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Summary

Evaluation of the amendment of the B8/3  
scheme

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## Colophon

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# Summary

## Background

Foreign nationals who are victims or witnesses of human trafficking fall under the human trafficking residence scheme.<sup>1</sup> Part of this scheme is the B8/3 scheme, included in Chapter B8/3 of the Aliens Act Implementation Guidelines 2000 (Vreemdelingencirculaire 2000 or Vc 2000). On the basis of this scheme, victims and witnesses of human trafficking who report the crime to the police or cooperate to the criminal proceedings in other ways are eligible for a temporary residence permit and associated provisions such as shelter and accommodation, medical assistance, legal aid and special provisions for living expenses.

Following an increase in the number of foreign nationals who reported human trafficking in early 2019, the B8/3 scheme was amended as per August 1<sup>st</sup>, 2019. Under the original B8/3 scheme, the Immigration and Naturalisation Service (IND) granted a residence permit to victims if they reported human trafficking to the police. If the Dutch Public Prosecution Service (Openbaar Ministerie, OM) terminated the criminal investigation due to the lack of sufficient indications for detection in the Netherlands, the temporary residence permit was withdrawn retroactively. The consequence of granting a residence permit was that Dublin claimants - asylum seekers whose asylum applications are the responsibility of another EU member state according to the European Dublin III Regulation (Dublin Regulation) - could not be transferred to the other EU member state and the Netherlands became responsible for their asylum applications. That is because article 19 (1) of the Dublin Regulation states that if a member state grants a residence permit, responsibility passes to that member state. This was also the case if the residence permit was later revoked. Under the new B8/3 regulation, Dublin claimants will no longer receive a residence permit after they file a police report, but at the time the IND receives a notification from the Public Prosecution Service that the foreign national's stay in the Netherlands is necessary for the investigation and prosecution. This change was aimed at preventing transfer to another EU member state from being made impossible by granting a residence permit.

In the progress report of the program 'Samen tegen Mensenhandel' (Together Against Trafficking in Human Beings), the State Secretary of Justice and Security promised to evaluate this amendment to the B8/3 scheme.<sup>2</sup> This is the report of this evaluation.

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<sup>1</sup> The human trafficking residence scheme consists of the reflection period and the temporary residence permit (both regulated in section B8/3 Vc 2000) and the non-temporary residence permit (regulated in section B9/12 Vc 2000).

<sup>2</sup> *Parliamentary Papers II 2019/20*, 28638, 183, p. 6.

## Research questions and research themes

The key research question consists of three parts:

- I. What was the policy theory of the changes to the B8/3 scheme?
- II. How is the amended scheme being implemented and how do stakeholders (executive organisations, civil society organisations and the target group) perceive the implementation process?
- III. What are the preliminary results/impacts of the changes to the B8/3 scheme?

We distinguish the following research themes, which correspond to the key questions:

1. Policy theory
2. Implementation
3. Effects

These research questions were answered through an extensive document study, interviews, file study at the IND and police/Public Prosecution Service and quantitative research. For validation, the policy reconstruction was submitted in writing to a former policy officer of the Ministry of Justice and Security, an employee of the OM and an employee of the Human Trafficking Coordination Centre (Coördinatiecentrum mensenhandel, CoMensha). The preliminary findings and conclusions were discussed in an expert meeting.

## Legal framework

The legal framework of the (change of the) B8/3 Scheme consists of national rules (the Aliens Act 2000 and the Aliens Decree 2000), international treaties and EU directives. Based on these treaties and directives, states have obligations in the field of combating human trafficking and protecting victims. In addition, other EU member states are bound by these international treaties and directives. This means that when transferring aliens to other EU member states, the Netherlands can assume that these countries will comply with their international and European obligations. This is called 'interstate trust'.<sup>3</sup>

In three respects, the B8/3 schemes may not fully comply with international and EU obligations.

First, the B8/3 regulation is an implementation of the Residence Permit Directive (2004/81/EC). EU directives must be implemented in national legislation. However, Policy rules like the Aliens Act Implementation Guidelines 2000 cannot be considered legislation in this context. This raises the question whether the Netherlands have correctly implemented the Residence Permit Directive. The District Court of The Hague submitted a preliminary question to the Court of Justice of the European Union on this issue, but the Court ultimately did not provide an answer.<sup>4</sup>

To allow foreign nationals who may be victims of human trafficking to recover and decide whether they want to cooperate with the criminal investigation into the trafficker, the

<sup>3</sup> Decision of the State Secretary of Justice and Security of July 10<sup>th</sup> 2019, number WBV 2019/10, amending the Aliens Act Implementation Guidelines 2000, *Stcrt.* 25 July 2019, 40593, p. 17.

<sup>4</sup> Rechtbank Den Haag, *zp.* Zwolle, 29 January 2021, ECLI:NL:RBDHA:2021:727, *JV* 2021/46 and Court of Justice EU, 20 October 2022, ECLI:EU:C:2022:809 (*O.T.E. v. State Secretary of JenV*).

Residence Permit Directive requires that a reflection period is offered at the slightest indication of human trafficking. Until May 18<sup>th</sup>, 2023, the B8/3 scheme excluded foreign nationals, including Dublin claimants, residing lawfully in the Netherlands from the reflection period because of their lawful residence. The District Court of The Hague submitted preliminary questions to the European Court of Justice (CJEU) on this issue. The CJEU ruled on October 20<sup>th</sup>, 2022, that the Residence Permit Directive in no way excludes victims who have lawful residence from its scope.<sup>5</sup> Following this ruling, the B8/3 scheme was amended as per May 18<sup>th</sup>, 2023. Dublin claimants now receive a reflection period. However, this reflection period is shorter (the minimum of 30 days) than the reflection period offered to non-Dublin claimants (three months). The Court considered in the ruling that it is for the member states to strike a balance between the duration of the reflection period and their compliance with the time period for transfer of the foreign nationals to other member states.

The final point is that there may be debate about the meaning the Secretary of State attributes to interstate trust if potential victims of trafficking are nevertheless transferred to the responsible member state. In the cases of *M.S.S. v. Greece and Belgium* and *N.S. v. United Kingdom*, both the ECtHR and the CJEU ruled that interstate trust does not relieve member states of their own duty to investigate.<sup>6</sup> This raises the question whether the Netherlands can transfer a foreign national to the responsible EU member state if insufficient investigation has been carried out into whether the foreign national can report the trafficking to the police there, whether this report is actually dealt with and whether the protection the potential victim receives there complies with international obligations. On 26 April 2023, the Dutch Administrative Jurisdiction Division of the Council of State ruled that the Dutch government cannot transfer foreign nationals to Italy because of the lack of reception facilities there.<sup>7</sup>

The Administrative Jurisdiction Division of the Dutch Council of State ruled on 5 July 2023,<sup>8</sup> following the Court of Justice's answers to preliminary questions of 30 March 2023,<sup>9</sup> that the policy in paragraph B1/7.2 of the Aliens 2000 violates the Dublin Regulation. While objections and appeals against the refusal to grant a B8/3 residence permit suspend the execution of a transfer decision, they cannot suspend the transfer period.

## Policy theory

The policy theory is the set of causal and other assumptions on which policy rests. In reconstructing the policy theory, we paid attention to the assumed societal problems giving rise to the amendment in the B8/3 regime, the goals of the amendment and the assumed mechanisms set in motion by the policy change to achieve those goals. Within the reconstruction, consideration is also given to the alternatives considered and unintended consequences.

### *Problem analysis*

The immediate reason for the policy change was a large increase, especially in early 2019, in the number of foreign nationals, especially Dublin claimants, who wanted to report human trafficking and thereby claim a temporary B8/3 residence permit. This increase led to bottlenecks and frustrations for police, the Repatriation & Departure Service (DT&V) and the IND in

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<sup>5</sup> Rechtbank Den Haag, zp. Zwolle, 29 January 2021, ECLI:NL:RBDHA:2021:727, *JV* 2021/46 and Court of Justice EU, 20 October 2022, ECLI:EU:C:2022:809 (*O.T.E. v. State Secretary of JenV*).

<sup>6</sup> ECHR 21 January 2011, no 30696/09 (*MSS. v. Greece and Belgium*); Court of Justice EU 21 December 2011, C411/10 and C-413/10 (*NS v. UK*).

<sup>7</sup> ABRvS 26 April 2023, ECLI:NL:RVS:2023:1655.

<sup>8</sup> ABRvS 5 July 2023, ECLI:NL:RVS:2023:2593.

<sup>9</sup> ECJ EU 30 March 2023, C-338/21, ECLI:EU:C:2023:269.

executing the B8/3 scheme. Many requests could not be processed in time and the waiting times for filing a report increased, making the situation untenable. Another major bottleneck was that a large portion of B8/3 declarations of human trafficking contained little or no detection indications for the Netherlands. The B8/3 scheme is a low-threshold scheme. By granting a temporary residence permit, the Dublin claim expired, making the Netherlands responsible for the asylum application. These factors combined made the ministry of Justice and Security conclude that there was an 'undesirable residence incentive' arising from the B8/3 scheme for Dublin claimants. Dublin claimants would make 'improper use' of the B8/3 scheme.

The following comments can be made on the problem analysis. Firstly, it is not well substantiated that and in what way(s) improper use of the scheme occurs. Research by the WODC, which was already known at the time the amendment was drafted, shows that it is not easy to measure improper use and that it can exist in different forms and degrees. Research on the increase in the number of B8/3 applications has also not taken place. Another important comment on the ministry's problem analysis is that it relies heavily on the fact that the reports contain few detection indications for police and OM; however, criminal detection indications say nothing about actual victimisation of trafficking and also say nothing about improper use. This was also known during the preparation of the policy amendment and was explicitly mentioned as a counterargument to the amendment during the preparation.

#### *Goals of the amendment and addressing human trafficking*

From the policy reconstruction, the following objectives of the amendment of the B8/3 regulation emerged. The main objective was to prevent the Netherlands from becoming responsible for the substantive processing of the asylum application of Dublin claimants in cases in which the prosecution did not consider the presence of that foreign national in the Netherlands necessary for the detection and prosecution of human trafficking. The other objectives were:

- Reducing the number of reports of human trafficking without indications for detection in the Netherlands by Dublin claimants.
- Unburdening organisations (police, IND, OM, DT&V) involved in executing the B8/3 scheme and migration policy.
- Preventing improper use of the B8/3 scheme by Dublin claimants.

The objectives of the amendment to the B8/3 regulation contribute only to a limited extent to the aims of tackling human trafficking (preventing and combating human trafficking and protecting victims). This is because the aims of the policy amendment are primarily focused on solving problems for government agencies, e.g. reducing the number of police reports, and migration control (preventing the Netherlands from becoming responsible for the asylum applications of these Dublin claimants). Indirectly, though, the policy change may contribute to the central objectives of tackling human trafficking. Reducing improper use, decreasing the number of reports with no indications for detection of human trafficking by Dublin claimants and relieving government agencies may benefit the investigation and prosecution following reports of other possible victims of human trafficking and the protection of those possible victims.

## **Implementation: process and experiences**

The second main question was how the amended scheme is implemented and how those involved (executing organisations, civil society and victims of human trafficking) experience the

implementation process. To this end, we described the changed processes at the police, OM, IND and DT&V. Particularly important here is that since January 1<sup>st</sup>, 2018, a national working method was developed by the police, the OM and the IND for the handling of B8/3 cases with no indications for detection in the Netherlands and that in August 2019, the police set up a National Coordination Centre (LCC) to achieve a more efficient handling of reports with no indications for detection in the Netherlands.

The government agencies interviewed are positive about the implementation of the amendment to the B8/3 regulation and especially about the renewed national working method and the LCC. The communication between organisations improved and the process has become clearer and more efficient. Waiting times for filing a report decreased, which is also the result of a decrease in the number of reports filed.

However, police, prosecutors, (legal) aid workers and civil society organisations express doubts about the connection between the criminal investigation and the right of residence in the B8/3 regulation. The right of residence of foreign nationals who have become victims of human trafficking is directly dependent on the existence of criminal investigations. Dublin claimants are denied a residence permit under the B8/3 scheme if, in the opinion of the Public Prosecution Service, the report does not contain sufficient indications for detection in the Netherlands. In the case of non-Dublin claimants, the permit is revoked in that case. The main argument for abandoning this connection is that indications for detection say nothing about victimisation of human trafficking. It is therefore not appropriate to link recognition as a victim of trafficking and the right to corresponding protection, assistance and shelter to the criminal investigation. Another argument for abandoning this link is that because of this link, foreign nationals *must* report to the police if they want to obtain a residence permit. As a result, the police still have to deal with reports that do not lead to investigation and prosecution at case level because of a lack of sufficient evidence and/or jurisdiction in the Netherlands.

## Effects of the amendment

The third central research question focuses on the preliminary results and effects of the amendment of the B8/3 scheme. Using figures from the IND, file studies at the IND and at the police/OM and interviews, we outlined the changes that occurred after the amendment. These developments relate to the number of applications for residence permits under the B8/3 scheme and the decisions thereon, the detection of human trafficking and the protection of victims.

### *Applications for residence permits*

With regard to Dublin claimants, two developments can be seen in the numbers of residence permit applications and decisions thereon. First, after peaking in the period from August 2018 to July 2020, the number of applications declined from August 2020. This may be due to a decreased willingness of victims to report, but also to the decreased migration inflow due to the corona crisis. The latter resulted in fewer asylum seekers coming to the Netherlands, which may (partly) explain the decrease in the number of reports.

IND figures show that before the amendment, Dublin claimants' applications were granted and then in most cases withdrawn retroactively. After the amendment, most Dublin claimants' applications are rejected. This development was to be expected given the new design of the

B8/3 scheme, in which Dublin claimants will first await the Public Prosecution Service's report before a residence permit is granted.

A comparison of the period pre-amendment with the period post-amendment shows no obvious differences in the number of finally granted residence permits (those granted and not revoked). Furthermore, the figures relating to the applications of non-Dublin claimants do not show any significant changes after the amendment. This was to be expected as the amendment only concerns Dublin claimants.

#### *Detection*

Both before and after the amendment, only a limited portion of B8/3 declarations actually lead to investigation. In the opinion of the Public Prosecutor Service, the pre- and post-change declarations rarely contain sufficient indications for detection in the Netherlands. This follows from the file review and was also observed by police and OM. Therefore, the amendment of the B8/3 regulation has not led to an increase in investigations resulting from reports filed by victims of human trafficking.

Although no complete picture exists of police and prosecutor processing times before and after the B8/3 change, there are indications that processing times have shortened since the change. Particularly relevant in this context is that waiting times for filing declarations fell significantly after the change. This development cannot be attributed to the change in the B8/3 scheme because of two reasons. Firstly, in 2018, the new way of handling B8/3 reports was implemented and in August 2019, the LCC was established. Secondly, the numbers of reports have fallen sharply since August 2019.

#### *Protection of victims*

In several interviews and in the expert meeting, respondents indicated that victims may receive less protection as a result of the B8/3 change. Firstly, there is less visibility of victims. The change in the B8/3 regime may have led to a decrease in victims' willingness to report. According to many interviewees, the absence of a reflection period for Dublin claimants contributed to this decrease.

Secondly, there is a risk that Dublin claimants who have been trafficked are transferred to other EU member states where the victim protection system does not function as well as in the Netherlands. The fact that a police report contains no detection indications has no bearing on the declarant's victimisation. Therefore, the OM's assessment that the foreign national's stay in the Netherlands is not necessary for the investigation or prosecution (i.e. that there are no indications for detection in the Netherlands) in no way precludes the transfer of actual victims to other EU member states.

Dublin claimants who are not transferred will also receive less protection if they are not granted a residence permit under the B8/3 scheme. This is because they cannot use the special provisions for victims of trafficking. There is also a risk that Dublin claimants, in order to avoid being transferred, will disappear into illegality.

## **Conclusion**

The policy reconstruction shows that the amendment of the B8/3 scheme was mainly aimed at preventing the Netherlands from becoming responsible for the substantive processing of



the asylum application and, by extension, reducing the number of reports of human trafficking without indications for detection in the Netherlands, relieving organisations involved in the implementation of this scheme and preventing improper use.

This study shows these goals have been partially achieved.

In fewer cases, the Netherlands has become responsible for the substantive processing of asylum applications by granting a B8/3 residence permit; most applications of Dublin claimants are rejected. In practice, however, it appears that, in the three years following the amendment, a large proportion of these Dublin claimants have not been transferred after their B8/3 applications have been rejected, for example because the transfer deadline has expired or because people leave with unknown destination (i.e. disappearing into illegality in the Netherlands). In those cases, the Netherlands may still become responsible for their asylum application. Corona (not being able to transfer because of test and vaccination requirements) may have played a role in this. Also, transfers to Italy have long been difficult because of corona and because of the asylum crisis there. In December 2022, Italy declared a halt to Dublin transfers, which led the Dutch Administrative Jurisdiction Division to block transfers to Italy on April 26<sup>th</sup>, 2023. Other developments in the case-law, such as the CJEU's ruling on the reflection period and two rulings on suspension of the transfer period, were also not taken into account when the B8/3 amendment was made, but do limit its impact in terms of achieving this goal.

Furthermore, it appears that the number of reports of human trafficking has decreased and the police, prosecution and IND have been relieved as a result. However, this development cannot be attributed solely to the change in the B8/3 scheme: the new way for police and prosecution of handling those cases since 2018, the establishment of the LCC in 2019 and the decreased migration inflow in recent years due to the corona crisis have probably had a greater effect on the decrease in the number of reports filed.

Whether the amendment has had an effect on improper use of the B8/3 scheme cannot be determined. As mentioned above, it is not possible to measure improper use. Furthermore, there was no proof of improper use before the B8/3 scheme was amended.

The amendment to the B8/3 scheme does not contribute to the achievement of the broader goals related to human trafficking, which are preventing and combating trafficking and the protection of victims. Reports of human trafficking in B8/3 cases rarely lead to an investigation, let alone prosecution of suspects. This was the case before the amendment and is still the case after the amendment. Therefore, the contribution of this scheme to combating human trafficking is small. The reduction in the workload may have had an effect on investigation and prosecution in other trafficking cases, but this does not emerge from the study. The protection of victims has been reduced by the amendment. Victims of human trafficking have become less visible and there is a risk that victims may be transferred to EU member states where they receive less protection, or end up in illegality in the Netherlands.

As mentioned, the police, the Public Prosecution Service, (legal) aid providers and civil society expressed their doubts about the connection between the criminal investigation and the right of residence in the B8/3 scheme. The limited usefulness of the B8/3 scheme for the investigations and the limited protection it offers to victims is an argument to disconnect the existence of a criminal investigation and the right of residence and instead work toward a scheme in which the residence status of foreign nationals who may be victims of human trafficking is based on the plausibility of their victimisation.

## Recommendations

### *Recommendation 1*

**Separate the residence protection for victims of trafficking (based on the B8/3 scheme) from the existence of a police report and criminal investigation.** Allow potential victims to submit a low-threshold application to the IND and let the IND, if necessary together with experts, assess the right to a B8/3 residence permit and the associated protection and facilities on the basis of the plausibility of actual victimisation of human trafficking.

### *Recommendation 2*

**Cooperate more and better on an international and European level in tackling human trafficking of which foreign nationals are victims,** both on criminal matters and on the protection of victims. **A commitment to improving international and European asylum and migration policy** is a prerequisite for effectively tackling human trafficking, but also for migration control and preventing problems like those that have led to this policy change.

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