or national security
- If his legal stay should be denied on account of a Treaty or in the interest of international relations of the Netherlands.

The difference between light and heavy entry bans, and their legal effects, has been affirmed by the Council of State in a judgment in which it also ruled that when the authorities issue a light entry ban (i.e. an entry ban based upon the circumstance that the third country has not left within the period for voluntary departure, or because he has not been provided with such a period) there is no scope for the balancing of interests. This is only different if the authorities decide to use their discretion to abstain from issuing a light entry ban for humanitarian or other reasons, as provided for in paragraph 8 of Article 66a Aliens Act. However, according to the Council of State, while issuing a heavy entry ban, the authorities are obliged to find a balance between the general interest of protecting public order or security, national security and international relations on the one hand, and the individual interest of the third country national by legally staying in the Netherlands or protection against removal. This balancing, in which all relevant facts and circumstances are taken into account, is required because the issuing of a heavy entry ban is not the result of the mere illegal stay of the third-country national, but of the fact that there are other reasons for the finding that future stay is "unwanted, illegal and punishable as a criminal offence" (Council of State, 19 December 2013, 201207041/1/V2). Circumstances that are to be taken into account are for example the existence of family life in the Netherlands, and the question whether the third-country national concerned has a well-grounded fear for persecution in the country of origin (Council of State 10 January 2014, 201300386/1/V2) Seeing that a residence permit cannot be granted for as long as a heavy entry ban is in force (see above, and Article 66a paragraph 7 Aliens Act), the judicial control of legal arguments for or against legal stay by

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the third-country national or his protection against removal can only be carried out during the appeal against the entry ban (Council of State, 19 December 2013, 201207041/1/V2, and Council of State 9 July 2013, 201204559/1/V1 en 201207753/1/V1). However, the fact that the third country national cannot leave the Netherlands on account of the general situation in his country of origin, cannot be dealt with in the appeal against the entry ban (Council of State 17 July 2013, 201202927/1/V3)

With regard to both light and heavy entry bans, the third country national has to be heard before adopting the entry ban, so that he may bring forward facts and circumstances according to which the duration of the (heavy and light) entry ban is to be shortened, or on the grounds of which the authorities may abstain from issuing an entry ban for humanitarian or other reasons (Council of State, 15 June 2012, 201201202/1V4 and 201202257/1/V3).

Apart from the fact that heavy and light entry bans differ from each other as regards the situations in which legal stay by the third country national is excluded, they also differ with regard to their criminal law consequences: staying in the Netherlands despite a heavy entry ban is designated as a *criminal offence* on the basis of Article 197 Criminal Code, whereas staying in the Netherlands while a light entry ban is in force is a *misdemeanour* on the basis of Article 108 paragraph 6 and paragraph 1 Aliens Act (for Dutch case law on the compatibility with the RD, in particular Article 8, of criminal sentences for stay in violation of an entry ban see above section 2.2).

### *5.3. Duration of entry bans, with particular emphasis on entry bans of more than five years.*

As mentioned above, the general rule for entry bans is that they last for two years (Article 6.5a paragraph 1 Aliens Decree), except if it concerns a third country national who has been sentenced to a prison sentence of less than 6 months – in which case it will last for three years (Article 6.5a paragraph 3 Aliens Decree). The entry ban will last five years in the following circumstances:

- It concerns a third country national who has been sentenced to a prison sentence of 6 months or more; or
- He has used false or falsified papers; or
- He has been issued with more than one return decision previously; or
- He has entered Dutch territory while an entry ban was in force against him

A prison sentence does not need to have become final and absolute for an entry ban to be based upon it (Council of State 7 March 2014, 201308944/1/V1). As Article 11(1) RD puts a maximum duration of five years to entry bans and, as mentioned above, the Council of State has ruled that the authorities are to balance interests when issuing heavy entry bans, law and practice with regard to entry bans up to five years in the Netherlands seems generally in line with EU law. However, the situation is more complicated with regard to entry bans of more than five years.

We have seen above that Article 66a paragraph 7 determines that a heavy entry ban can be issued if a third country national poses a serious threat to public policy, public security or national security. In paragraph 4 of the same provision, the duration of entry bans is limited to five years, except when the third country national concerned poses a serious threat to public policy, public security or national security. According to Article 6.5a paragraph 5 Aliens Decree, a serious threat to public order, in which case an entry ban can be imposed for ten years, can materialize in the following circumstances:

- A conviction for a violent or drug related crime;
- A prison sentence for a crime that is punishable with a sentence of more than 6 years;
- The fact that Article 1F of the Refugee Convention has been invoked against the third-country national.
- The third-country national has been convicted to detention under a hospital order

It is questionable whether the application of these grounds in order to issue entry bans of ten years, and the control exercised by the Council of State of the lawfulness of these bans, are in line with the concept of a serious threat to public policy, as recently elaborated upon by the Court of Justice in *Zh. and O.* (C-554/13). As we have seen above, this case concerned the interpretation of threat to public order in the context of article 7 RD, but there is no reason to believe that a threat to public order would be interpreted differently in the context of Article 11 RD, except from the fact that the threshold for

authorities invoking it may even be higher, seeing that Article 11(2) RD adds the adjective ‘serious’ to threat. In *Zh. and O.*, the Court has emphasised that the interests that need to be appraised in order to protect public policy are not necessarily the same as those that are taken into account in the context of a criminal conviction. It concludes, by citing a judgement dealing with free movement of EU citizens “*that the concept of ‘risk to public policy’, as set out in Article 7(4), presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*”. As such, Member States are bound to take into account any factual or legal matter relating to the situation of the third-country national concerned which can clarify whether his personal conduct poses a threat to public order.

However, according to the Council of State, the fact that the authorities makes a well-grounded argument that the third country national has been convicted for very serious crimes is sufficient for an appeal to a serious threat to public policy in the sense of Article 11(2) RD (Council of State, 4 March 2014, 201305772/1/V3; and Council of State 15 June 2012, 201201202/1/V4). It should be noted though, that the Council of State does require the authorities to substantiate with arguments the duration of the entry bans, by focusing on issues such as the time passed since the third country national was convicted, the seriousness of the sentence that was imposed, and the nature of the crime for he was convicted (Council of State 23 June 2014, 201306380/1/V4). And although it does in some cases pay attention to recidivism (Council of State 14 August 2014, 201311362/1/V3), the actuality of the threat is not really examined *apart* from its seriousness.

Along the same lines, the Council of State infers from the mere fact Article 1F of the Refugee Convention has been invoked to exclude a third country national from refugee status, the existence of a serious threat for public policy in the sense of Article 11(2) RD (Council of State 9 March 2015, 201400601/1/V2, see also Council of State 18 September 2014, 201402288/1/V2). The question whether the danger to public policy is actual and genuine is not dealt with separately at all – according to the Council of State the very seriousness of 1F-exclusion entails an actual and genuine threat.

This interpretation is striking in light of the way in which the Court of Justice has consistently understood the concept of threat to public order in its free movement case law – and all the more so because it has ruled that *in order to exclude someone from refugee status* under EU law, the risk to the receiving Member State does not need to be *actual*. It has observed in this context that exclusion from refugee status should be understood as a punitive measure (Cases C-57/09 and C-101/9, *B. and D.*). Moreover, some of the persons who have been excluded from refugee status on the grounds of 1F remain in the Netherlands for many years. They are issued a return decision and an entry ban, but are not removed because their return (to Afghanistan) would entail a risk of violating Article 3 ECHR. So far, only two of them have been criminally prosecuted. The absence of repressive, or any other kind of genuine and effective measures undertaken with respect to these people raises the question as to how *serious, genuine and actual* their threat to Dutch public order really is (Cases C-115/81 and C-116/81, *Adoui and Cornuaille*). In addition, the serving of a return decision and an entry ban to these people may also conflict with a common approach to illegally staying third country nationals in general, and with some of the provisions of the Return Directive in particular.

#### *5.4. Old entry bans – when do they start ‘running’?*

In line with the judgment of the Court of Justice in *Filev and Osmani* (C-297/12), the Dutch Supreme Court has ruled that entry bans that have been issued *before* the Return Directive entered into force are generally bound by a maximum time limit of five years. This period begins running, not from the moment that the ban was issued, but from the moment the third-country national has actually *left* Dutch territory (Supreme Court 4 November 2014, 13/00812).