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Summary research report

'Other than incidental' criterion in the Temporary Restraining Order Act

The appellate case law in the wider context of the application practice

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SUMMARY

Background of the study

According to the law, a temporary restraining order may be imposed on an adult if facts or circumstances show that his or her presence in the dwelling presents a serious and immediate danger to the safety of one or more persons living with him or staying in the residence 'other than incidentally' or if, based on facts or circumstances, there is a serious suspicion of such danger (art. 2, paragraphs 1 and 2, Temporary Restraining Order Act). The research laid down in this report was conducted because in practice there is a lack of clarity as to what should be understood by persons staying in the dwelling 'other than incidentally'. Discussions between the Ministry of Justice and Security and the G4 municipalities revealed that these municipalities perceive that there are regional differences in the testing of this criterion by the courts. These would include differences regarding the circumstances that are taken into account, the requirements for the application of the criterion to ex-partners and different interpretations of who the criterion refers to, the suspected perpetrator or the victim, in administrative law terms the 'person removed from the residence' or the 'person who remains in the residence'. Clarity and unambiguity on this point is crucial because the interpretation of the criterion has direct consequences for the possibilities of applying the temporary restraining order, and a difference in interpretation could lead to unequal application.

Methodology

This study focuses on the following general research question:

"To what extent are there differences in the court's assessment of the 'other than incidental' criterion in the Temporary Restraining Order Act? To what extent is it possible and desirable to promote harmonization?"

The research is divided into two parts. The first part of the research concerns a (limited) context study of the discussions regarding this criterion in the application practice, when the temporary restraining order was imposed. This study was conducted because during an exploratory study it emerged from the most important research reports on the Temporary Restraining Order Act that the main issue surrounding the 'other than incidental' criterion is repeatedly emphasized in the reports that relate to the application practice and is virtually absent from publications that relate to case law. That the discussion of the criterion is primarily held in the application practice was confirmed in exploratory interviews conducted prior to the study with several professionals in the field who are involved in the imposition of temporary restraining orders in various roles.

The second part of the research concerns the case law study. In this, the first sub-question 'How do courts assess the 'other than incidental' criterion?' is answered. For this purpose, the published appeal case law in which the 'other than incidental stay' criterion was substantively assessed was examined, over the period from the entry into force of the law in 2009 through 2022. In total, this entire fourteen-year period involved (only) 26 decisions, including seven

decisions of the Administrative Jurisdiction Division of the Council of State and nineteen decisions of the courts. For these rulings, it has been examined how the judge tests and substantiates whether the criterion is met, whether the judge applies this criterion to the alleged perpetrator or the victim, whether there are different requirements for the criterion in the case of ex-partners, and whether there are other differences in the judge's decision when assessing the criterion.

Based on the findings from both studies and some further analyses, it was possible to draw substantiated conclusions and make recommendations aimed at the question to what extent it is possible and desirable to promote harmonisation. This also included the second sub-question " Are there differences in the application of the 'other than incidental' criterion?" as well as the sub-questions of which differences are involved, how they can be explained, to what extent it is necessary or desirable to reduce these differences and how this can be achieved. The additional analyses consisted of analyses of the legislation and legislative history and the formulation of concerns about the context in which appeals are held.

The criterion in the context of the application practice

The context study is presented in Chapter 2. It gives an impression of the context of the use of the criterion in the application practice and the discussions that occur in this context. The study is based on interviews with a total of 14 professionals involved in the day-to-day practice of imposing temporary restraining orders in Rotterdam, The Hague and Twente. These were highly experienced and well-versed professionals. Five of the fourteen had been involved since the introduction of the law in 2009 and even during the implementation phase before that. Where possible, this context research was supplemented with relevant research reports, literature, legislation and legislative history.

From the outline of the organisation of the imposition of a temporary restraining order in Twente, The Hague and Rotterdam Rijnmond it emerged that the processing of a temporary restraining order, partly due to the completion of the Risk Instrument for Domestic Violence (RiHG), takes up a large part of the assistant public prosecutors' working day. In some police units, they work with a permanent team (Twente) or a pool of permanent assistant public prosecutors (The Hague) and in others it is a general task (Rotterdam) that every assistant public prosecutor may encounter. It also became apparent that, despite this very comprehensive RiHG, which is intended as a screening tool, it is still person-dependent in cases of doubt as to whether the temporary restraining order is imposed, and it would be desirable if there were more unambiguous criteria. Part of the organisation is the cooperation with mayors, which is organised differently for each police unit, but often also for each municipality. After all, police units deal with a large number of municipalities. In Twente and Rotterdam, some municipalities have granted full mandate to the assistant public prosecutor, who carries out the screening and decides on the imposition of a temporary restraining order. But in the municipalities of Police Unit The Hague, the principled choice was made not to give the assistant public prosecutor a double role and place the decision with the mayor. In Twente, in case the mayor has not given a full mandate to the assistant public prosecutor, the mayor must be called personally. In case of poor reachability, this can lead to practical problems. This is not

necessary in Rotterdam and The Hague because both municipalities use an automated system that alerts (deputy) mayors when they need to respond.

With regard to the question of who is the *subject of 'other than incidental' criterion*, there appears to be considerable unanimity. Almost all the professionals interviewed are of the opinion that the criterion applies first and foremost to the person removed from the residence and, if inquired further, in connection with this, also to the person who remains in the residence. In practice, the distinction is also relativised because there could be situations in which that distinction between perpetrator and victim cannot always be made, and in those cases, it often depends on the circumstances as to who is categorised as the person removed from the residence and the person who remains in the residence.

With respect to the *interpretation of the criterion*, all professionals agree that the criterion is so broad in its interpretation that there are many discussions among the professionals about what it should include, especially since in practice there are many types of relationships and the most diverse housing situations. In practice, assistant public prosecutors look at the frequency of the stay as well as its nature, considering whether there are indications that the person in question sleeps, has closet space and clothes in the residence. There are many ambiguous cases such as whether a caregiver who visits a residence for a few hours every week is staying there 'other than incidentally'. As a matter of fact, in practice, not only the content of the criterion should be considered but should also focus practically on the purpose and whether it can be achieved by the means.

The 'other than incidental' criterion is mainly at issue in relation to *ex-partners* who no longer live in the residence but still visit it. It is noted from the practice of the police that the situation of ex-partners is tricky because it sometimes appears that ex-partners cannot quite separate from each other and things will turn sour once they get back together. It does require tailoring and an assessment that depends on the situation. A clear tension is perceived at this point between the needs that arise in practice on this point and the possibilities offered by the interpretation of the criterion. On this point, both the municipality of Rotterdam and the municipality of The Hague have taken cases to court which have not been upheld.

In practice, the criterion is also under debate in *specific housing situations* where there are hesitations as to whether there is an 'other than incidental' stay, such as when the residence is temporary or shared. These include a hospital room, a temporary shelter for asylum seekers or 'sheltered housing', as well as homes where a temporary restraining order is difficult to apply due to shared housing. In practice, this involves the use of a criminal conduct order from the public prosecutor, which may include a location ban.

The interpretation of the criterion in case law

The case law study is presented in Chapter 3. All published case law from the entry into force of the law in 2009 until 2022 mentioning the criterion of 'other than incidental' residence was examined for this purpose. This comprised initially a total of 344 rulings, but only a small proportion of these included a substantive assessment of the criterion. These include 26 rulings: 7 from the Administrative Jurisdiction Division of the Council of State and 19 from the courts. Most of the rulings are from the court of Rotterdam, followed by the courts of

Amsterdam, Limburg and Noord-Holland, the court of Zeeland-West Brabant and the court of The Hague. No published judgments were found from five courts that addressed the 'other than incidental' criterion.

The first question examined was *to whom the court applies the criterion of 'other than incidental' stay*, the alleged perpetrator or the victim or, in administrative law terms, the 'person removed from the residence' or the 'person who remains in the residence'. In 2015 the Administrative Jurisdiction Division of the Council of State held in a ruling, referring to the law and legislative history, that the criterion applies to both the person removed from the residence and the person who remains in the residence. Less than a year later, in 2016, without further explanation the court shifted this direction, referring to the same legislation and legislative history, and ruled that the criterion is only applicable to the person who remains in the residence and that the person who is removed from the residence must 'reside or partially reside' in the home. In three subsequent judgments, reference was consistently given to that 2016 ruling. Some courts have followed this interpretation which led to unsatisfactory rulings because a woman who was severely abused in her home in front of the children by her ex-partner who was staying in the residence on a regular basis, was therefore deprived of protection. The Rotterdam court, from which most of the rulings originate, has dealt with it in a variable manner, but in its most recent rulings, it again applies the broad interpretation for both those removed from the residence and those who remain behind. In addition, the other case law shows that most courts do so.

Secondly, it has been examined how the criterion has been interpreted in case law in *situations involving ex-partners*. In almost all the cases revolving around the subject of the criterion, it concerned ex-partners. This is not surprising because it is in these cases in particular that the living situation can be diffuse, especially if there is a contact arrangement with the children. Whether they are ex-partners is not always apparent from the rulings but can often be inferred from them, for instance when one of the partners has temporarily moved in with a relative with the children. Although the cooling-off period is sometimes much needed in situations with ex-partners, the temporary restraining order does not appear to be able to provide that in all situations. The rulings show that being in an ex-partner's home every day to care for a joint child is sufficient for fulfilling the 'other than incidental' criterion, but not for 'partial residence'. And because courts use different criteria, this has also led to different rulings in similar situations, depending on the criterion used. Also, case law shows that picking up the children from the ex-partner's home is not sufficient for assuming 'other than incidental' stay. The appeals lodged by the mayors of Rotterdam and The Hague for such cases show that there is a need for it in practice.

Thirdly, it was examined how case law deals with the 'other than incidental' criterion in *LAT or other types of relationships*. The examined case law shows that, in practice, there are more types of relationships and accommodation situations in which the legislator can foresee. LAT relationships occur, as well as long-distance relationships that take various forms through time, people with no fixed abode who have temporarily moved in with someone or, for example, a family whose mother and children live in fear of the father but are dependent on him because the mother is in the Netherlands illegally. Case law shows that judges consider all the circumstances in assessing the 'other than incidental' stay at the hearing or in appeal submissions, also looking at the statements of those who remain in the residence, family

members, as well as their own statements in police mutations. The court considers objective circumstances such as having closet space, but in cases of doubt it also considers whether both the person removed from the residence and the person who remains in the residence intended to stay together in the home for an extended period of time.

Fourthly, the study assessed how case law deals with the 'other than incidental' criterion in the case of *children or guests residing in the home who may qualify as people who remain in the residence*. The criterion serves a different purpose in that case and aims to protect the people who remain in the residence. This is also reflected in case law. In the reviewed cases, tenants and homeowners were issued restraining orders for their own homes to protect the children or other persons to whom they had provided temporary shelter. Thus, the criterion can also protect persons who do not live in the residence in question, provided that the mayor includes those persons in the temporary restraining order. This case law shows that being a tenant or owner of the property and bearing all the burdens for the property does not directly mean that the mayor cannot impose a temporary restraining order. Thus, a temporary restraining order can be imposed on the tenant or owner of the property who has been staying there for years if a cooling-off period needs to be created, even if this results in them having to go roaming due to lack of housing as was the case in one of the cases. The right to housing then seems to have to give way to creating a cooling-off period. It is also clear from case law that being in the Netherlands illegally does not preclude the establishment, for this person as the person who remains in the residence, that he is staying in the house 'other than incidental'.

Finally, three rulings were discussed in which the 'other than incidental' criterion was at issue *in relation to the non-contact order linked to the temporary restraining order*. These rulings show that the linking of the temporary restraining order to the non-contact order can sometimes be perceived as constraining where it concerns contact with the children. Vice versa, in case of persons who classify as the persons remaining in the residence, it is sometimes desirable to maintain it in the event that the home has become vacant due to their departure to a secret address in order to protect them, independent of the temporary restraining order.

Conclusions

Based on the findings from both sub-studies and the analyses applied to them, the following conclusions are drawn in the light of the overarching research question as to what extent there are differences in the courts' assessment of the criterion and to what extent it is possible and desirable to promote harmonisation.

A first conclusion concerns the term 'criterion'. The research question refers to an 'other than incidental' criterion and that term has been adopted in this study. The study on the application practice also reveals that it is considered an independent criterion, perhaps because there was ambiguity on its interpretation from the beginning, it is considered an independent criterion. In some interviews, it was named as one of the three criteria, alongside the danger criterion and the criterion of adulthood. However, the analyses of the legislation show that the words 'other than incidental' were not intended as a stand-alone criterion, but as a requirement included in the main criterion focusing on the relationship between the person who is removed and the person who remains in the residence in question. This also explains why the legislator

paid little attention to it and why the criterion does not play an important role in case law either. There, the 'other than incidental stay' mainly plays a role in assessing the balancing of interests.

The *second conclusion* is that ambiguities in the interpretation of the 'other than incidental' criterion led to direct consequences for the possibility of imposing a temporary restraining order. In particular, this refers to the direction initiated from 2016 by the Administrative Jurisdiction Division of the Council of State in which the 'other than incidental' criterion was declared applicable only to those staying behind and, for those placed out of home, the tighter requirement was introduced that they would have to 'live in the home or live there temporarily'. For this, the Administrative Jurisdiction Division referred to the law and legislative history, but in a ruling a year earlier, it defended, with reference to the same law and legislative history, that the 'other than incidental' criterion does apply to the person who is removed from the residence. Analysis of this statutory provision shows that 'other than incidental' is included in the provision in such a way that there are two modes of interpretation, depending on how it is read. However, given the explanatory note, the legislator seems to have meant the interpretation in which '*one or more persons*' and '*living with him in the house or residing therein other than incidentally*' are to be read in relation to each other which refers to a shared living situation between those placed out of home and those remaining behind.

A *third conclusion* concerns the fact that the main discussions on the interpretation of the criterion occur in cases where relationships and living and residence situations are diffuse, which is often the case with ex-partners. There are many situations where an ex-partner still regularly visits the former shared home to take care of the children. For example, the situation where ex-partners take turns living in the house where the children have a permanent residence, i.e., 'birdnesting' but there are also situations where the contact mainly takes place at the door of the home when picking up the children. This would require tailoring and an assessment that would depend on the situation. Both the research on the application practice and the case law study makes it clear that the situation around ex-partners is insufficiently clearly regulated. This leads, especially if courts continue to use the 'partial residence' criterion, to unjustified differences. From the larger municipalities, a clear tension is perceived at this point between the needs that arise in practice on this point and the possibilities that the law seems to offer. Both the municipality of Rotterdam and the municipality of The Hague have filed (appeal) cases on this point which have not been upheld in which the municipality of Rotterdam also invoked the Istanbul Convention.

A *fourth conclusion* concerns the expectation in the application practice that case law would interpret the criterion. This expectation has not been met and may be unjustified because this study also shows that the majority of the very diverse characteristics of the cases do not reach the courts. The municipality of Rotterdam and the municipality of The Hague each mention a number of around 20 unique cases for the year 2022, while several hundred temporary restraining orders are imposed per year in both municipalities.¹ The context in which appeal cases are heard by the court also does not seem to provide sufficient space for comprehensive

¹ Both municipalities dominated in 2018 with 300 temporary restraining orders in that year, Lünemann e.a. 2020, p.10

consideration, reasoning and elaboration of the content of 'other than incidental' stay. Judges do not deal with these cases regularly and usually at very short notice, and where they have to work with an administrative law framework as family judges. There, the mayor's balancing of interests is subject to only marginal scrutiny, and it is only possible to respond to asserted submissions.

Recommendations

In continuation of the conclusions drawn above, the following recommendations are made.

1) Apply the 'other than incidental' stay also to the person removed from the residence

Based on the law and legislative history and with a reasonable interpretation of the circumstances of the case, the direction of the Administrative Jurisdiction Division of the Council of currently less appealing than the alternative, also in view of concrete cases. It is therefore recommended to adopt the interpretation in which the criterion is applicable to both the (intended) person removed from the residence and the (intended) person who remains behind. In this way, the mayor is not limited in the decision on whom to impose the temporary restraining order and the occurrence of unjustified disparities is avoided. This is also consistent with the interpretation in the application practice in which it is generally accepted that this criterion applies to both parties, but also to the observation that the distinction between perpetrator and victim cannot always be made and it sometimes depends on practical circumstances who is classified as the person removed from the residence and who is classified as the person who remains within in the home. Working with two different criteria then feels rather forced and is also practically unworkable, especially if, as is the case now, it is not clear what the distinction between the two is and what justifies the distinction.

2) Organise an expert meeting on different scenarios with the professionals involved

Following the conclusion that the expectation that the interpretation of 'other than incidental' stay would be further defined by the courts is unjustified, it is recommended to promote such unity by other means. The research into the context of the application practice revealed that in practice, there are professionals working with the temporary restraining order on a much more regular basis and face dilemmas surrounding the determination of 'other than incidental' stay than the individual judges dealing with these cases, and also regularly discuss them with each other. In Chapter 2, these professionals also provided a wide variety of examples of the many types of relationships and living situations that are subject to doubts. Given this observation, it is advisable to gather these professionals in an expert meeting and have them brainstorm on the many scenarios, as compiled in this report, and on that basis, with a regard to the intention of the law, establish clear guidelines. In this respect, attention should be given separately to the situation in which people who are threatened in their homes by their ex-partners, without those ex-partners entering the home and the situation of bird nesting. As well as to the interpretation of the criterion in the case of persons who remain in the residence, and the possibility of allowing the non-contact order to continue for a longer period of time

than the temporary restraining order. Other possibilities, such as criminal behaviour orders, should also be considered.

3) Design a feasible framework for assessment that allows room for the practice with a focus on the objective

As a follow-up to the expert meeting, it should also be possible to streamline the interpretation of 'other than incidental' stay by designing an assessment framework. This could be based on factors such as the nature, duration and frequency of stay in a residence which also play a role in practice and case law today. The 'nature' of the stay may include whether the person sleeps in the home, has closet space and clothes. For the 'duration' of the stay, there are already points of reference in case law where a one-day stay was considered insufficient, and a forty-day stay was considered sufficient. However, in both cases, other factors also played a role such as both partners' intention regarding their stay and owning their own home. And in the second case, a pre-existing relationship in which both partners also had children together. Thus, the standards are not absolute but must be considered in conjunction with other circumstances, always keeping in mind the purpose of the law. The 'frequency' of the stay, or how often someone stays in the home, serves more as a guideline. For example, an 'other than incidental' stay can be assumed more quickly if someone stays in the residence daily instead of only occasionally. There should always be enough room for a practical approach, focusing on the purpose of the law and whether there are other less far-reaching means to achieve the same purpose.

4) Identify the needs and possibilities at the courts

Finally, the description of the context of appellate proceedings gives cause for reflection. It is recommended that a national survey is to be conducted on the situation in the eleven courts and their needs and possibilities around the identified concerns. These include the fact that judges do not deal with these cases regularly, that they are almost always urgent cases, that family courts have to work with an administrative law framework, and that the written information provision differs from one municipality to another.