

Summary

Introduction

This procedural evaluation in relation to asylum procedure forms part of the evaluation of the Aliens Act 2000. The aims of the 2000 Act were to shorten asylum proceedings and to improve the quality of asylum decisions. To achieve these aims, a number of new statutory mechanisms were incorporated into the 2000 Act. Also, several mechanisms were included that did not relate to these aims. This report will look into how the asylum system has prepared itself for the introduction of the Aliens Act 2000 and particularly the new statutory mechanisms, and also the context in which that preparation for the introduction of the new Act has taken place. We will also describe how the new statutory mechanisms in the Act and in subordinate legislation have been implemented, how the case law of the Department of Administrative Law of the Council of State (the 'DAJ') has developed in relation to these mechanisms and what the experiences have been in practical terms. This will show whether the new mechanisms are operating in practice as expected by the legislator. We shall also discuss, in the subsequent reports "Duration of Asylum Procedures" and "Quality of Asylum Decisions", whether the aims mentioned above have been achieved.

Aim of the research

The research questions related to the change process (1) and the implementation process (2). The research questions were as follows:

- 1a How much and in what way did the organisations concerned prepared themselves for the introduction of the Aliens Act 2000?
- 1b What important changes occurred in the asylum system between 1 April 2001 and 1 January 2005, as a result of the Aliens Act 2000 or otherwise?
- 2a How are the new mechanisms in the Aliens Act 2000 operating in practice?
- 2b What have been the experiences of employees in the organisations concerned in relation to these new mechanisms, and, in the opinion of these employees, are there any bottlenecks occurring in the implementation of these mechanisms?

These questions are answered in relation to the following new mechanisms under the Aliens Act 2000:

- Intention procedure
- Extension of individual decision periods
- Moratorium on decisions
- Sequential status system with standard provision package

- Wider-ranging decisions and standard repatriation time limit
- Moratorium on repatriation
- Standard suspensive operation of appeal
- Ex-nunc test
- Higher-level appeal

Information in relation to the *change process* was collected by means of analysing documents from the Lower House of Parliament up until the spring of 2005 and documents from the project 'New Aliens Act', open interviews with staff of the organisations concerned at policy/management level, and analysis of written material from these organisations up until the spring of 2004. The parties involved were the most important implementation organisations in the asylum system, and those acting under the authority of the Minister for Alien Affairs and Integration (Immigration and Naturalisation Service (IND), Central Body for Asylum Seekers Accommodation, Management Unit for Coordination of Aliens, IND Procedural Representatives and State Advocate), organisations concerned with legal assistance (Foundation for Legal Aid in the Asylum Process, and Netherlands Bar Association), interest groups (Dutch Council for Refugees) and judicial institutions (State Management Unit for Alien Courts and the DAJ).

To analyse the *implementation process*, we used case law from the DAJ up until 1 January 2005. Also, in the course of 2004, a policy-orientated Delphi investigation was carried out, in which, by means of two written information-gathering rounds, information on implementation practice was gathered from 26 experienced staff members of important organisations concerned with the field of asylum implementation (IND, IND-PR, State Advocate, FLAA, lawyers, DCR and Aliens Courts). The aim of this was to provide a description of the variety and patterns of experience and understanding in the field of asylum in general, and to indicate potential bottlenecks. It is not possible, based on this, to indicate precisely what percentage of each professional group shared each reported experience and opinion.

Results

Preparation for the Aliens Act 2000

Preparation for the introduction of the Aliens Act 2000 went on for several years, within a context of a large number of requests for asylum and many associated reorganisations and expansions within the organisations involved. The Bill was sent to the Lower House in 1999 and the implementation bodies, the legal representatives, the judiciary

and some advisory committees were asked to give their opinions and to prepare Ex Ante Implementation Tests with a view to the feasibility of implementing the Act on 1 January 2001. The New Aliens Act project team took note, at set times, of how far preparations were proceeding amongst the organisations in the field. These involved primarily the recruitment and training of staff and the adjustment of business and working processes. Halfway through 2000, it appeared that the planned date for introduction would not be achievable and the date was postponed until 1 April 2001. By that date, a number of important conditions that had been formulated by the project team with a view to the earlier implementation date had been met, namely those concerning the financial preconditions, amendment of internal computerised information systems at the organisations, acquisition of knowledge about the Aliens Act 2000 and the setting up of new working processes. Preparations were, indeed, frustrated at a number of the organisations by the late publication date of the final legislation. There were also still a number of bottlenecks on the date the Act was introduced. First of all, there was a shortage of interpreters and a threatened lack of legal staff in the Aliens Courts and amongst legal representatives. This shortage was partly the result of the large number of asylum applications prior to the introduction of the 2000 Act and the resulting expansion of various organisations. The introduction of a higher level of appeal also led to a need for expansion of the DAJ.

The second bottleneck concerned the backlog of work at the IND and the Aliens Courts. Despite efforts by the IND to reduce the backlog of asylum decisions at first instance to normal levels *before* the introduction of the new Act, the implementation date, when it came, still saw a higher than normal backlog of asylum decisions at first instance. There were also still substantial backlogs at the Aliens Courts at that point, which could not be processed in the short term.

Thirdly it appeared that, at the date of introduction of the 2000 Act, there was still no provision of information, or coordination of that information, across the whole spectrum. This led to a start being made at the Ministry of Justice on the development of an across-the-board information system. Finally, when the 2000 Act was introduced, there was no acceptance of the new legislation throughout the whole asylum system, although emphatic attempts had been made to achieve this. The Ministry of Justice, however, could not or would not take account of the interests of all of the organisations in the asylum field when finalising the legislation; the lawyers and the DCR, in particular, remained outspokenly critical of the new law. Taking all of this into account, the decision to introduce the Aliens Act 2000 on 1 April 2001 was not without risk.

Developments after the introduction of the Aliens Act 2000

Some months after the introduction of the Aliens Act 2000, the growth in numbers of asylum seekers began to give way to a reduction, which continued at a strong rate, particularly from the end of 2001 onwards. The continuing reduction was part of a trend which materialized in industrialised nations across the world after 2001. How much of this latest phenomenon can be ascribed to the Aliens Act 2000 (or its announcement) is unclear, but what is certain is that this reduction had a substantial influence on the organisations operating in the asylum field. From 2002 onwards, a number of organisations had to start tightening their belts. First of all this affected organisations working at the beginning of the asylum chain, but starting at the end of 2005, other cutbacks are also expected, in the Aliens Courts, for example. Because of the reduction in the number of asylum seekers, the (threatened) staffing shortages of interpreters and legal assistance staff are also disappearing. Even at the Aliens Courts, the expected staff shortages have not materialized. The backlogs at IND and the Aliens Courts, however, remain a long-standing problem. The backlog of asylum decisions at the IND returned to a normal level at the end of 2002, but then began to climb again. The backlogs at the Aliens Courts began to fall at the start of 2003, but are only expected to reach a normal level again at the end of 2005. Until September 2004, the slow reduction was partly caused by the large number of detention cases that had to be processed by the Aliens Courts as a result of the ten-day test for alien detention; these are cases which take priority over normal asylum cases.

In order to introduce improvements in the system-wide provision and coordination of information, the Ministry of Justice set up the temporary Directorate General for the Aliens Act 2000. Its Project Coordination Team for the Aliens Chain ('PCT') established various consultation structures and coordination projects, and brought about the Basic Calculation Model and the Basic Provisions for Aliens. The forecasts for the workload for various organisations under the basic Calculation Model did not always appear to be completely reliable before 2004.

Coordination at a national level between the implementation organisations and the judicial authorities was intensified by the PCT. In addition, existing consultation between the various organisations in the asylum field at national, regional and local levels was continued, giving rise to some friction as well as some good collaboration.

The asylum field was also strongly influenced by developments that occurred in the first years after the introduction of the Aliens Act 2000, both in a judicial and in a policy context. The Aliens Act 2000 was amended a few times and policy measures, such as the introduction of the Once-only Regulation and the assessment of so-called 14/1 Letters, had a large and lasting impact on the IND and the Central Body for

Asylum Seekers Accommodation, amongst others. The case law from the DAJ also had a substantial effect, partly in relation to the Application Centre procedure and the manner in which the Courts tested the IND's asylum decisions. This aroused much criticism on the part of the legal assistance providers and interest groups. Up until 1 January 2005, there was relatively little influence from European legislation.

Current functioning of the new mechanisms

Generally speaking, it can be said that the most important of the new mechanisms under the Aliens Act 2000 have actually been applied in asylum practice. As was intended, some of these mechanisms are playing a part, in principle, in every asylum procedure. This is the case with the intention procedure, the sequential status system (on approval of the asylum application), the wider-ranging decision and the suspensive operation of the appeal against a decision taken in the normal asylum procedure. Other mechanisms are only used in particular situations. These include the individual extension of the decision period for further investigation or because of a decision moratorium, and deferral of repatriation as a result of a repatriation moratorium. It is not known precisely how many asylum seekers have had to deal with these since the introduction of the Aliens Act 2000. As a result of the statutory text and the case law from the DAJ, the *ex-nunc* test has only been applied, in practice, in a limited number of cases, according to the Courts. Also, the higher-level appeals are used considerably less frequently than was anticipated when the 2000 Act was introduced. We will now deal with each of the new mechanisms in turn.

Intention procedure

In practice, the intention procedure has been applied according to the legislation and regulations under the 2000 Act, the Aliens Order 2000 and the Aliens Circular 2000. The legislative history suggests that the government assumed that the asylum seeker would lodge a written response in relation to the intention. It appears, however, that this has not always been happening in practice, not even when the legal assistance provider disagrees with the intention. The assertion that the legal assistance staff do not have enough time in the Application Centre to lodge a properly reasoned written response is supported, in broad terms, in the field.⁸⁸ If there is no written response, or if it is of poor quality, then the intention procedure cannot logically contribute towards making up a complete file, nor towards the quality of the asylum decision. A second bottleneck is that neither the legislation and regulations nor the

⁸⁸ 'In broad terms' here means that the assertion was endorsed by a large proportion of the respondents from a variety of professional groups.

case law provide any definitive answer to the question of how, precisely, the IND should take the written response into account in the decision. In practice, the interpretation of this provision varies between summary referral to the written response and the issue of a reasoned reply to various parts of the written response. The anticipated shortening of the asylum procedure by replacing the objection phase with the intention procedure does indeed occur, according to those involved, at the start of the normal asylum procedure. There are, however, still failures to meet time limits at the IND and long processing times at the Courts (see the report 'processing times').

Individual extension of the decision period

In a limited number of the asylum cases, the individual decision period was extended in order to carry out further investigation. In these cases, the (extended) decision period was sometimes still exceeded. Also, the decision period of six months was regularly exceeded without being officially extended (see 'processing times'). This meant that appeals against 'notional refusal' could not be avoided, as had indeed been anticipated. The explanation for the continued breaching of decision periods may possibly lie in the many reorganisations and job re-definitions that have taken place in recent years at IND. According to the report 'on the quality of asylum decisions', further investigation was indeed carried out during the extension of individual decision periods and the results of this were used in reaching the decision (see the relevant report).

Decision and repatriation moratoria

Between 1 April 2001 and 1 January 2005, the Minister imposed a decision moratorium on several occasions. The same statutory basis was always employed for this, namely what was expected to be a short period of uncertainty on the situation in the country of origin. The Minister also made use of the opportunity to extend or withdraw a decision moratorium, in general terms, on several occasions. The individual decision periods on all outstanding applications were extended during the moratoria by the maximum permitted extension of one year.

Various repatriation moratoria have also been imposed since 1 April 2001, often combined with a decision moratorium. According to the legislative history, the reason was always that the situation in the relevant country of origin was too unsafe to return there. A repatriation moratorium was, however, seldom followed by a policy of class protection. When repatriation moratoria were withdrawn, changes in the country of origin played their part, but also sometimes the expiry of the maximum one-year time limit. Follow-up research is required to obtain information on the application of decision and repatriation moratoria in individual files.

Wider scope of decisions and standard repatriation time limit

The statutory effect of the wider-ranging decision is that the provisions are terminated and the foreign national is then obliged to leave the Netherlands, or else can be removed. Practice has shown that it is impossible for the implementation bodies to terminate the provisions immediately after the expiry of the repatriation period. This is partly because this time limit coincides with the time limit for legal redress. Preparations to terminate the provisions only start if that time limit has expired and has not been used. In the field, the impression persists that the wider-ranging decisions and standard repatriation time limit have, in practice, led to a reduction in the number of proceedings, as had been anticipated. Despite the wider-ranging decision, proceedings are still commenced to prevent the ending of reception and removal from the Netherlands.

Also, the judicial test of the legal consequences of the wider-ranging decision has been interpreted in a different way by the DAJ than what seems to have been thought likely by the legislator: whereas the legislative history suggested that this might well happen, the DAJ has decided that the legal consequences cannot be assessed separately from the decision on admission.

Ex-nunc testing

A limited judicial ex-nunc test was included in the Aliens Act 2000, which has been further interpreted by the case law from the DAJ. According to this case law, only facts and circumstances occurring after the challenged decision can be taken into consideration by the Court in assessing the appeal, and only if they meet the requirements imposed by the DAJ on these 'new facts'. Considering the limitations imposed by the Act and case law on ex-nunc testing, this test is only applied in a limited number of cases in practice, according to the judges who responded. Also, because it is up to the asylum seeker to decide whether these new facts and circumstances are to form the basis of a subsequent asylum application or are to be aired on appeal, it is unlikely that the ex-nunc test will prevent second and subsequent asylum applications, because facts and circumstances occurring after the decision will already be considered on appeal. However, this was what the government expected.

Higher-level appeal

Because large numbers of appeal cases were expected, the Aliens Act 2000 set out a limited form of higher-level appeal. For hearing appeals, the Department of Administrative Justice sticks closely to the grievance system and the formal requirements under the Act. It also makes frequent use of the facility offered by the Act to issue abbreviated pronouncements and to dispose of cases in camera. The grievance system suits the so-called 'funnel model', generally applied by the DAJ. Quite separately from

the Aliens Act 2000 or the legislative history, the DAJ demands a marginal test by the Alien Court Judges of an assessment of the credibility of the official asylum report by the IND.

The government expected the higher-level appeal to make a contribution towards unity of the law, legal development and the safeguarding of legal rights. Unity of law – and, to a lesser extent, legal development – has indeed been promoted by the case law, according to those involved. All of the professional groups in the field of asylum, however, warn that the case law on the marginal test has led to a reduction of the safeguards of the individual asylum seeker's rights. In only a very few cases has a higher appeal by an asylum seeker been held to be well founded (see the report 'processing times'). During parliamentary debate of the Bill, the government acknowledged and defended its position that there would be fewer procedural safeguards in cases involving aliens. It is also asserted that 'adequate protection of rights' must be safeguarded. It is a matter of debate whether, in the field of asylum, the current higher-level appeal offers this 'adequate' protection to the asylum seeker.

Other mechanisms

The intention behind the sequential status system with a standard provision package was to prevent proceedings from continuing once the asylum application had been granted. Because the DAJ had quickly concluded that an asylum seeker had no interest in appealing a grant, proceedings against a grant became de facto impossible. The government expected a limited impact on the number of applications for interim provisions from the standard suspensive operation of appeals against decisions taken in the normal asylum procedure. This coincided with the experience of the respondents, partly because the standard suspensive operation does not apply in Application Centre cases.

Evaluation and criticisms from the field

The new mechanisms under the Aliens Act 2000 are valued more highly by the responding staff of the IND, the IND-PR and the State Advocate's department than by the lawyers from the Foundation for Legal Aid in the Asylum Process, lawyers and the staff at the Dutch Council for Refugees. The judges most often take a neutral position or share the views of the latter. The pattern is not, however, as clear with all of the mechanisms and, even where this is the case, there are still 'dissidents'.

There is a relatively widespread approval in the asylum field for the statutory basis, with clear legal consequences, of the repatriation moratorium and the place for new facts and circumstances in judicial assessment, with this also actually happening in practice (ex-nunc testing). Respondents from various organisations also approve of the

increased legal unification and clarity resulting from the introduction of the higher-level appeal. The streamlining of the procedure and the increased clarity of the wider-ranging decision are met with various reactions across the field.

Criticism of the new mechanisms in the 2000 Act comes primarily from the legal assistance providers and the Dutch Council for Refugees, but others are also occasionally critical. The criticism concerns the intention procedure (primarily in the Application Centres), the protracted uncertainty for asylum seekers during a repatriation moratorium and the reduction of opportunities to do anything for so-called 'harrowing cases' as a result of the wider-ranging decision. More widely held criticism in the field concerns the long-term uncertainty for asylum seekers who are affected by a decision moratorium, the (excessively) restricted ex-nunc testing and the experience that the Department's reasoning for its decisions is not always consistently argued. All groups also emphasise that the marginal test required from the Courts by the DAJ has led to reduced protection of rights for asylum seekers.

It appears from these comments that the introduction and implementation of the Aliens Act 2000 by the organisations in the asylum field is and will be influenced by many internal and external factors, including the fluctuation in the number of asylum seekers and trends of growth or reduction in the organisations that result from this. In addition to the Netherlands statutory and subordinate legislation and the policy of the Netherlands government in the area of asylum, European legislation will have an increasingly important impact in coming years. Up until now, however, it appears that the case law from the DAJ has a particularly significant influence on the operation of the Aliens Act 2000. The expectations of the legislator do not always appear to be borne out in practice through this case law, through the facilities – or lack of them – offered by the law, and through the conduct of, for example, those providing legal assistance.