English summary

1. Introduction

Legislation on the return of illegally residing third-country nationals is harmonised at EU level in Directive 2008/115/EC on common standards and procedures in Member States for returning third-country nationals staying on their territory illegally (the Returns Directive). This Directive came into force in 2008 and was implemented in 2011 in the Netherlands by the Aliens Act 2000 and its underlying regulations. The Returns Directive includes, *inter alia*, safeguards on immigration detention and an obligation for Member States to issue a return decision on third-country nationals with no legal residence. The purpose of the Returns Directive is to guarantee an effective removal procedure, so that illegally residing third-country nationals are returned to their country of origin in a humane manner and with respect for their fundamental rights.

The central questions in this study are: *What is the impact in the Netherlands of the implementation of the Returns Directive and the interpretation of relevant case law, in particular concerning the detention of third-country nationals? And what has been the impact of the Directive in Belgium, Denmark, Germany, and Norway?*

2. Purpose, structure and method

The main purpose of this study is to find possible clarifications for fluctuations in the use of detention for the purpose of deportation as opposed to voluntary departure of illegally residing third-country nationals. The study covers the period 2009 up to and including 2019.

The study is composed of three parts. The first part examines the impact of the implementation of the Returns Directive and includes a study of case law concerning the nature and scope of the return of third-country nationals in the Dutch return policy. The case law study involves decisions by the Court of Justice of the European Union (ECJ) and the Administrative Jurisdiction Division of the Council of State (Dutch abbreviation: ABRvS). The second part involves comparative research on the impact of the implementation of the Returns Directive and the case law of the ECJ on the return policy in four other European countries. The third and final part of the study compares the outcomes of the first and second parts.

Various sources were used to conduct the study. First, the Repatriation and Departure Service (Dienst Terugkeer en Vertrek (DT&V)) made available two data files. These only include cases known to the DT&V and do not include Dublin transfers. The files contain information on the detention of third-country nationals, the return procedures carried out, and the outcome of those procedures. In addition, public data files were used to gather information on the situation in the aforementioned European countries. In examining the implementation of the Returns Directive, in addition to a study of literature and case law, interviews were held with experts on policy, and from academia and the legal profession. Both Dutch and international experts were interviewed (see Appendix III). The interviews were conducted online using a (semi-)structured questionnaire (Appendix 1 and Appendix II).

3. The Returns Directive and the case law of the Court of Justice of the EU

The Returns Directive was the outcome of a complicated and lengthy negotiation process that produced a directive that contains many open standards. As a result, on the one hand, the Member

States retain a certain margin of discretion in implementing and applying the Directive. On the other hand, though, this has led to many preliminary-ruling proceedings in which national courts refer questions to the ECJ on the interpretation of provisions in the Returns Directive. Partly because the return of third-country nationals and the use of immigration detention to achieve this are matters strongly influenced by fundamental rights, in its judgments the ECJ underlines the importance of compliance with fundamental rights. This has led, for example, to judgments in which the ECJ emphasises that the national courts must review all aspects related to the legitimacy of a detention measure (*Mahdi*). Since the judgments in which the ECJ clarifies the Returns Directive are binding for all Member States, a judgment which is given in preliminary-ruling proceedings following a question from a German court, for example, can have far-reaching consequences on how the implementation of the Returns Directive proceeds in the other Member States. The interpretation, implementation, and application of the Returns Directive is thus an inherently dynamic process that is undergoing constant change.

4. The implementation of the Returns Directive in immigration law in the Netherlands

The legislature in the Netherlands exceeded the implementation period of the Directive. When implementing the Returns Directive itself, the legislature opted to retain the structure of the existing legislation and amended the legislation to achieve conformity with the Returns Directive. The implementation of the Returns Directive and the ECJ's case law on this Directive has led to far-reaching amendments to legislation and policy in the Netherlands. During the period for this study, this has resulted in a higher level of individual legal protection and an increasing complexity in regulations. This means in particular that court decisions set higher requirements on reasons to impose the detention of a third-country national. The perceived high requirements imposed on the motivation for a detention measure could have an impact on the application of this measure in the practical implementation. According to the researchers, various reasons can be given for the increasing complexity of the regulations and how they are interpreted. A first reason is the reactive approach of the legislature. A second reason is that the legal framework is constantly being developed. As a consequence, the Dutch legislature and the administration are constantly responding to developments in the interpretation of the Returns Directive that arise from the case law of the ECJ and the ABRvS.

The Returns Directive ensures better legal protection of third-country nationals in the area of returns and immigration detention. This can be concluded from the text of the Returns Directive which is interpreted by both the ECJ and the ABRvS. It appears from an examination of the case law that the level of legal protection in legal practice in the Netherlands is not consistently higher than that required by the Returns Directive. Although the ECJ and the ABRvS indicate that public order cannot constitute grounds for immigration detention under the Returns Directive, the respondents in this research are divided on this issue.

5. Fluctuations in the outcome of return procedures and detention measures

The aforementioned data from the DT&V in the research period shows some variations in numbers. The question is whether these fluctuations concerning the outcome of return procedures and the use of immigration detention in the research period can be explained by the implementation of the Returns Directive on the one hand, and the case law of the ECJ and the ABRvS on the other hand. The source data used in the study does have certain limitations. For example, the legal basis for detention measures changed during the research period and it is only possible to a certain degree not to include Dublin procedures in the data analysis on the implemented return procedures. In view of these limitations in the source data, a degree of caution should be exercised when drawing conclusions. The data on detention of third-country nationals demonstrates a clear reduction over

the research period, both in the number of detention measures imposed as well as the average duration of a measure. This is a clear trend, even though at the end of the research period a small increase was observed. The general decrease coincides with the implementation of the Returns Directive and the subsequent case law, first from the ECJ and subsequently from the ABRvS. This correlation is considered plausible in the case law study and is fully endorsed by all respondents. The average duration of a detention period fell in the course of the research period. This trend is also identified by respondents, who indicate that the use of immigration detention is particularly effective to achieve returns within a short time after detention has been imposed.

The data on departures demonstrates a clear upward trend in the number of return procedures carried out. A distinction is made in the analysis of the data between forced departure, supervised voluntary departure and unsupervised voluntary departure. A decrease is observed in forced departures over the research period. This development runs parallel to the decrease in the use of detention. This reduction in forced departures and the use of detention seems to be connected to the implementation of the Returns Directive and the relevant case law. There was a substantial increase in supervised voluntary departures which somewhat explains the decrease in forced departures. The Returns Directive, after all, takes voluntary return as its guiding principle. An increase was also observed in unsupervised voluntary departures. This group of persons is not traced subsequently by the DT&V.

6. Comparison with other countries

Having analysed developments and trends in Europe and the Netherlands, the study compared national legal practice in the area of returns and the use of immigration detention in four European countries. Two Member States (Belgium and Germany) were selected in which the Returns Directive and the case law of the ECJ apply in full. Two other countries were also selected which do apply the substance of the Returns Directive, but are not (fully) bound by it (Denmark and Norway). Although the Returns Directive aims to harmonise national immigration law in the area of returns and immigration detention, the researchers believe this objective is only partially achieved. All countries selected have adopted the structure of the Returns Directive in their national immigration law. The specific safeguards provided by the Returns Directive are more or less adopted. This includes, for example, offering a period for voluntary departure, providing alternatives for detention of third-country nationals because detention can only be used as an ultimate remedy, maximum periods and grounds for the detention of third-country nationals. Although such features are present in almost all countries examined, in practice they are put into effect in very different ways. For example, the maximum period of detention in Belgium is much shorter than in the other countries examined, and in Norway detention of third-country nationals is mainly used when an actual deportation is imminent.

What the countries do have in common is that the observation of a lack of cooperation from authorities in certain countries of origin is seen to be an obstacle to return. There also seems to be consensus in the countries selected on preferring voluntary departure to forced departure. According to respondents working for the government, this is seen to be more efficient and cost-effective than forced returns. It is notable that public order aspects in all countries selected can be applied when imposing a detention measure. The comparison of the countries provides a picture that the implementation of the Returns Directive and the relevant case law by the ECJ in the national law systems has led to a more complex situation in relation to the imposition of a detention measure.

7. Answer to central questions and conclusions

What is the impact in the Netherlands of the implementation of the Returns Directive and the interpretation of relevant case law, in particular concerning the detention of third-country nationals? And what has been the impact of the Directive in the other European countries selected?

In both the Netherlands and the other countries selected, there seems to be a preference for supervised voluntary departure instead of forced departure. To an increasing extent in the various countries selected, there is attention for promoting supervised voluntary departure in the implementation of the Returns Directive. In the Netherlands, supervised voluntary departure increased over the period of the research. In Belgium, the figures remain roughly the same as those for forced departure. In the other countries selected, there are few reliable data sources available with information on the extent to which third-country nationals involved in a return procedure actually leave voluntarily. Our research and information from meetings with the respondents shows that – with the exception of Belgium – in the countries selected there are no reliable overviews of data on returns and immigration detention in the period when this study was conducted.

In the Netherlands, the legislature seems to have adopted a 'wait-and-see' approach and seems to leave the interpretation of the Returns Directive to the courts instead of taking the initiative itself. By leaving the answers to points of law to the courts, and the legislature not making the adjustments to legislation itself, case law plays a relatively large role in the shaping of the law. Respondents in Germany indicated that immigration detention cannot be applied as a means to exert pressure on third-country nations to cooperate in their return. In contrast, in the Netherlands and Denmark a third-country national's obligation to cooperate in their return is interpreted as permitting detention in certain cases to encourage the cooperation of the person in question. In Germany there is less cause to start proceedings about the prospect of removal compared to the Netherlands and Denmark.

The effectiveness of a return procedure depends to a large degree on the cooperation of the third-country national and the authorities of the country of origin. This was emphasised by the respondents in the study conducted in the Netherlands, as well as the respondents in the other countries selected. It is recommended – also by the respondents – to try to come to additional agreements at EU level with safe countries who are not cooperating in the return procedure. Partly on the basis of suggestions provided in the interviews, it would appear to be desirable to conduct further research on the motives of third-country nationals who make asylum applications that are destined to fail. These third-country nationals evidently prefer illegal residence to being returned to their country of origin.

In the Netherlands and the selected countries, the Returns Directive has led to amendments in the legislation. It is clear from the analysis of the application of this implementation legislation that there is tremendous variation in how the open standards in the Returns Directive are interpreted. Therefore, only a limited degree of harmonisation in legislation has been achieved. Since the data in the Netherlands on the outcomes of the return procedures and the use of immigration detention can only be used to a limited extent, and in three of the four other countries there is no data available at all specifically on return procedures within the scope of the Returns Directive, no meaningful conclusions can be drawn from fluctuations in the data or what causes these fluctuations. It appears that in the countries included in the comparison, the case law of the ECJ has

less influence on legislation, policy and implementation than in the Netherlands. What is more, in those countries it is possible to detain a third-country national on the grounds of public order.