

Summary

For reasons of societal interest

Advisory report on involving local authorities and communities in the exercise of discretionary powers

Public concern regarding the impact of aliens policy in individual cases

Aliens who have no legal basis on which to reside in the Netherlands must leave the country. However, a proportion of this group cannot or will not leave independently, nor are they expelled. These rejected immigrants are explicitly excluded from all benefits but sometimes manage to establish themselves despite their vulnerable position. On the grounds of humanitarian considerations, local authorities and civil society organisations feel responsible for the welfare of these people. A feeling of injustice can gradually take root about a decision by central government not to grant them residence rights or to terminate residence, particularly if they have become part of the local community. This sentiment regularly leads to requests to the Minister from local residents, civil society organisations and local authorities, asking him to use his discretionary powers to depart from policy, by way of exception, and grant the person concerned a residence permit. The reasons they put forward to justify their request are often of a humanitarian nature, but are also connected with the person's participation in the life of the local community. The Minister has only a limited insight into these local circumstances, while it is not always clear to local authorities and communities what factors he takes into account in applying his discretionary powers. The public debate on these issues can be highly emotional and this puts considerable pressure on public support for aliens policy.

The Minister for Immigration and Asylum Policy too has indicated that society's expectations regarding the application of discretionary powers are not in line with the way in which such powers are exercised in practice. Accordingly, he has asked the Advisory Committee on Migration Affairs (ACVZ) to advise him on options for allowing failed asylum seekers to remain if their continued residence serves 'Dutch interests'. He also wishes to know whether, and if so how, local authorities could play a role in this context.

No leeway within current policy or present application of discretionary powers

This advisory report is concerned with aliens in respect of whom it has been concluded that they are not eligible for a residence permit on the basis of current policy. The term 'Dutch interests' as used by the Minister is closely linked to the term 'essential Dutch interests' which is one of the mainstays of regular admission policy. This criterion applies to employed and self-employed persons, highly skilled migrants, students and au pairs, and means that the alien has to demonstrate on the basis of objective information that his admission would serve a specific Dutch interest, for example an economic or cultural interest. As a rule, the group at issue here cannot meet this criterion. Pleas for their legalisation are generally inspired by social bonding processes resulting from the interaction between the person concerned and his immediate environment: 'he is part of our community and we will take care of him'.

At present, such local interests and circumstances are not taken into account in the application of discretionary powers. The Minister only avails himself of these powers in 'exceptionally distressing cases'. The fact that the person concerned contributes to Dutch society through his participation in the life of the local community is not an independent criterion in the current assessment process.

Societal interest as an independent assessment criterion for the application of discretionary powers . . .

In view of public concern, in combination with demographic and economic developments, it would seem logical when applying discretionary powers in the case of rejected immigrants who still remain in the Netherlands, to look not just at whether their circumstances are exceptionally distressing but also at their (potential) contribution to society. Key to such considerations is the fact that where rejected immigrants have become part of the local community partly because of their extended stay in this country, and where the government has failed to expel them, there is at the very least a shared responsibility for the situation that results.

But when has an alien become such an integral part of the local community that acquiescing in his stay serves a societal interest? There are no fixed criteria that will help answer this question. It has to be assessed on a case-by-case basis, and the circumstances must be evaluated as a coherent whole. Such an assessment must include aspects relating to the alien's inclusion in the community in which he lives.

With a view to legal certainty, however, it is important to make clear what factors and circumstances are relevant to the assessment, particularly from the local perspective. For example, how well the person concerned speaks Dutch, the education or training he has followed in the Netherlands, the activities (paid or voluntary) he performs here, his participation in associations and civil society organisations, and other social contacts. Particular attention should be focused on the interests of minors, since they have little or no influence on their situation. Generally speaking, the assessment should look at more than just the 'market value' of the immigrant. It should be convincingly established that through his participation in the life of the local community and with the support of that community, he has equipped himself to remain socially committed and will be able, in the future, to lead an independent life.

. . . through making use of local knowledge of and experience with the immigrant concerned

The question of the extent to which a rejected immigrant is part of the local community can only be answered if knowledge of that person and experience with him drawn from the local community is taken into account in the assessment of his situation. Since decision-making powers are reserved to the Minister for Immigration and Asylum Policy, this can only be done in the form of recommendations. Combining the local perspective on the immigrant in question with the information on him in his immigration case file would create a complete picture of his situation. An answer to the question of how this can be organised in such a way as to take account of the tasks and responsibilities of both central government and local authorities may be found in the German system of *Härtefallkommissionen*.

Since 2005 all the German *Länder* have set up committees on the basis of an optional clause in federal legislation to assess exceptionally distressing cases (*Härtefälle*). The key question in their assessments is whether there are compelling humanitarian or personal reasons to allow the person to stay on the basis of the public interest ('im öffentlichen Interesse'). The *Härtefallkommissionen* are independent, but have no decision-making powers: they merely advise the state authorities on the degree to which a case is exceptionally distressing. None of the statutory instruments setting up *Härtefall* committees contain fixed criteria for assessing cases. What they do demonstrate is that language, and economic, social and cultural integration in German society play a substantial role. The

committees are multidisciplinary in nature: they consist of representatives from the relevant state ministries, local authorities, regional and local civil society organisations and a single independent member.

Since the *Härtefall* statutory instruments are based on the public interest and the committees themselves determine whether they assess a case, rejected immigrants are unable to assert their rights in the procedure. This means that the statutory instruments fall in their entirety outside the scope of procedural law and aliens legislation. Consequently, aliens have no legal remedies against a recommendation issued by a *Härtefallkommission*, or against a decision of the state authorities based on such a recommendation. The system therefore does not lead to further litigation or procedures.

Organising local involvement where the use of discretionary powers is requested

The ACVZ considers it advisable to set up a multidisciplinary advisory body, along the lines of the *Härtefallkommissionen*, whose recommendations would carry considerable weight, to examine from various perspectives cases in which the use of discretionary powers on the basis of exceptional circumstances is requested. This could be organised at local, regional or central level. Whichever option is chosen, a formal basis for the body would have to be created in all cases and it should be clearly stipulated that there are no legal remedies available to contest the body's decisions. The order establishing the body would have to contain provisions concerning access to the body, its method of operation, composition and administrative support, as well as the status and use of its recommendations and the form which they would take.

The ACVZ proposes establishing a central advisory body on which an Immigration and Naturalisation Service staff member, a representative of the local authority and delegates from civil society organisations would sit. The municipality where the person in question lives would supply the local authority representative. This would thus be a rotating position. Because it would take considerable organisation to decide in each case which local civil society organisations should sit on the committee, the remaining members should be permanent representatives of national organisations. It would be up to the representative of the local authority and the delegates from these organisations to ensure that all relevant information from local civil society organisations with which the person is connected is gathered and taken into account in the assessment. Establishing a central advisory body would guarantee that local information is combined with data from the immigration case file, while ensuring that recommendations are uniform and no extra bureaucracy is created.

Local responsibilities if residence permit is granted

In addition to assisting the Minister in taking a carefully considered decision, local authorities can, in partnership with local organisations support rejected immigrants who are nevertheless granted a residence permit on the grounds of a societal interest in following further training/education or finding work. They should have the freedom to base their aftercare on local considerations and choices.

Recommendations

On the basis of the research and the considerations set out above, the ACVZ would make the following recommendations.

- 1) Register requests for the use of discretionary powers in a uniform manner so that it is clear how and by whom the request was submitted, on what circumstances it is based and what the factual grounds are if a residence permit is granted after all.
- 2) In addition to ‘compelling reasons of a humanitarian nature’, adopt ‘societal interest’ as an independent criterion for the application of discretionary powers.
- 3) Instead of formulating administrative rules for assessment in the light of societal interest, take all relevant facts and circumstances into account.
- 4) Give local authorities and national civil society organisations an advisory role carrying substantial weight in all cases in which the use of discretionary powers is requested. This would apply both to cases in which extremely distressing circumstances are invoked and to those in which the person’s participation in the life of the local community is the principal ground, as well as to cases involving both factors.
- 5) Establish for this purpose a central advisory body in which local authorities and national civil society organisations are represented.
- 6) In cases where a residence permit is granted on the grounds of societal interest, give local authorities and communities the freedom to base the aftercare they provide to the persons concerned on local choices.
- 7) Evaluate this new approach after a year.

This proposal enables aliens who despite formal exclusion have nevertheless become part of the local community to put their potential to good use and to continue to contribute to Dutch society. This does not affect the need for strict enforcement, which may entail expulsion of rejected immigrants who are not in exceptionally distressing circumstances and have not made any positive contribution to society.

Because the Minister will be assisted by a fully qualified expert advisory body which looks at the alien’s situation from various perspectives, he will have the benefit of balanced recommendations based on experience that combine a variety of interests and views. This could reinforce the democratic legitimacy of his decision, reduce public and political pressure on him as well as the need for incidental general amnesty schemes, and contribute to a more open and rational debate on this issue.