

Summary and conclusion

The fate of the entry ban

A study into the implementation in practice and the perceived effects of the Return Directive in the Netherlands

Background and methods

The European Return Directive was implemented in the Netherlands in 2011. This resulted in the introduction of the 'return decision' and the 'entry ban'. By issuing a return decision, the Dutch government communicates that an illegally staying foreigner is to leave the Netherlands (either immediately or within 28 days). If the foreigner is required to leave immediately, an entry ban has to be issued as well. This means that the foreigner is not allowed to reside in the Netherlands or another European country for a certain period. There is a distinction between 'light' and 'heavy' entry bans. A light entry ban has a duration of maximum 5 years and needs to be imposed, in principle, when an illegally residing foreigner has been apprehended who previously received a return decision with a 28-days term, or who is considered to be at risk of absconding and is placed in immigration detention with a return decision of zero days. A heavy entry ban has a maximum duration of 20 years and is imposed on migrants who have been convicted for crimes, or who are believed to represent a threat to public order or national safety (this category includes foreigners whose residence permit is revoked because of these crimes). This study examined the practices and (perceived) consequences of these new procedures, and of the Return Directive more generally. The study was conducted at the request of the Dutch Parliament.

First, it was examined how many return decisions and entry bans were issued in 2012 and 2013, and how many violators of the entry ban were apprehended, prosecuted and punished in these years. This was done using administrative data from various governmental organisations (immigration and naturalisation service, police, military police, and the public prosecutor). Second, four focus groups were organised in which lawyers and key informants from governmental and non-governmental organisations were interviewed on how return decisions and entry bans are used by relevant organisations in the Netherlands, and to document the perceived effects of changes resulting from the implementation of the Return Directive. In two regional areas, 21 informants were interviewed in total.

The study has certain limitations. For example, the precise number of sanctions due to violations of heavy entry bans could not be established due to certain registration practices by the courts. By linking data on the basis of what are called foreigner numbers (unique administrative numbers that are used to identify foreigners), the number of sanctions was estimated. A second limitation is that it remained unclear whether the prosecution of cases involving the entry ban also involved other crimes. However, key informants indicated that cases involving a violation of the entry ban, without further crimes, are uncommon. A third limitation, concerning the quantitative part of the study, is that the registration of return decisions and light entry bans is incomplete for 2012 and the first three quarters of 2013 (the reason being that the Immigration and Naturalisation Service (IND) was, in part, still using an old computer system during that period, from which relevant data could not be retrieved for this study). The main limitation of the qualitative part of the study is

that a relatively small number of key informants were interviewed. Therefore, the outcomes are indicative rather than definitive.

Main conclusion and discussion

The organisations in the Dutch immigration system (*Vreemdelingenketen*) seem to issue return decisions more or less systematically, but show a certain restraint in imposing entry bans and – even more so – in the prosecution and punishment of violations of the entry ban, especially the light entry ban. In 2012 and 2013 more than 24,000 return decisions were issued, and approximately 8,000 entry bans were imposed, including about 1,000 heavy entry bans. The number of entry bans turns out to be significantly lower than the approximately 13,000 apprehensions involving illegally residing persons in these years. If a person is apprehended after a return decision had been issued (and the term for departure has expired), it is prescribed to impose a light entry ban unless there are strong humanitarian reasons not to do so (the right to family life is especially relevant to making exceptions). In 2012 and 2013, 451 apprehensions occurred involving persons who were found in the Netherlands after the term of departure had expired, but who had not yet been served an entry ban. In only 70 of these cases, a light entry ban was imposed following the arrest.

Although legislators wanted entry bans to be imposed with a certain restraint – for example by stipulating that family ties can inhibit the imposition of such bans – the actual restraint seems to be significantly stronger than specified by law. In fact, illegally residing foreigners rarely receive an entry ban when arrested for the first time, while this is formally possible or even required.

Light entry bans are imposed with some restraint, but violations of such bans are rarely punished. In 2012 and 2013 there were 467 apprehensions involving a person who, according to the registrations, had previously received a light entry ban. In principle, such violators should be fined. The Central Fine Collection Agency (CJIB) imposed 21 fines in 2012 and 2013, and nine persons – possibly the same ones – were detected in registrations of the Public Prosecutor Service. Based on the administrative data provided we could not establish whether these fines were actually paid. It is possible that the police passed on a larger number of cases to the public prosecutor; there are indications that the public prosecutor does not always recognise or register certain cases involving violations of the light entry ban. The general impression is that fines are never or rarely imposed and that violations of the light entry ban also do not lead to imprisonment.

There appear to be several reasons why violations of the light entry ban are rarely punished. Our key informants indicated that many professionals in the immigration and criminal justice system (*Vreemdelingen- en Strafrechtketen*) do not think that punishment on the basis of criminal law offers any added value compared to instruments already available via administrative law, such as immigration detention. Making use of administrative law rather than criminal law may promote a quick and efficient departure, but if the expulsion procedure fails, a criminal sanction does not follow. Apparently, there are other reasons to not make use of the expanded possibilities under criminal law. Our key informants indicated that the enforcement of the entry ban via criminal law is not widely supported by professionals, because its violation is not perceived as a 'real' crime and is considered less harmful than crimes such as theft and violence, and should therefore receive less priority. An additional reason to impose entry bans with a certain restraint is that relevant street level

bureaucrats, especially those working at the aliens police, seek a gradual 'build-up' of measures.³² There is qualitative as well as quantitative evidence to support the idea that issuing a return decision (without imposing an entry ban yet) can encourage persons to leave the Netherlands (perhaps temporarily). The quantitative data indicate that individuals who received a return decision in 2013 had a two times smaller chance of being found (apprehended) in the Netherlands within a year than individuals who received a return decision in 2012. This could mean that, in 2013, a higher number of illegally residing foreigners left after the return decision was issued, in order to avoid an entry ban. This interpretation is based on the assumption that foreigners who received a return decision in 2013 were more aware of the risks of an entry ban than foreigners who received a return decision in 2012, the year that the entry ban was introduced. (The Netherlands was late to implement the Return Directive and the entry ban was introduced quite quickly, and without much publicity, in order to meet the deadline set by the EU; it therefore seems probable that a relatively large number of migrants initially did not know what the entry ban meant).

Such a deterrent effect does not seem to occur once an entry ban has been imposed. There are no indications (quantitative or qualitative) that illegally residing foreigners with an entry ban leave the Netherlands voluntarily in order to avoid the criminal sanction that comes with the violation of the entry ban. Thus, the tendency to impose entry bans with some restraint makes sense in that respect. These observations also suggest that the deterrent effect of the entry ban itself is stronger than the deterrent effect of criminalising violations of the entry ban (in other words: some illegally residing foreigners are keen to avoid the entry ban, but once an entry ban has been imposed, they seem unimpressed by the criminal sanctions that may follow).

Besides, we found some indications that the entry ban has a deterrent effect that might be undesirable. Based on information from the focus groups, it is suspected that a growing number of migrants that have resided in the Netherlands leave via airports in other European countries, in order to avoid an entry ban.

There are no indications that the heavy entry ban is imposed and punished with a similar amount of restraint. However, the sanctioning of the violations of heavy entry bans also seems bound to certain limits. That is, in both regional areas where focus groups were organised, no efforts seem to be made to directly trace persons with a heavy entry ban. Therefore, sanctions are mainly imposed if such persons happen to come into contact with the police (again) because of their involvement in (street) crimes such as theft, drug trafficking or violence. The criminalisation of the heavy entry ban therefore seems a bit redundant, as prosecution is generally also possible on the basis of other crimes. The administrative data indicate that violations of the heavy entry ban are usually punished in the form of imprisonment (fines are rare).

The criminalisation of violations of the entry ban means that criminal law is mobilised to address 'unwanted' migratory behaviour. On the face of it, such a mobilisation of criminal law suggests a stricter policy with regard to illegal residence. However, the present study indicates that doing so may have given the Dutch state fewer rather than more options to deal with 'unwanted' migration. That is, convic-

³² There turns out to be an additional reason why entry bans are not always imposed in cases where it would be legally possible to do so. At airports, there is not always enough time to complete the procedure before the flight takes off. In that case, departure is usually given priority. This is not so much a matter of restraint as of practical limitations.

tions can only take place after a judge in a criminal court has ruled that the foreigner can be blamed for still being in the Netherlands. However, it also happens that judges rule that the foreigner is not culpable, and it can moreover take quite some time before the court hearing takes place. Some of these cases are therefore eventually acquitted, or lead to convictions in absentia. Previously, it might have been possible to place these people in immigration detention. Several key informants stress that the Return Directive has made this option more difficult. We therefore arrive at the somewhat paradoxical outcome that there may have been more means of dealing effectively with certain categories of foreigners who are regarded as problematic, before the implementation of the entry ban.

In April 2014, the Dutch coalition partners agreed that the initial plans to criminalise illegal residence will not be pursued by the current cabinet. The results of this study can nonetheless be taken into consideration when, if the occasion arises, the decision to criminalise illegal residence is made in the future. After all, such a criminalisation would take the present criminalisation of entry ban violations only one step further: individuals would then be punishable when apprehended for illegal residence for the first time and not, as is currently the case, only after an entry ban was imposed at an earlier point in time. The present study suggests that the enforcement of such a criminalisation is unlikely, or at least not guaranteed.