



Dutch National Contact Point for  
the European Migration Network (EMN)

# EMN Study      The Practises in The Netherlands Concerning the Granting of Non-EU Harmonised Protection Statuses

April 2010



Immigratie- en Naturalisatiedienst

The objective of the European Migration Network (EMN) is to meet the information needs of Community institutions and of Member States' authorities and institutions on migration and asylum, by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in the European Union in these areas. The EMN also serves to provide the general public with information on these subjects.

The migration network is an initiative of the European Commission and finds its Legal base in Council Decision 2008/381/EC of 14 May 2008. The EMN is composed of the European Commission and National Contact Points (NCP) designated by the Member States. Each NCP maintains a national network.

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# The practices in the Netherlands concerning the granting of non-EU harmonised protection statuses

April 2010

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Staff Directorate for Implementation and Policy (SUB),

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# Management Summary

This report provides an overview of all forms of protection for asylum seekers in Dutch legislation and regulations which have not been harmonised within the EU. On the basis of this report and similar reports published by the other EU Member States, the European Migration Network (EMN) is going to draw up a comparative 'European' report.

Chapter 2 deals with the implementation of international protection in Dutch legislation and regulations, and all forms of supplementary national protection. The Qualification Directive is used to harmonise two protection statuses within the EU, namely the refugee status and the subsidiary protection status. The refugee status offers protection to refugees within the meaning of the Geneva Convention, while the subsidiary protection status offers protection to those who run a real risk of serious damage upon returning to their country of origin.

These forms of protection have been recorded in Article 29 under a and b of the Aliens Act [*Vreemdelingenwet*] (Vw), despite there having been some discussion about whether Article 29b of the Vw actually offers the subsidiary protection referred to in the Qualification Directive. Besides Article 29 of the Vw offers four supplementary, national grounds for providing an asylum permit: the c ground (referred to as traumata policy), the d ground (the categorical protection policy), the e ground (family members who travel later in a narrower sense) and the f ground (family members who travel later in a wider sense).

Dutch immigration policy involves a number of regular residence permits which, although outside the asylum domain, still offer an additional form of non-EU harmonised protection to asylum seekers whose asylum applications have been rejected. What is more, the focus is explicitly not just on protection in the asylum-related sense of the word. This means an emphasis not only on protection against dangers which the asylum seeker were to run in the country of origin, but also protection in a wider sense of the word.

Some of these residence permits can be granted automatically either for residency as an unaccompanied minor foreign national, or for residency as a foreign national who is unable to leave the Netherlands through no fault of his own. A number of regular residence permits, which cannot be granted automatically, but for which an application has to be submitted, can provide a supplementary form of national protection to certain categories of foreign nationals whose asylum applications have not been accepted. This relates to residency subject to the medical treatment restriction or, following on from this, a medical emergency. A special case is the discretionary authority to grant a residence permit.

Chapter 3 outlines the procedures and the rights relating to all the different non-EU harmonised protection statuses. The Netherlands applies a single status asylum system which means that all asylum permits are subject to the same rights, no matter what ground they have been granted on. In a general sense these rights are more robust than those associated with the different regular residence permits. The various regular residence permits do not always offer the same rights.

The statistical overview in Chapter 4 shows, among other things, that recognised refugees do not even account for 10% of all asylum status holders. The majority of the asylum permits granted concern subsidiary protection within the meaning of the Qualification Directive, or categorical protection.

It appears that an increasing percentage of statuses in the EU as well are granted for subsidiary protection or national forms of protection. The proportion of positive decisions on the grounds of the Geneva Convention (whereby the applicant is acknowledged as a refugee) has not substantially changed since 2003, while the percentage positive decisions, whereby subsidiary or other forms of protection were granted, more than tripled during these years. It is therefore important, with an eye on the Common European Asylum System (CEAS) to pay particular attention to subsidiary and other forms of protection, and the possibility to investigate in order to bring into line the national types of protection status which are currently not covered by the EU international protection system. The comparative study of which this report on non-EU harmonised protection in the Netherlands is part, can contribute to achieving this goal.

At the end of 2009 the Cabinet made known its intentions to abolish two non-harmonised forms of protection, namely the permit for unaccompanied minor foreign nationals and the categorical protection policy. The State Secretary of Justice has justified these intentions by, for example, referring to far-reaching harmonisation of the European asylum and migration policy. The first steps towards initiating a debate on this constitute the core of Chapter 5 which deals with national opinions on providing protection. Debates on these proposals in the Lower House of Parliament have been postponed, due to the downfall of the Cabinet on 20 February 2010.

Chapter 6 draws a number of conclusions:

- In the Netherlands there is not only a wide variety of national, non-EU harmonised protection. The procedures also vary and the rights related to the different statuses also differ considerably. The asylum status offers the most robust rights.
- Few relevant statistical details are available regarding the regular residence permits dealt with in this report. The asylum figures show that recognised refugees do not even account for 10% of all asylum status holders. The majority of the asylum permits granted relate to international subsidiary protection or national categorical protection.
- The proposed abolition of the unaccompanied minor foreign national permit and the categorical protection policy immediately produced criticism from civil society.



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# 1. Introduction: goal and methodology

This report was commissioned by the European Migration Network (EMN). The EMN was established on the initiative of the European Commission and collects and analyses information on migration and asylum (from, for example, social debates, scientific research, statistics, policy and case law). At the meeting of 10 October 2008, the Steering Committee of the EMN approved the subject of the two theme studies to be carried out by the EMN in 2009. The different national practices concerning granting of non-EU harmonised protection statuses is one of the subjects. Within this framework each national contact point (NCP) of the EMN draws up a national report based on the most recent data. As the national contact point for the EMN in the Netherlands, the Information and Analysis Centre (INDIAC) of the Staff Directorate for Implementation and Policy (SUB) of the Immigration and Naturalisation Service (IND) is responsible for the Dutch report. On the basis of this report and the reports published by the other EU Member States, the European Migration Network (EMN) is going to draw up a comparative 'European' report.

## 1.1. Goal

The objective of this report is to provide an analysis of the Dutch national practice as regards the granting of protection statuses which are not harmonised within the EU.

Two protection statuses have been harmonised within the EU, namely the refugee status and the subsidiary protection status. These have been defined in Council Directive 2004/83/EC of 29 April 2004 relating to minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Official Journal of the European Union (OJ) 2004, L 304/12) (hereinafter to be referred to as: the Qualification Directive).

The Qualification Directive therefore deals with two forms of international protection. The refugee status corresponds to the protection offered within the framework of the Convention on Refugees [*Vluchtelingenverdrag*]. In the case of the subsidiary protection status, one person can be eligible if s/he is not eligible for the refugee status but with regard to whom substantial grounds exist for assuming that s/he would run a real risk of 'serious harm' should s/he return.

A supplementary form of protection harmonised within the EU is laid down in Directive 2001/55/EC.<sup>1</sup> This directive concerns the minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

Dutch national protection covers all other protection statuses.

Its focus is explicitly not just on protection in the asylum-related sense of the word. This means an emphasis not only on protection against dangers which the asylum seeker would run in the country of origin, but also protection in a wider sense of the word.

That is why this report not only deals with the various grounds for granting an asylum residence permit, all of which are certainly related to the situation in the country of origin, but also a number of regular residence permits. The related residence statuses offer protection to minors, protection in medical emergencies, protection against human trafficking, protection against the lack of rights which are thought to be associated with illegal residency here in the Netherlands, and protection in individual cases which are not covered by generic policy.

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<sup>1</sup> Official Journal of the European Union (PBeu), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:12:23:NL:PDF>

Council Directive 2003/109/EC is also important<sup>2</sup> (long-term residents). This directive offers long-term residents substantial protection against expulsion.<sup>3</sup> However, the EU protection statuses explicitly fall outside the scope of this directive. The question is whether, and if so how, the directive does apply to the national protection statuses.

On the one hand this analysis of Dutch national practice as regards the granting of protection statuses which are not harmonised within the EU offers the possibility of comparing Dutch national practice with the national practice in the other Member States. On the other hand, this report functions as a reference work for Dutch policymakers and other interested parties in this field.

### Context

The Policy Plan on Asylum, Communication by the Commission of 17 June 2008,<sup>4</sup> identifies a key asylum-related trend as being that, in the event of positive decisions on an asylum application, an ever-increasing percentage of the applicants are granted subsidiary protection or another protected status on the grounds of national law, rather than the refugee status in accordance with the Geneva Convention. According to the Commission this is probably because more and more of the current conflicts and prosecutions are not covered by this Convention.

This is clarified in more detail in the accompanying Impact Assessment<sup>5</sup> in which, among others, the following problem is observed in the asylum field: *more and more often, people seek protection for reasons which are not referred to in the traditional refugee arrangements (the Geneva Convention) and acquire protection statuses with fewer safeguards.*

The examples of these reasons for offering protection referred to in the *Impact Assessment* are:

- humanitarian or medical reasons;
- climate or environmental changes in the country of origin;
- non-refoulement.

Based on the number of positive asylum decisions taken between 2003 and 2006, an increasing percentage of statuses were granted for subsidiary protection or national forms of protection. The proportion of positive decisions on the grounds of the Geneva Convention (whereby the applicant is acknowledged as a refugee) has not substantially changed (5% in 2003 compared to 7 % in 2006), while the percentage positive decisions, whereby subsidiary or other forms of protection were granted in these same years increased by more than fourfold (from 4.57% in 2003 to 15.24% in 2006).

The most recent data shows that the trend towards an increasing importance of subsidiary protection and other protection could be stopped. In the last quarter of 2008, 10.9% of applications were granted refugee status, with subsidiary protection status within the meaning of the Qualification Directive being granted in 9.1% of the cases while a national, non-EU harmonised protection status was granted for 2.4% of the applications. All the same, the number of positive decisions whereby subsidiary or a national form of protection was granted is still jointly higher than the number of decisions whereby the refugee status was granted. However, it should be pointed out that the total share of positive decisions in relation to an asylum application does not appear to have substantially changed given that these accounted for a proportion of just over 22% in both 2006 and in the last quarter of 2008.

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<sup>2</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0109:and:NOT>.

<sup>3</sup> Particularly articles 3 (2b & c) and 12 (partly in the light of considerations (3) and (16))

<sup>4</sup> COM/2008/360. Commission of the European Communities. (17 June 2008) *Asylum Policy Plan An integrated approach to protection in the entire EU* (Communication by the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions). See in particular paragraph 1.2 Trends. Available in digital format at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:NL:PDF>.

<sup>5</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2029:EN:NOT>. For a summary in Dutch and a number of other languages, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2030:EN:NOT>.

On the one hand, according to the Commission, the trend outlined above can partially be explained by the growing discrepancy referred to in the *Asylum Policy Plan* between the nature of the need for protection and the criteria of the Geneva Convention. When the Convention was drawn up, it was tailored to certain types of prosecution which were relevant at the time. Today's refugees are fleeing from newer forms of prosecution and conflicts which are not covered by the Convention. On the other hand, according to the Commission, this is connected to the fact that Member States have developed supplementary or subsidiary forms of protection to offer asylum seekers suitable protection in so far as they are not covered by the Geneva Convention, but still need protection. The Commission argues that this development implies two major risks:

A weakening of the general level of protection, attributable to the fact that acknowledging the refugee status in accordance with the Geneva Convention is becoming relatively uncommon. The status in accordance with the Geneva Convention goes hand in hand with a large number of related rights, but is only granted subject to strict conditions. The other protection statuses can be acquired more easily but go hand in hand with fewer rights and are often for a shorter term. More and more people have protection based on these 'residual' statuses, which are often uncertain by nature.

A reinforcement of the substantial differences by the EU as a whole as regards practices, procedures and decision-making processes for granting protection, attributable to the fact that the alternative forms of protection have come about without any coordination and are continuing to develop all the time in all the Member States. The increasing diversity of national practices may seem at odds with the frequently announced goal of harmonising asylum policy in the EU.

In this context the *Asylum Policy Plan* states that it is therefore important during the second phase of the Common European Asylum System (CEAS)<sup>6</sup> to pay particular attention to subsidiary and other forms of protection, and that a study should be initiated into the possibility of bringing the national types of protection status which are currently not covered by the EU international protection system into line. The comparative study of which this report on non-EU harmonised protection in the Netherlands is part, can contribute to achieving this goal.

As regards the Dutch situation it should be noted that, at any rate, the former risks, or those just referred to, do not play a role, or only do so to a very small degree. After all, the Netherlands applies the 'single status system which means that all asylum permits are linked to the same rights and obligations, no matter on what grounds the asylum permit is granted.

## **Structure**

In this report, Dutch protection practice is analysed as follows.

Chapter 2 assesses the various protection statuses granted in the Netherlands. The initial focus is on the implementation of Directives 2001/55/EC and the Qualification Directive, followed by the national statuses not covered by these Directives.

Chapter 3 contains an overview of the procedures followed, including the decision and departure moratoria and the rights granted.

Chapter 4 contains, in so far as available, statistical data on applications and permits granted in the period since 2004.

Chapter 5 contains a brief assessment of the views that exist in the Netherlands on offering protection. This report relates to the period since 2004, with the emphasis on the current state of affairs. It also examines a few intentions formulated by the Cabinet which will result in the short term in changes to the policy pursued and the applicable procedures. At the moment it is still unclear what the consequences

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<sup>6</sup> For a summary of this policy plan, consult

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/jl0002\\_nl.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0002_nl.htm)

will be, in this respect, of the very recent fall of the Dutch Cabinet. In so far as this report refers to Cabinet intentions and the expected policy and procedure changes, the passages in question must be read in the light of the still uncertain political future.

## 1.2. Methodology

This report is the result of desk research. It has been compiled by A.C. van der Helm, policy officer at the Information and Analysis Centre of the Immigration and Naturalisation Service (INDIAC), on behalf of the national contact point for the EMN in the Netherlands. Grateful use was made of the expertise of the Implementation Policy Department (AUB) of the IND. The Migration Policy Department (DMB) of the Ministry of Justice also cooperated on this report.

Content-related and procedural information on the different protection statuses and the related rights in the Netherlands was taken from the legislation and regulations laid down in the Aliens Act 2000, the Aliens Decree 2000 and the Aliens Act Implementation Guidelines 2000.

Additional information on the categorical protection policy pursued in the Netherlands during the review period, the policy relating to specific groups designated by the Minister and the departure and decision moratoria comes from official sources. The main sources consulted are the publications of legislation and regulations in the Dutch Government Gazette.

All these documents can be found in the database of official publications on the website: [www.overheid.nl](http://www.overheid.nl). This website is maintained by the Ministry of the Interior and Kingdom Relations.

An important source of information on the social debates are the weekly Migatierecht.nl news reports which are digital publications by Sdu Uitgevers.<sup>7</sup>

Statistical data has been taken from Eurostat and from the IND information system referred to as INDIS.

This report is based on the definition of relevant terms in the EMN Glossary.<sup>8</sup> Among other things, the terms and definitions in this glossary, which was developed by the EMN, are intended to increase the comparability of the information exchanged between the EU Member States.

The definition of 'protection' in the Glossary comes, in turn, is from the UNHCR Master Glossary of Terms.<sup>9</sup>

- Protection: All activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation. (See the UNHCR Master Glossary of Terms.<sup>10</sup>)

Most of the other relevant definitions in the EMN Glossary have, in turn, been taken from the Qualification Directive.

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<sup>7</sup> These are available on the non-public website [www.migatierechtonline.rijksweb.nl](http://www.migatierechtonline.rijksweb.nl)

<sup>8</sup> It is available at <http://emn.sarenet.es/Downloads/prepareShowFiles.do?directoryID=2>.

<sup>9</sup> It is available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=42ce7d444>

<sup>10</sup> "A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation."

- International protection: In the EU context the refugees and subsidiary status as laid down in Article 2, d and f of the Qualification Directive. (See the EMN Glossary)
- Subsidiary protection: The protection which, as laid down in Article 2 under e of the Qualification Directive, is granted to a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. (See the Qualification Directive Article 2, e.)
- Refugee: A person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (See Convention on Refugees, Article 1, paragraph a, under 2.<sup>11</sup>) In the EU context this specifically means a third country national or a stateless person covered by this definition in the Convention on Refugees, to whom the right has been granted to remain as such in on the territory of a Member State and to whom Article 12 does not apply. (See the Qualification Directive Article 2, c.)
- Refugee status: The recognition by a Member State of a third country national or a stateless person as a refugee. (See the Qualification Directive Article 2, d.)

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<sup>11</sup> This is available at [www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf](http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf).



## 2. Protection statuses granted in the Netherlands

As indicated in paragraph 1.1, in this report the protection statuses granted in the Netherlands are divided into two groups:

- EU statuses covered by the definitions of Directives 2001/55/EC (temporary protection) and 2004/83/EC (Qualification Directive), and
- national statuses which are not covered by these Directives.

In order to acquire a proper insight into which protection statuses granted in the Netherlands have to be designated as national, we first define EU harmonised protection. This means the EU statuses covered by the definitions of Directives 2001/55/EC and 2004/83/EC, and the way in which both have been implemented in Dutch legislation and regulations. We then examine the national statuses which are not covered by these Directives.

### 2.1 EU statuses covered by the definitions of Directives 2001/55/EC and 2004/83/EC

#### 2.1.1 Implementation of Directive 2001/55/EC

Directive 2001/55/EC concerns the minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, was implemented in Dutch legislation and regulations on 15 February 2005.<sup>12</sup> To this end, the Aliens Act 2000 and the Aliens Decree 2000 had to be amended.<sup>13</sup> Directive 2001/55/EC was implemented in Article 43 a of the Aliens Act and Article 3.1a of the Aliens Decree. The policy is detailed in Chapter C20 of the Aliens Act Implementation Guidelines.

The directive should have been implemented on 31 December 2002. In connection with this the Minister for Immigration and Integration declared on 26 March 2003 that an agreement had been reached with the European Commissioner that the directive would be declared applicable, even if had not yet been implemented in Dutch legislation and regulations.

The Aliens Act 2000 already provided for the possibility of granting a departure postponement in the event of a mass influx of displaced persons who are not eligible for an asylum residence permit via a departure moratorium. The amendment of the Aliens Act 2000 in connection with the implementation of the directive is linked to this. Article C20/1 of the Aliens Act Implementation Guidelines defines the character of the temporary protection as follows.

In the event of a mass influx or the threat of a mass influx of displaced persons from third countries who are unable to return to their country of origin, the Council of the EU can, if such is proposed by the Commission, decide to grant temporary protection to a group of foreign nationals to be described in more detail for a certain period of time.

Foreign nationals who are eligible for temporary protection in the Netherlands on the grounds of the directive are given an opportunity to submit an application for asylum. As asylum seekers these people may stay in the Netherlands, even if no asylum has been granted. The submission of an application is

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<sup>12</sup> For details of the implementation see INDIAC – NL EMN NCP 2006 (Policy Analysis Report 2005).

<sup>13</sup> Act of 16 December 2004 amending the Aliens Act 2000 for the implementation of Directive no. 2001/55/EC of the Council of 20 July 2001 concerning minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (*PbEG* L212), *Bulletin of Acts and Decrees* 2004, 691 (see also the *Bulletin of Acts and Decrees* 2005, 25 in conjunction with the amendment of the Aliens Decree 2000).

essential for the assessment of whether the foreign nationals are indeed covered by Directive 2001/55 and for the registration of the necessary details.

Temporarily displaced persons who are not eligible for an asylum residence permit or who have not yet been assessed as being eligible for a residence permit, have the same status as an asylum seeker during the period of temporary protection. Among other things this means that they cannot be repatriated. In addition, the temporarily displaced person may be allowed access to the employment market subject to certain conditions.<sup>14</sup>

This permit will be granted retroactively to temporarily displaced persons who are eligible for an asylum residence permit up to the day on which the application has been submitted or so much later as the conditions have been fulfilled. Before the amendment, the substantive decision regarding an application for asylum was postponed until after the period of temporary protection and an asylum permit was not then granted retroactively.<sup>15</sup>

Directive 2001/55/EC has never been applied to date. In her memorandum entitled 'Vision of protection' [*Visie op bescherming*] of 11 December 2009, which explored the various viewpoints, the State Secretary of Justice pointed out that we should not have excessively high expectations of the Temporary Protection Directive given that, precisely due to the lack of a joint assessment of situations in conflict areas, it has to date never proven possible in the European Union to activate this directive.<sup>16</sup>

## 2.1.2 Implementation of Directive 2004/83/EC

### **International protection in Dutch legislation and regulations**

Article 29, paragraph 1 of the Aliens Act 2000 states the grounds on which an asylum seeker can become eligible for a temporary asylum residence permit. Grounds a. and b. of this Article are intended to offer the international protection to which the Qualification Directive also relates.

#### *The a-ground*

The a-ground determines that an asylum permit can be granted to foreign nationals who are recognised refugees. It is based on the Convention on Refugees and provides the protection to which the refugee status of the Qualification Directive relates. This ground is not the subject of any debate.

In country-specific asylum policy, population groups can be designated as risk groups.<sup>17</sup> In the case of the people who belong to a risk group, the conclusion is more likely to be that the events they have experienced are serious enough to proceed to grant refugee status. If these people refer to problems relating to the authorities or fellow citizens and their statements are credible and individualised, even minor indications can substantiate a well-founded fear of persecution. Although Dutch policy refers to these groups, the protection is still international protection within the meaning of the Convention on Refugees. At the moment, the following groups have been designated as risk groups:<sup>18</sup>

- Afghanistan: ethnic minorities, religious minorities and homosexuals
- Somalia: Reer Hamar (an ethnic minority group)
- Iraq: homosexuals

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<sup>14</sup> B1/4.1.1 (h) of the Aliens Act Implementation Guidelines

<sup>15</sup> *Parliamentary documents II* 2002/03, 29 031, no. 3. (Explanatory Memorandum)

<sup>16</sup> *Parliamentary documents II* 2009/10, 19 637, no. (Explanatory Memorandum) 1314 (Letter). The 'Vision of protection' memorandum can also be found at [www.justitie.nl](http://www.justitie.nl).

<sup>17</sup> These risk groups must be differentiated from other groups of foreign nationals designated as such in the asylum policy, and dealt with later on in this report. There are four different types of groups: risk groups (international protection based on the a-ground), vulnerable minority groups (international protection based on the b-ground), specific groups that are eligible for an asylum permit (national protection on the c-ground) for reasons other than traumata, specific groups that are eligible for categorical protection (national protection on the d-ground).

<sup>18</sup> For more information on the designation of risk groups, please refer to INDIAC – NL EMN NCP 2009 (*Annual Policy Report 2008*).



### *The b-ground*

The b-ground determines that an asylum permit can be granted to foreign nationals who have demonstrated that they have well-founded reasons to fear that they run a real risk, after repatriation to their country of origin or continuous residency, to be exposed to torture, inhuman or degrading treatment or punishment. This stipulation is derived from Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>19</sup> Expulsion to a country in which someone runs a real risk of being subjected to such treatment constitutes a violation of this Article.<sup>20</sup>

Since 30 July 2007, following a ruling by the European Court of Human Rights (ECHR)<sup>21</sup> vulnerable minority groups for whom a real and individual risk of treatment in violation of Article 3 ECHR is assumed are designated in the country-specific asylum policy. Less stringent requirements are imposed on asylum seekers who belong to such a vulnerable minority group as regards eligibility for an asylum permit on the b-ground.

Since this policy amendment came into force, the following groups have been designated as vulnerable minority groups in the country of origin:

- the Reer Hamar in Somalia<sup>22</sup>;
- Christians, Mandaean, Yazidis (all religious minority groups) and Palestinians in Iraq<sup>23</sup>;
- people from an area where they belong to an ethnic or religious minority in Afghanistan<sup>24</sup>;
- single women in Afghanistan<sup>25</sup>;
- non-Arab population groups from Darfur<sup>26</sup>;
- Tutsis from the Democratic Republic of Congo<sup>27</sup>;
- the religious minority groups of Jews, Shabak and Kaka'i in Iraq.<sup>28</sup>

The b-ground is intended to provide the protection to which the subsidiary protection status of the Qualification Directive relates. However, there has been some discussion on this matter, which continued until after the implementation of the Qualification Directive.

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<sup>19</sup> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

<sup>20</sup> See C/2, 3.1.1 of the Aliens Act Implementation Guidelines for more on the link between the b-ground and Article 3 of the ECHR.

<sup>21</sup> ECHR, 11 January 2007, no. 1948/04 (Salah Sheekh/the Netherlands). More on this can be found in INDIAC – NL EMN NCP 2008 (*Annual Policy Report 2007*).

<sup>22</sup> Decision by the State Secretary of Justice of 30 July 2007, no. 2007/20, comprising an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 148, p. 6.

<sup>23</sup> Decision by the State Secretary of Justice of 30 July 2007, no. 2007/21, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 148, p. 7.

<sup>24</sup> Decision by the State Secretary of Justice of 26 October 2007, no. 2007/33, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 216, p. 12.

<sup>25</sup> Decision by the State Secretary of Justice of 26 October 2007, no. 2007/33, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 216, p. 12. The policy was broadened by a Decision by the State Secretary of Justice of 3 February 2010, no. 2010/1, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 2010, 2112. The definition of a single woman in Afghanistan originally read 'women whereby, in the event repatriation to Afghanistan, no husband or other adult male family member, with whom they lived in a family setting before their departure from Afghanistan and can again live together, is present or travels with them. The definition now reads, 'A woman is regarded as single if the marital bond with the husband to whom she was married at the time of her departure from Afghanistan can be regarded as broken, or if she is unmarried and the bond with the family to which she belonged at the time of her departure from Afghanistan can be regarded as broken.'

The repatriation element has therefore been left out and it is no longer important whether any other male family members live in Afghanistan.

<sup>26</sup> Decision by the State Secretary of Justice of 05 November 2007, no. 2007/34, comprising an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 221, p. 6.

<sup>27</sup> Decision by the State Secretary of Justice of 5 November 2007, no. 2007/35, comprising an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 221, p. 5.

<sup>28</sup> Decision by the State Secretary of Justice of 10 November 2008, no. 2008/28, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 771.

### Implementation of the Qualification Directive

As from 25 April 2008, the Qualification Directive has been implemented in the Aliens Act 2000<sup>29</sup> and the Aliens Decree 2000<sup>30</sup> and, as from 25 May 2008, in the Aliens Regulations 2000.<sup>31</sup> The Youth Care Act Implementation Decree [*Uitvoeringsbesluit Wet op de Jeugdzorg*]<sup>32</sup> and the Aliens Act Implementation Guidelines<sup>33</sup> were also amended accordingly in 2008.<sup>34</sup>

The directive has resulted in a number of amendments to existing legislation and regulations. Generally speaking these amendments are not, by nature, substantive but are the consequence of the transfer of provisions laid down in policy rules (Aliens Act Implementation Guidelines 2000) and/or legal precedents to a generally binding regulation. As a result, no one has the authority any longer to deviate from these regulations in exceptional circumstances.

The most important innovation in Dutch legislation and regulations stems from Articles 14 and 19 of the directive. Article 14, paragraph 1 of the directive stipulates that if the ground for granting has lapsed, the refugee status must be withdrawn. Article 19, paragraph 1 of the directive stipulates the same for subsidiary protection. This obligatory withdrawal has now also been included in Dutch legislation and regulations.

Article 30 of the directive lays down conditions which are applicable to the representation and housing of unaccompanied minors to whom the refugee status or subsidiary protection has been granted. This has resulted in a number of amendments to the Youth Care Act Implementation Decree as regards the qualifications of the legal representative and as regards the housing of the minor.

### Article 15 (c) of the directive

A person can be eligible for subsidiary protection within the meaning of the Qualification Directive if s/he is not eligible for the refugee status but with regard to whom substantial grounds exist for assuming that s/he would run a real risk of 'serious harm' should s/he return.

This term 'serious harm' is defined in Article 15 of the Qualification Directive as follows:

- a) death penalty or execution; or
- b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The implementation of the Qualification Directive has resulted in a discussion of the scope of Article 15 of the directive. The key question is whether Article 15 (c) of the directive means offering supplementary protection to foreign nationals as regards the existing protection on the grounds of Article 3 of the ECHR. If so, the directive would contain a new ground for the granting of a permit and therefore go beyond Article 29 paragraph 1 (b) of the Dutch Aliens Act.

On 17 February 2009, the Court of Justice of the European Communities (hereinafter to be referred to as: the Court) – in the proceedings relating to the husband and wife Elgafaji against the State Secretary of Justice – rendered a ruling concerning a request for a preliminary decision by the Dutch Council of State.<sup>35</sup> Among other things the Court held that Article 15 (b) of the directive basically corresponds to Article 3 of the ECHR, that the content of Article 15 (c) of the directive differs from that of Article 3 of the ECHR and that the interpretation of Article 15 (c) has to take place autonomously but with due regard for the basic rights as safeguarded by the ECHR. The Court also held that the interpretation of Article 15 (c) of the directive can provide this part of the article with its own scope of application.

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<sup>29</sup> *Bulletin of Acts and Decrees* 2008, 115

<sup>30</sup> *Bulletin of Acts and Decrees* 2008, 116

<sup>31</sup> *Dutch Government Gazette* 2008, 97, p.16. See *Parliamentary Documents II* 2008/09, 19 637, nr. 1258, p. 1, n. 1

<sup>32</sup> *Bulletin of Acts and Decrees* 2008, 116

<sup>33</sup> *Dutch Government Gazette* 2008, 728

<sup>34</sup> The information in this paragraph has largely been taken from INDIAC – NL EMN NCP 2008 (*Annual Policy Report 2007*) and INDIAC – NL EMN NCP 2009 (*Annual Policy Report 2008*).

<sup>35</sup> Administrative Jurisdiction Division of the Council of State, 12 October 2007, no. 200702174/1.

On 25 May 2009, the Administrative Jurisdiction Division of the Council of State (hereinafter to be referred to as: the Division) rendered a judgment in the individual case on which the Court's ruling was based.<sup>36</sup> One of the considerations states that the material scope of application of Article 15 (c) of the Qualification Directive is, in accordance with the interpretation provided in the Court's ruling of 17 February 2009, not broader than that of Article 3 of the ECHR. According to the Division, Article 29, paragraph 1 (b) of the Aliens Act therefore refers to the protection which Article 15 (c) of the Qualification Directive intends to offer.

Nevertheless a bill, published on 8 July 2009, proposes implementing sections a and c of Article 15 of the Qualification Directive in the Aliens Act 2000. In the light of the considerations in the ruling of the Court, the previously chosen implementation at the level of the Aliens Decree 2000 seems to be less suitable as a clarification of the existing grounds for admission in the Article 29 paragraph 1 (b) of the Aliens Act 2000. It is again emphasised that this is not a substantive amendment based on the currently proposed implementation method. In cases in which a situation exists as referred to in Article 15, (a) and (c) of the directive, a temporary asylum residence permit can already be granted.<sup>37</sup>

## 2.2 National statuses not covered by the definitions of Directives 2001/55/EC and 2004/83/EC

In the case of non-EU harmonised protection statuses, the focus is initially on the four grounds for granting an asylum permit to which the Qualification Directive does not relate. Protection statuses, which are linked in the Netherlands with a regular residence permit, will also be discussed. On the one hand there is the automatic granting of a regular residence permit, as a consequence of an asylum procedure. On the other hand there are certain types of regular residence permit which can be granted following an application after a previous asylum procedure, or separately from this.

The above-mentioned decision and departure moratoria are not related to the granting or any residence status and are therefore dealt with in the following paragraph (under 3.1.1) on procedures followed and rights granted.

### 2.2.1 National grounds for granting an asylum permit

As already mentioned Article 29, paragraph 1 of the Aliens Act 2000 states the grounds on which an asylum seeker can become eligible for a temporary asylum residence permit. Apart from the two grounds for asylum dealt with in the previous paragraph, to which the Qualification Directive relates, Article 29, paragraph 1 of the Aliens Act 2000 contains a further four grounds on which an asylum seeker can become eligible for a temporary asylum residence permit: the c, d, e and f grounds. The basis for these is in national policy and they therefore provide national protection. The Qualification Directive is not connected to this national protection.

Incidentally, it does not make any difference for the rights and provisions, whether the foreign national enjoys EU harmonised or national protection. The Netherlands applies what is referred to as the single status asylum system. There is one residence status for all asylum-related grounds, namely the asylum residence permit. The same rights and provisions are attached to the asylum permit irrespective of the ground for granting. The next chapter examines what these rights and provisions imply. In any event this level of rights and provisions ensures fulfilment of the requirements set by the Convention on Refugees.

#### **The c-ground**

On the basis of the c-ground of Article 29, paragraph 1 of the Aliens Act, an asylum residence permit can be granted to foreign nationals who cannot reasonably be expected to return to the country of origin on

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<sup>36</sup> The rendering of this judgment by the Division is based on the analysis thereof in the letter from the State Secretary of Justice to the Lower House of Parliament of 29 June 2009 (*Parliamentary documents II* 2008/09, 19 637, no. 1292 (Letter))

<sup>37</sup> Explanatory Memorandum to the Bill to amend the Aliens Act 2000 in connection with the amendment of the asylum procedure, published on 8 July 2009 (*Parliamentary documents II*, 2008/09, 31 994, no. 2 (Explanatory Memorandum))

the basis of compelling humanitarian grounds relating to the reasons for their departure from the country of origin.

The policy is explained in more detail in the Aliens Act Implementation Guidelines,<sup>38</sup> based on the three elements:

- Traumata policy
- Special individual compelling humanitarian grounds
- Specific groups

#### *Traumata policy*

The traumata policy is intended to provide protection to foreign nationals who are confronted by an event which it is assumed they will experience as traumatising. This event must also have the characteristics of a violation of human rights. In addition, it must be possible to assume, as a consequence of the situation in the country of origin, that the perpetrators of these violations of human rights remain unpunished in the country of origin. In that case, the foreign national cannot be required to return to the country of origin. In this way, the traumata policy protects foreign nationals from a confrontation with unpunished perpetrators.

A key factor is not the (medically proven) trauma on the part of the foreign national, but the traumatising nature of the event in relation to the actual situation in the country of origin. These traumatic experiences have to have been caused

- by the government,
- by political or militant groups who exercise actual power in the country of origin or part thereof, or
- by groups against which the government is unable to offer protection.

The following traumatising events may provide grounds for granting an asylum residence permit:

- a) the violent death of close family members or housemates;
- b) the violent death of other relatives or friends if the person involved can prove that there was a close relationship between the deceased and the person involved;
- c) substantial non-criminal detention;
- d) torture, serious ill-treatment or rape of the person involved;
- e) the witnessing of torture, serious ill-treatment or rape of close family members or housemates;
- f) the witnessing of torture, serious ill-treatment or rape of other relatives or friends if the person involved can prove that there was a close relationship between the relative or friend and the person involved.

#### *Special individual compelling humanitarian grounds*

In the second instance, special individual compelling humanitarian grounds, other than traumata, which are connected to the reasons for the departure from the country of origin and are also connected to the asylum report, can be reason to grant an asylum residence permit on the c-ground.

These must be individual humanitarian circumstances of such a nature that the foreign national cannot reasonably be requested to return to the country of origin. Such circumstances are not specified in any greater detail in legislation and regulations. Humanitarian reasons which arise after the departure from the country of origin cannot provide grounds for the granting of a residence permit.

The assessment of whether an asylum seeker is eligible on the basis of individual convincing humanitarian reasons for an asylum residence permit only takes place after it has been determined that the foreign national is not eligible for the granting of an asylum residence permit on the grounds of Article 29, paragraph 1, (a) or (b) of the Aliens Act or the traumata policy.

#### *Specific groups*

Lastly the Minister can designate specific groups of asylum seekers who cannot reasonably be expected to return to their country of origin. For reasons other than traumata, they too are eligible for an asylum

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<sup>38</sup> C2/4 Aliens Act Implementation Guidelines

residence permit on the grounds of Article 29, paragraph 1 (c) of the Aliens Act. To date this policy-based option has been used twice.

As of 24 June 2006 single women with Afghan nationality have been designated as a specific group and are eligible for an asylum residence permit due to compelling humanitarian grounds.<sup>39</sup>

As of 29 November 2006, on the grounds of compelling humanitarian grounds, Iranian homosexuals, bisexuals and transsexuals have been designated as a specific group which, for reasons other than traumata, are eligible for an asylum residence permit on the grounds of Article 29, lid 1 (c) of the Aliens Act.<sup>40</sup>

### **The d-ground**

Based on the d-ground of Article 29, paragraph 1 of the Aliens Act, asylum residence permits can be granted to foreign nationals for whom repatriation to the country of origin would be particularly harsh in connection with the general situation there. This d-ground does not, therefore, offer any protection on individual grounds, but group protection or categorical protection.

This policy of categorical protection means that asylum seekers who come from (a certain part of) a country and/or belong to a certain population group are, in principle, given a temporary asylum residence permit on the basis of the situation in the country of origin. However, an assessment is first carried out to determine whether the applicant is eligible for an asylum residence permit on individual grounds, for example because the foreign national in question is a refugee within the meaning of the Convention on Refugees.

The Aliens Decree<sup>41</sup> provides the indicators which have to be included, in any event, in the assessment of whether a situation exists as referred to in Article 29, paragraph 1 (d) of the Aliens Act. These indicators are:

- the nature of the violence in the country of origin;
- the activities of international organisations as regards the country of origin;
- the policy in other EU countries.

During the review period the categorical protection policy applied to asylum seekers from the following areas.

#### *Burundi*

Since 26 March 1996, a categorical protection policy has been pursued as regards asylum seekers from Burundi.<sup>42</sup> As of 2 August 2006, it was decided that the categorical protection policy relating to people from Burundi should be ended.<sup>43</sup>

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<sup>39</sup> Decision by the Minister for Immigration and Integration of 2 June 2006, number 2006/22, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette*. 2006, 119, p.10. See also Ministry of Justice 2009 (*Immigration Process Report Period January-June 2009*), paragraph 2.2.5 (plus annex to the *Parliamentary documents II* 2009/10, 19 637, no. 1300 (Letter)). As detailed above in paragraph 2.1.2, Afghan single women are also designated as a vulnerable minority group for which a real and individual risk of treatment contrary to Article 3 ECHR is assumed sooner. The footnote to this passage in paragraph 2.1.2 details the broader definition of 'single woman in Afghanistan', which has applied since the coming into effect of the Decision by the State Secretary of Justice of 3 February 2010, no. 2010/1, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette*. 2010, 2112. This new definition also applies to the designation of single Afghan women as a specific group which, for reasons other than traumata, are eligible for an asylum residence permit on the grounds of Article 29, paragraph 1 (c) of the Aliens Act.

<sup>40</sup> Decision by the Minister for Immigration and Integration of 17 November 2006, no. 2006/38, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette*. 2006, 231. See also Ministry of Justice 2009 (*Immigration Process Report Period January-June 2009*), paragraph 2.2.5.

<sup>41</sup> Article 3.106 of the Aliens Decree.

<sup>42</sup> See the Decision by the Minister for Immigration and Integration of 01 July 2005, number 2005/37, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette*. 2005, 155, p. 8.

### *Iraq*

Since 22 November 2002 a policy of categorical protection has applied to asylum seekers from central Iraq.<sup>44</sup> This categorical protection policy ended on 24 February 2006.<sup>45</sup>

As of 2 April 2007, a policy of categorical protection has again become applicable to asylum seekers from central Iraq.<sup>46</sup> As of 22 November 2008 it was decided to end this categorical protection policy again.<sup>47</sup>

### *Democratic Republic of Congo*

On 21 April 2004, categorical protection was established for people who belong to the population group of ethnic Tutsis from the Democratic Republic of Congo (DRC).<sup>48</sup> The categorical protection policy for the population group of Tutsis in the Democratic Republic of Congo ended on 22 November 2008.<sup>49</sup>

### *Somalia*

As of 1 July 2005, a categorical protection policy was established for people of Somali nationality who do not come from the relatively safe part of Puntland or Somaliland. The provinces of Sool and Sanaag are not regarded as being included in the relatively safe part of Puntland and Somaliland.<sup>50</sup> The originally applicable categorical protection policy for people from the provinces of Sool and Sanaag ended on 11 October 2006.<sup>51</sup> The categorical protection policy for all other asylum seekers from Somalia also ended on 19 May 2009.<sup>52</sup>

### *Ivory Coast*

A categorical protection policy became effective for asylum seekers from Ivory Coast on 28 November 2005.<sup>53</sup> This policy still applies.<sup>54</sup>

### *Sudan*

A policy of partial categorical protection has been pursued for the southern non-Arab population groups and the Nuba population groups since 8 September 2000. As of 22 April 2004, this policy has been extended to include non-Arab population groups from the states of Northern, Western and Southern Darfur.<sup>55</sup>

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<sup>43</sup> Decision by the Minister for Immigration and Integration of 19 July 2006, no. 2006/24, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2006, 146.

<sup>44</sup> See the Decision by the Minister for Immigration and Integration of 13 July 2004, number 2004/44, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2004, no. 134, p. 12 2.

<sup>45</sup> See the Decision by the Minister for Immigration and Integration of 14 February 2006, number 2006/10, containing an amendment to the Aliens Act Implementation Guidelines 2000 *Dutch Government Gazette* 2006, 38, p. 13.

<sup>46</sup> Decision by the State Secretary of Justice of 21 May 2007, no. 2007/09, comprising an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 100, p. 42.

<sup>47</sup> Decision by the State Secretary of Justice of 10 November 2008, no. 2008/28, comprising an amendment to the Aliens Act Implementation Guidelines 2008, *Dutch Government Gazette* 771

<sup>48</sup> Decision by the Minister for Immigration and Integration of 7 April 2004, number 2004/28, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 2003 [must be 2004], 76, p. 10

<sup>49</sup> Decision by the State Secretary of Justice of 10 November 2008, no. 2008/26, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 2008, 774

<sup>50</sup> Decision by the Minister for Immigration and Integration of 27 June 2005, number 2005/34, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2005, 123.

<sup>51</sup> Decision by the Minister for Immigration and Integration of 26 September 2006, no. 2006/32, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 196, p. 13.

<sup>52</sup> Decision by the State Secretary of Justice of 2 July 2009, no. 2009/16, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette* 2009, 11449.

<sup>53</sup> Decision by the Minister for Immigration and Integration of 29 November 2005, number 2005/58, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2005, 237, p. 21.

<sup>54</sup> Aliens Act Implementation Guidelines 2000 (C) 24 country-specific policy [13] The asylum policy relating to Ivory Coast.

<sup>55</sup> Decision by the Minister for Immigration and Integration of 9 June 2004, no. 2004/36, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2004, no. 116, p. 10.

The categorical protection policy relating to Nuba population groups was ended on 1 September 2005. The same applies to the southern non-Arab population groups.<sup>56</sup> The categorical protection policy for the non-Arab population groups from the states of Northern, Western and Southern Darfur still applies.<sup>57</sup>

The Cabinet has expressed its intention to discontinue the categorical protection policy. On 11 December 2009 the State Secretary of Justice sent a memorandum which explored the various viewpoints entitled 'Vision of protection' to the Lower House of Parliament.<sup>58</sup> The State Secretary intended this memorandum to serve as a basis for the House to exchange ideas about the future of the protection policy. In a press release of 12 December 2009 the State Secretary expressed her intention to abolish the categorical protection policy in its entirety.<sup>59</sup> Debates on these proposals in the Lower House of Parliament have been postponed, due to the downfall of the Cabinet on 20 February 2010.

On the subject of this intention, the memorandum states that the risk of an inducing effect and fraud means that pursuing a categorical protection policy is no longer justified, and that, for legal content-related reasons as well, it is no longer necessary to pursue a national categorical protection policy. According to the State Secretary, the intended element of group protection is already safeguarded by international subsidiary protection.

In an interview with the *Volkskrant* newspaper of 12 December 2009, the State Secretary explains that she is justified in discontinuing the categorical policy because the Qualification Directive states exactly who is entitled to protection. 'One article in that directive refers to the situation in the country of origin. In the individual assessment this therefore continues to be a consideration. There is now also applicable case law. This means real refugees retain this basis for protection, but we are able to filter out fraud and improper use.'<sup>60</sup>

Article 15 (c) of the directive has already been discussed in paragraph 2.1.2. Precisely this article deals with the situation in the country of origin and, according to the State Secretary in her vision document, offers points of departure for her planned joint estimate of the situation in countries of origin and communal protection standards.

### **The e-ground**

On the basis of the e-ground of Article 29, paragraph 1 of the Aliens Act an asylum residence permit can be granted to foreign nationals who, as the husband or wife or underage child, actually belong to the family of the foreign national to whom an asylum permit has been granted on the a, b, c or d grounds, who has the same nationality as that foreign national and has travelled to the Netherlands at the same time as this foreign national or has travelled there within three months after said foreign national was granted the asylum residence permit.

### **The f-ground**

On the basis of the f-ground of Article 29, paragraph 1 of the Aliens Act, an asylum residence permit can be granted to foreign nationals who, as a partner or as adult child, is dependent on the foreign national to whom an asylum permit has been granted on the basis of the a, b, c or d grounds in such a way that, for that reason, they belong to the family of this foreign national, who has the same nationality as the foreign national and has travelled to the Netherlands with this foreign national at the same time, or has travelled there within three months after said foreign national was granted the asylum residence permit.

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<sup>56</sup> Decision by the Minister for Immigration and Integration of 23 August 2005, number 2005/42, containing an amendment to the Aliens Act Implementation Guidelines 2000. *Dutch Government Gazette* 2005, no. 167, p. 11.

<sup>57</sup> Aliens Act Implementation Guidelines 2000 (C) 24 country-specific policy [23] The asylum policy relating to Sudan.

<sup>58</sup> *Parliamentary documents II* 2009/10, 19 637, no. 1314 (Brief). This memorandum was discussed above in paragraph 2.2.1, and can, for example, be found at [www.justitie.nl](http://www.justitie.nl).

<sup>59</sup> <http://www.justitie.nl/actueel/persberichten/archief-2009/91212staatssecretaris-albayrak-wil-groepsgewijze-bescherming-asielzoekers-afschaffen.aspx?cp=34&cs=579>.

<sup>60</sup> R. Meijer, 'We do not always protect the good' [*We beschermen niet altijd de goeden*], *Volkskrant* 12 December 2009. [http://www.volkskrant.nl/binnenland/article1326763.ece/We\\_beschermen\\_niet\\_altijd\\_de\\_goeden](http://www.volkskrant.nl/binnenland/article1326763.ece/We_beschermen_niet_altijd_de_goeden).

The granting of an asylum permit on the e or f grounds means family members of a person with refugee status or the subsidiary protection status can claim the same rights and provisions as this same person. This ensures fulfilment of the safeguards imposed by Article 23 of the Qualification Directive as regards preserving the family.

## 2.2.2 The automatic granting of a regular permit

As mentioned at the beginning of this Chapter 2.2, the non-EU harmonised protection extends in the Netherlands beyond the asylum domain. First and foremost, there is a focus within this framework on the automatic granting of a regular residence permit, as a consequence of an asylum procedure. Paragraph 2.2.3 focuses on certain types of regular residence permits which can be granted following an application after a previous asylum procedure, or separately from this.

On the grounds of Article 14 of the Aliens Act it is possible to grant a temporary regular residence permit for a foreign national automatically, that is without an application having been submitted. Although a regular residence permit is then granted, and therefore not an asylum permit, this possibility can offer a supplementary form of national protection to certain categories of foreign nationals whose asylum applications have not been accepted. They are still automatically allowed to stay, either subject to the restriction of residency as an unaccompanied minor foreign national (unaccompanied minor foreign national residence permit), or subject to the restriction of a foreign national who is unable to leave the Netherlands through no fault of his own.

Detailed information on the automatic granting of a regular permit can be found in Chapter B14 of the Aliens Act Implementation Guidelines. There you will find a clarification of the conditions which apply to using that authority and to the granting of the residence permit. These conditions are similar to policy rules. For the sake of complete clarity: in order for an unaccompanied minor foreign national residence permit to be automatically granted it is essential that an asylum procedure has first been completed. A residence permit subject to the restriction of residency as a foreign national who is unable to leave the Netherlands through no fault of his own can also be automatically granted following a rejected application for a regular residence permit.

### **Unaccompanied minor foreign nationals**

If the asylum application is rejected, an unaccompanied minor foreign national can be eligible for a temporary regular residence permit subject to the restriction that it is linked to residency as an unaccompanied minor foreign national.<sup>61</sup> The unaccompanied minor foreign national residence permit can also be granted if an asylum residence permit is withdrawn.<sup>62</sup>

Only foreign nationals who are underage and unaccompanied can be eligible for an unaccompanied minor foreign national residence permit. Moreover, the unaccompanied minor foreign nationals in question must fulfil the conditions that they cannot support themselves independently in the country of origin or another country they could reasonably go to,<sup>63</sup> and that there are no adequate reception provisions, according to local criteria, in the country of origin or another country they could reasonably go to.<sup>64</sup> The passport requirement, which normally applies to the granting of a regular residence permit, does not apply to the granting of an unaccompanied minor foreign national residence permit.<sup>65</sup>

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<sup>61</sup> On the basis of Article 3.56 of the Aliens Decree. See more on this issue in the INDIAC – NL EMN NCP 2010a (EMN report entitled 'Unaccompanied Minor Foreign National policy and figures relating to reception, repatriation and integration' [*Alleenstaande Minderjarige Vreemdelingen in Nederland - AMV-beleid en -cijfers inzake opvang, terugkeer en integratie*]).

<sup>62</sup> Article 3.56, paragraph 1 (a) of the Aliens Decree 2000.

<sup>63</sup> Article 3.56, paragraph 1 (b) of the Aliens Decree 2000.

Different factors are important for the assessment of independence, such as age, facts and circumstances related to the person and personal backgrounds of the individual minor foreign national. If an unaccompanied minor can support himself independently, there will be no reason to assess the presence of adequate reception possibilities. Independence is not objected to if the minor is under the age of sixteen at the time of the decision.

<sup>64</sup> Article 3.56, paragraph 1 (c) of the Aliens Decree 2000.

Adequate reception means any form of reception in circumstances which are not essentially different from the circumstances in which reception is offered to contemporaries who are in a similar position as the unaccompanied minor foreign national. Adequate reception can consist of reception by, for example, parents and other family



The child will be assessed as being underage in accordance with Dutch law.<sup>66</sup> This means that the child has not yet reached the age of 18 and is not, or has not been, married. A minor is not an adult in the event of a marriage that is not recognised by Dutch private (international) law. However, such a marriage may be important for the assessment of whether the foreign national is single, or of the degree of independence and the reception possibilities.

If there is any doubt about the child's age, an investigation will be initiated.

Foreign nationals are regarded as unaccompanied if they are not accompanied by adult parent(s) or a guardian assigned abroad.<sup>67</sup>

Unaccompanied minor foreign nationals who, during the procedure, do not cooperate with such an investigation into the reception possibilities in the country of origin or another country, will not be eligible for an unaccompanied minor foreign national residence permit. This will be the case, if unaccompanied minor foreign nationals – including outside the context of the asylum report – make implausible and contradictory statements or if they make vague, summary statements and withhold information relating to identity, nationality or reception. In this context, psychological pressure, traumata, the intellectual development and age of the unaccompanied minor foreign national will be taken into account because, after all, a child cannot be expected to provide information with the same degree of completeness and detail as an adult.

The unaccompanied minor foreign national residence permit can be renewed annually after an assessment of whether the unaccompanied minor foreign national in question still fulfils the conditions for being eligible for this permit. In general, the permit will, in any case, cease to be valid when the child reaches the age of 18. Only unaccompanied minor foreign nationals who, upon reaching the age of 18, have already had an unaccompanied minor foreign national residence permit for three years, will in principle be entitled to a permit with the aim being 'continued residence' (in so far as all other conditions are also met).<sup>68</sup> This means in practice that unaccompanied minor foreign nationals who were fifteen or older at the time of their application for asylum and whose application for asylum has been rejected must leave the Netherlands after their eighteenth birthday. However, in exceptional cases involving special humanitarian grounds, the group in question also has the possibility of acquiring continued residence.

In a letter to the Lower House of Parliament dated 11 December 2009 regarding the 're-evaluation of policy relating to (unaccompanied) minor foreign nationals'<sup>69</sup> the State Secretary of Justice announced that she is going to abolish the unaccompanied minor foreign national permit. Debates on these proposals have been postponed as well, due to the downfall of the Cabinet on 20 February 2010.

The State Secretary does not regard it to be in the interest of unaccompanied minor foreign nationals, who cannot claim an asylum permit, to grant them a temporary permit which then lapses when they reach the age of majority. She is of the opinion that the abolition of the unaccompanied minor foreign national permit provides clarity regarding the asylum prospects and is in the interest of rapid repatriation. According to the State Secretary, the granting of unaccompanied minor foreign national permits sends a contradictory signal, 'not only to the young people themselves, but also to supervisors and social workers'. The fact that they acquire a permit makes the young people focus on integration and not on repatriation, despite them having a temporary status. Most permit holders have to return as soon as they reach the age of eighteen.

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members, but also by friends, neighbourhoods, kinsmen, clan members, or fellow-villagers and reception by (private) welfare institutions.

<sup>65</sup> See below, in the opening words to paragraph 2.2.3, for the generally applicable conditions for granting a regular residence permit.

<sup>66</sup> Article 1"233 of the Dutch Civil Code.

<sup>67</sup> C2/7.1.3. Aliens Act Implementation Guidelines 2000.

<sup>68</sup> This purpose of stay is covered by the category of regular residence permits. The policy relating to continued residence is laid down in paragraph C2/7.7 of the Aliens Act Implementation Guidelines 2000.

<sup>69</sup> *Parliamentary documents II* 2009/10, 27 062, no. 64 (Letter)

The State Secretary considers the abolition of the unaccompanied minor foreign national permit in conjunction with the new asylum procedure to be introduced in mid 2010. Unaccompanied minor foreign nationals then have a rest and preparation period of at least three weeks, a longer period than applies to adults, who have a minimum of six days to rest and prepare. The reason for this difference is that, during the three week period, the unaccompanied minor foreign national has to contact more organisations than an adult. For example, solitary underage foreign nationals are placed under the guardianship of the NIDOS foundation, are allocated a guardian and a COA (Central Agency for the Reception of Asylum Seekers) mentor, and sometimes start attending school in the Netherlands. The State Secretary's aim is to limit the uncertainty regarding asylum prospects and will therefore try to complete the asylum procedure within one year, including the appeals procedure.

#### **Foreign nationals who are unable to leave the Netherlands through no fault of their own**

Another category of foreign nationals to whom a temporary regular residence permit can be granted automatically concerns those foreign nationals who are unable to leave the Netherlands through no fault of their own.

The point of departure for the Dutch policy is that all foreign nationals are able to return to their country of origin. Nevertheless, exceptional situations may arise in which a foreign national is unable to leave the Netherlands through no fault of his own because he cannot obtain the necessary travel documents, despite their being no doubt about the details he has provided regarding his identity and nationality. This may be the case, for example, if the foreign national is stateless and if he is unable to gain re-entry to the country where he previously had continuous residency.

In these cases the foreign national may be eligible for a residence permit under the restriction 'residency as a foreign national who, through no fault of his own, cannot leave the Netherlands'.

The foreign national must be able to prove, using objective verifiable evidence that the authorities of the country of origin or of the country where he had residency, will not cooperate in his repatriation. The foreign national is himself partly responsible as regards attempting to acquire the necessary cooperation from the authorities concerned, and as regards acquiring the necessary travel documents.

There are three categories of foreign nationals who may become eligible for a residence permit on the grounds of the policy applicable to foreign nationals who are unable to leave the Netherlands through no fault of their own. These categories are: foreign nationals who have tried to leave unsuccessfully, unaccompanied minor foreign nationals and foreign nationals who have exhausted all legal remedies and who cannot leave for medical reasons.<sup>70</sup>

#### *Foreign nationals who have tried to leave unsuccessfully*

In order to become eligible for a residence permit on the grounds of the special policy described here, the foreign national must first have contacted the representatives of his country of origin and any countries of previous residency. The foreign national becomes eligible for residency if all the following conditions are fulfilled:

1. the foreign national has himself tried to arrange his departure. He can prove that he has contacted the representatives of the country or the countries of which he has the nationality, or the country or the countries where he previously had his habitual residence as a stateless foreign national, and/or other countries with regard to which it can be assumed, on the basis of all the facts and circumstances, that the foreign national will be granted access; and
2. he has contacted the IOM to facilitate his departure and this organisation has indicated that it is unable to arrange the departure of the foreign national due to the fact that the foreign national claims that he does not have travel documents; and
3. he has requested mediation by the DT&V as regards obtaining the required documents from the authorities of the country he is allowed to go to, and this mediation has not produced the desired result; and

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<sup>70</sup> This policy is detailed in B14/3.2.2 of the Aliens Act Implementation Guidelines

4. there is a coherent whole of facts and circumstances which provide grounds for ascertaining that the person involved cannot leave the Netherlands through no fault of his own; and
5. he is residing in the Netherlands without a residence permit and does not fulfil other conditions for a residence permit.

As can be concluded from the conditions, this policy not only applies to asylum seekers who have exhausted all legal remedies since, in principle, other undocumented foreign nationals may also be eligible.

*Unaccompanied minor foreign nationals who have exhausted all legal remedies*

An unaccompanied minor foreign national who has exhausted all legal remedies may be eligible for a residence permit on the grounds of the policy relating to foreign nationals who are unable to leave the Netherlands through no fault of their own, if:

- the foreign national, after having exhausted all legal remedies as an unaccompanied minor foreign national, has resided in the Netherlands for three consecutive years or longer despite having to be legally repatriated;
- his departure from the Netherlands has not been arranged in that period of three years or longer;
- the foreign national, after the end of that three year period, has not yet reached the age of eighteen; and
- the foreign national has cooperated sufficiently with the investigation that, with a view to his repatriation, was carried out into adequate reception in his country of origin or third country.

The unaccompanied minor foreign national is expected to have cooperated sufficiently as regards confirming his identity and nationality within the framework of the application of a replacement travel document. If the foreign national has refused to cooperate with an age testing or if, during such cooperation, the foreign national has turned out to be an adult, he will not be eligible for the residence permit referred to here.

*Foreign nationals who cannot leave for medical reasons*

Lastly, a residence permit on the grounds of the policy relating to foreign nationals who are unable to leave the Netherlands through no fault of their own can be granted to foreign nationals who are obliged to leave the Netherlands but who have been deemed permanently unable to travel due to their state of health. This group also includes foreign nationals who cannot physically be transferred in the long term to a medical institution or health care practitioner in the country of origin following the journey, meaning that they cannot travel due to their state of health.

A physical transfer to a medical institution or health care practitioner following the journey means that medical treatment must be continued immediately after arrival.

The foreign national and the institutions involved must have done all they can to arrange the departure from the Netherlands. The conclusion as to whether they have done this depends on the specific facts and circumstances of the case. In so far as medically possible, the foreign national will be expected to adopt a cooperative attitude, in the sense that his activities do not frustrate the departure. The foreign national must have cooperated fully with the application for a replacement travel document if he does not have documents which facilitate the repatriation.

### 2.2.3 Regular permits for which an application has to be submitted

A number of regular residence permits, which cannot be granted automatically, but for which an application has to be submitted, can provide a supplementary form of national protection to certain categories of foreign nationals whose asylum applications have not been accepted.

This relates to residency subject to the medical treatment restriction or, following on from this, a medical emergency. In addition, repatriation may not take place for medical reasons on the grounds of Article 64 of the Aliens Act. However, this is not accompanied by the granting of a residence permit.

A special case is Article 3.4, paragraph 3 of the Aliens Decree, that regulates the discretionary power to grant a residence permit.

A regular residence permit subject to another restriction which can offer a form of protection is linked to the prosecution of human trafficking. Human trafficking covers not only forced prostitution, but all forms of modern slavery and exploitation. The policy is detailed in Chapter B9 of the Aliens Act Implementation Guidelines. This policy has been harmonised within the EU through the implementation of Directive 2004/81/EC relating to the granting of a residence permit for victims of human rights violations.<sup>71</sup> It is, therefore, outside the scope of this report, which is about the non-EU harmonised forms of protection.<sup>72</sup>

### **General conditions**

Among others, the following apply generally to the granting of a regular residence permit:

- the passport requirement: the applicant must have a valid passport, identity card or any other document satisfactorily establishing nationality,
- the Regular Provisional Residence Permit requirement: the applicant must have a Regular Provisional Residence Permit applied for in the country of origin (a D-visa); and
- the means requirement: the applicant must have sufficient means of existence.

An application for a temporary regular residence permit must always include a reference to the purpose of stay. The residence permit is then granted subject to a restriction which is related to this purpose of stay.<sup>73</sup> Each purpose of stay is subject to supplementary conditions, and the generally applicable conditions may also be deviated from. This is the case as regards regular residence permits which offer a supplementary form of national protection.

The Regular Provisional Residence Permit obligation does not apply to all, but nevertheless to the vast majority of nationalities. If the foreign national has a nationality which requires a Regular Provisional Residence Permit an application for the granting of a temporary regular residence permit may be rejected if the foreign national does not have a valid Regular Provisional Residence Permit. This is a visa for residency for longer than 90 days,

- for which an application must be submitted to the Dutch representative in the country of origin or continuous residency, and
- which is issued for the same purpose of stay as for which a residence permit is applied for later.

By demanding that the foreign national has a valid Regular Provisional Residence Permit, the Dutch government can check whether the foreign national fulfils the requirements for admission before he arrives in the Netherlands.

A (former) asylum seeker will not fulfil the Regular Provisional Residence Permit requirements. This is because, prior to his application for a regular residence permit, he will have been involved in an asylum procedure here in the Netherlands. The assessment of any subsequent regular application involves – partly in the light of international obligations, including those of Article 8 ECHR – determining whether an exemption from the Regular Provisional Residence Permit requirement exists and if necessary from other requirements relating to the regular permit.

### **Residence in connection with medical treatment or medical emergency**

Among other things, foreign nationals can apply for a regular residence permit in connection with undergoing medical treatment. If an asylum seeker wants residency in the Netherlands in connection with medical treatment which he is going to undergo here, he can submit a relevant application for a regular residence permit after rejection of his application for asylum.<sup>74</sup> The treatment of this regular application will not take any account of asylum aspects.<sup>75</sup>

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<sup>71</sup> Directive 2004/81/EC of the Council of 29 April 2004 concerning residence permits issued in exchange for cooperation with the competent authorities to third country nationals who have been victims of human trafficking or have been assisted in connection with illegal immigration. *PbEU* 2004, L 261/19-23.

<sup>72</sup> A description of the B9 regulation can be found in INDIAC – NL EMN NCP 2008, paragraph 3.3.2. Additions to this are provided in INDIAC – NL EMN NCP 2009, paragraph 3.3.10 and INDIAC – NL EMN NCP 2010, paragraph 4.10.2.

<sup>73</sup> Article 3,4, paragraph 1 of the Aliens Decree provides an overview of all the restrictions that apply to the granting of a regular residence permit.

<sup>74</sup> Since the introduction of the improved asylum procedure (see below in paragraph 3.1.1, this will also be possible parallel to the asylum procedure, and not simply after the rejection. The letter from the State Secretary of Justice to the

Before residency is permitted, the three following conditions have to be fulfilled:

- the Netherlands must be the designated country for the medical treatment.
- the medical treatment must be essential and
- the financing of the medical treatment must be properly arranged.

If these conditions are not fulfilled,<sup>76</sup> an ex-asylum seeker may well be eligible, as a continuation of the application for residency for medical treatment, for residency on the grounds of a medical emergency.<sup>77</sup> This means situations whereby the person involved is suffering from a disorder with regard to which it has been decided, based on current medical and scientific opinion, that the lack of treatment in the short term will lead to death, invalidity or another form of serious mental or physical damage. The term 'in the short term' means within a deadline of three months,

The fact that the medical emergency is a continuation of the application in connection with medical treatment, no separate application has to be submitted if the original application was for residency for medical reasons.<sup>78</sup>

In order to be eligible for a residence permit in connection with this exemption clause, the person involved must be in the Netherlands and the following circumstances must apply:

- discontinuation of the medical treatment will lead to a medical emergency; and
- medical treatment of the medical complaints in question cannot take place in the country of origin or another country to which the person involved can depart to; and
- the medical treatment to prevent this emergency from occurring is expected to last for longer than one year.

In fact, if the medical treatment to prevent this emergency is going to take one year or less, no residence permit will be granted and instead the repatriation of the foreign national will be suspended on the grounds of Article 64 of the Aliens Act (see below) and the foreign national will be entitled to provisions during this period.

Besides the specific conditions for granting a regular residence permit in order to undergo medical treatment or due to a medical emergency, the general conditions are applicable, with the exception of the means requirement. Exemption from the requirement that the applicant has a Regular Provisional Residence Permit (a D-visa) can be granted if it would not be responsible for the ex-asylum seeker to travel due to his state of health or, if he cannot be asked to return because the required medical treatment cannot take place after repatriation.

### **The withholding of repatriation**

The suspension of repatriation is laid down in Article 64 of the Aliens Act.

Any foreign national who does not have, or no longer has, lawful residency must leave the Netherlands on his own initiative within a period of four weeks. Failure to do so will mean he can be repatriated.<sup>79</sup>

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Lower House of Parliament of 7 October 2009 contains information on 'medical problems and the immigration policy', *Parliamentary documents II* 2009/10, 19 637, no. 1305 (Letter)

<sup>75</sup> The policy relating to medical treatment is detailed in Chapter B/8 of the Aliens Act Implementation Guidelines.

<sup>76</sup> For example because the applicant does not have a valid Regular Provisional Residence Permit and cannot be exempt from this, or because the financing is not properly arranged.

<sup>77</sup> Since the introduction of the improved asylum procedure (see below in paragraph 3.1.1, one year's residency will always be started on the grounds of Article 64 of the Aliens Act, with any residence permit only being granted thereafter. The letter from the State Secretary of Justice to the Lower House of Parliament of 7 October 2009 contains information on 'medical problems and the immigration policy', *Parliamentary documents II* 2009/10, 19 637, no. 1305 (Letter)

<sup>78</sup> In effect, no separate application can be submitted for this. The application is then always for medical treatment. After assessment based on the conditions for medical treatment, the IND will automatically continue to assess the conditions for residency based on medical necessity.

<sup>79</sup> Article 61 of the Aliens Act, Article 62 of the Aliens Act, Article 63 of the Aliens Act

However, Article 64 of the Aliens Act states that repatriation must not take place as long as the state of health of the foreign national or of one of his family members means it would not be responsible to travel. In this context, family members are regarded as being:

- spouses and (registered) partners and their respective minor children (from previous marriages);
  - the adult children who actually belong to the family and already did so in the country of origin.
- The parents, brothers and sisters of the child may also be considered family members, subject to certain conditions, if the sponsor is an underage child.<sup>80</sup>

In this case the foreign national therefore has lawful residency because the repatriation would be in violation of Article 64 of the Aliens Act.<sup>81</sup> However, he will not be given a residence permit and therefore will not have a residence status. At the end of the period during which repatriation is withheld, the foreign national will still have to leave the Netherlands.

Article 64 may apply to a(n) (rejected) asylum seeker in two ways.

Within the framework of the processing of an application submitted by the (ex) asylum seeker with a view to undergoing medical treatment or due to a medical emergency, an automatic assessment will take place of whether repatriation should be withheld on the grounds of Article 64 of the Aliens Act.<sup>82</sup>

If an asylum seeker believes that he cannot be repatriated in connection with his state of health, he can invoke Article 64 of the Aliens Act, without having to submit an application for a regular residence permit for medical reasons.<sup>83</sup>

#### **Residence as a consequence of the Minister using his discretionary power**

The restrictions applicable to the granting of a regular residence permit are listed in Article 3.4, paragraph 1 of the Aliens Decree. However, the Minister of Justice has the discretionary power (freedom to decide) to grant a regular residence permit subject to a different restriction to the one referred to. This discretionary power is laid down in Article 3.4, paragraph 3 of the Aliens Decree. This power can be invoked in two ways. If unforeseen cases are of a categorical nature, a policy rule will be drawn up the whole group, usually on the grounds of this power. In addition, exceptional individual situations may provide grounds for proceeding to grant using the discretionary power.

This authority is limited to the issuing of a regular residence permit. An asylum permit can only be issued on the basis of grounds a to f of Article 29 of the Aliens Act, as referred to in detail above. An asylum procedure conducted by the foreign national cannot therefore result in the issuing of a regular residence permit based on the discretionary power on the grounds of Article 3.4, paragraph 3 of the Aliens Decree. If a regular application is submitted following an asylum procedure, this can, of course, result in the issuing of a such regular residence permit.

Generally, the Minister's discretionary power will only be used if the foreign national's individual circumstances are so special that they provide grounds for deciding that their situation is extreme, with the foreign national not being eligible, on the grounds of the policy, for either an asylum permit or a regular permit.

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<sup>80</sup> See paragraph A4/7.1 of the Aliens Act Implementation Guidelines

<sup>81</sup> Article 8 opening words and under j of the Aliens Act.

<sup>82</sup> Article B/8, 10 of the Aliens Act Implementation Guidelines.

<sup>83</sup> Article A/4, 7 of the Aliens Act Implementation Guidelines.

## 3. Procedures followed and rights granted

This chapter outlines the procedures and the rights relating to all the different non-EU harmonised protection statuses. The Netherlands applies a single status asylum system which means that all asylum permits are subject to the same rights, irrespective of the ground they have been granted on. In a general sense these rights are more robust than those associated with the different regular residence permits. The various regular residence permits do not always offer the same rights.

### 3.1 Procedures followed

The Immigration and Naturalisation Service (IND) is, as an independent agency of the Ministry of Justice, responsible for the implementation of immigration policy in the Netherlands. This means that the IND assesses all applications from foreign nationals who want to stay in the Netherlands or who want to acquire Dutch nationality. This not only involves asylum seekers but also, for example, people who want to work and live in the Netherlands or people who seek naturalisation after being admitted. The IND is an implementing body. This means that the IND is not responsible for the content of the applicable policy or conditions. The immigration policy is set by the government and parliament.<sup>84</sup>

#### 3.1.1. Asylum procedures

##### **Registration**

Foreign nationals can submit an application for asylum to one of the IND application centres at Schiphol or Ter Apel. Applications can be submitted free of fee. Applications for asylum cannot be submitted to, for example, Dutch embassies and consulates abroad.

Asylum seekers who have reported at a Dutch external border (port or airport) and who have been refused admission, must submit their application for asylum to the application centre (AC) at Schiphol. A measure for the deprivation of liberty will be imposed on them during what is referred to as the AC procedure. If the application for asylum is rejected, access will continue to be refused and the measure for the deprivation of liberty will, in principle, be continued until the foreign national departs.

All other asylum seekers must submit their application for asylum to the AC in Ter Apel.

##### **The 48 hour procedure**

The procedure at the application centre lasts no longer than 48 working hours (3 to 5 working days). For that reason it is referred to as the 48 hour procedure. During an intake (the initial interview) the asylum seeker will discuss his identity, nationality and route travelled with an IND employee. During a second interview, the detailed interview, the asylum seeker can explain why he has applied for asylum. A legal assistance counsellor prepares the asylum seeker for this interview and may also be present. The questions are drawn up in Dutch. For that reason an independent interpreter is also present. Within 48 procedure hours (= five working days) the asylum seeker will be told whether additional investigations are necessary or that his application is to be granted or rejected.

##### **Referral to a processing office**

After the initial interview the IND may opt in advance to continue the procedure in the AC if one or more of the following circumstances apply:

- contraindications relating to public order;
- unconvincing statements regarding identity, nationality and/or route travelled, or a failure to cooperate with determining these;
- the existence of another country that is responsible for processing the application for asylum and/or for granting any necessary protection;
- policy-related or statutory contraindications for the granting of status (for example a safe country of origin, legal departure or other indications on the grounds of the country-specific asylum policy);

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<sup>84</sup> 'This is what the IND does' at <http://www.ind.nl>

- wrongful use of the asylum procedure (for example asylum shopping).

Applications which are immediately not suitable for further investigation in the context of the AC procedure and which, therefore, will be forwarded to a processing office for processing after the initial interview concern asylum seekers:

- who belong to the category of legally not to be repatriated based on policy (categorical protection is offered or a decision or departure moratorium applies); and
- whose identity, nationality and route travelled are not disputed; and
- for whom no other country is responsible; and
- who is not subject to any other contraindications.

If an application for asylum is possibly eligible for processing within the framework of the AC procedure, the detailed interview will take place at the AC. After the detailed interview, a decision may still be taken to continue processing the asylum seeker's application within the framework of a follow-up procedure.

If it transpires that further investigation is necessary, the asylum seeker will be referred on to the IND's processing office. There, a (second) detailed interview will take place. After the detailed interview at the processing office, the IND will take a decision within six months. The asylum seeker will then stay temporarily in a reception location run by the Central Agency for the Reception of Asylum Seekers (COA).

### **The assessment of an application for asylum**

After it has conducted any necessary investigations, the IND will take a decision on the application for asylum. In this context the IND can use what is referred to as the Official Country Reports (relating to the country of origin) and Official Individual Reports (relating to individual applications) by the Ministry of Foreign Affairs. During the process, the ministry assumes the role of an independent expert that provides information on asylum seekers' countries of origin.<sup>85</sup>

In order to ensure that it takes a careful decision, the IND can also obtain information from other objective sources. The IND may only deviate from the deadline of six months in exceptional cases, for example if advice from, or investigations by, external experts are needed in order to take a decision, or if the situation in the country the asylum seeker comes from is unclear or unsafe and the expectation is that this will not last for long. In certain cases a decision moratorium can be declared, as detailed below.

### **The decision on an application for asylum**

If the asylum seeker fulfils the conditions for an asylum residence permit, he will be issued with a temporary residence permit. He may later apply for a permanent residence permit.

If the IND is of the opinion that the asylum seeker does not fulfil the conditions for an asylum residence permit, he will be informed in writing that his application is going to be rejected. The asylum seeker and his legal assistance counsellor may respond to this decision. If the IND does not change its mind, the asylum seeker will be sent a rejection and must leave the Netherlands.

### **Legal remedies**

If the IND rejects the application for asylum, the asylum seeker will be obliged to leave the country. The asylum seeker can, however, bring appeal proceedings at a court against a decision to reject. If the asylum seeker appeals, the obligation to leave the country will temporarily lapse. The asylum seeker can, therefore, await the outcome of the appeal procedure in the Netherlands. The asylum seeker will then stay in one of the COA reception locations.

Exceptions to this rule apply if, for example, the application for asylum has already been rejected at the application centre, or if the applicant has previously submitted an application for asylum which was then rejected and if he is now unable to submit any new facts or circumstances. In these cases he may

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<sup>85</sup> More information on official reports can be found at <http://www.minbuza.nl/nl/actueel/ambtsberichten>



not await the outcome of the appeals procedure in the Netherlands. However, he can ask the court to issue a Provisional Ruling to prevent repatriation. The asylum seeker may then, in principle, await the verdict in the Netherlands.

If the court declares the asylum seeker's appeal to be well-founded, the IND must re-assess the application. If the court dismisses the appeal, the IND's decision will stand.

Both the foreign national and the State Secretary of Justice can appeal against the court's verdict to the Administrative Jurisdiction Division of the Council of State (hereinafter to be referred to as: the Division). The verdict pronounced in response to this additional appeal may not be awaited in the Netherlands. If the Division declares the asylum seeker's appeal to be well-founded, the application must be re-assessed. If the Division declares the State Secretary's appeal to be well-founded, the rejection of the application for asylum will be definite. The Division may also refer the case back to the court, meaning that the court must again decide on the appeal. A rejection of the additional appeal means the Department confirms the court's verdict.

### **Decision and departure moratoria**

Sometimes no immediate decision is taken on applications for asylum from people from a certain country. What is referred to as a 'decision moratorium' then applies. A decision moratorium can be declared for three reasons:

- There is a (temporary) lack of clarity regarding the security situation in a particular country.
- There is an unsafe situation in a country of origin, although this is expected to last only a short time.
- There are so many applications for asylum from a particular country that the IND needs more time to make a decision.

In the event of a decision moratorium, the standard period for making a decision of six months can be extended to a maximum of one year. During this period, the asylum seekers will be lawfully resident in the Netherlands because their applications for asylum are still being processed. If the Cabinet cancels the decision moratorium, the extended period for making a decision will apply to cases for which the deadline has already been extended. New applications for asylum by people from the same country are again subject to the standard six month period for making a decision.

Other situations are imaginable in which, after the application has been irrevocably rejected and the foreign national is required to leave the Netherlands, the situation in the country of origin changes in such a way that it is not certain whether they can be repatriated. In such a situation the Minister can decide<sup>86</sup> that this category of foreign nationals are not to be forcibly repatriated. What is referred to as a 'departure moratorium' then applies.<sup>87</sup>

A foreign national who is covered by this departure moratorium has lawful residence in the Netherlands. He will be issued with proof of lawful residence for the duration of the departure moratorium. The period of validity of the lawful residence is equal to the period of the departure moratorium. The document is issued by the Aliens Police.

A decision moratorium and a departure moratorium often apply simultaneously to a certain area.

In the review period the following decision moratoria and temporary stops on departures were applicable:

#### *Iraq*

A decision moratorium and departure moratorium applied to Northern Iraq from the beginning of the review period until 1 February 2004.<sup>88</sup> A decision moratorium and departure moratorium applied to Central Iraq from the beginning of the review period until 27 June 2004.<sup>89</sup>

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<sup>86</sup> On the basis of Article 45, paragraph four of the Aliens Act

<sup>87</sup> See C/22, paragraph 6 of the Aliens Act Implementation Guidelines

<sup>88</sup> Decision by the Minister of Immigration and Integration van 27 June 2003, no. 5230798/03/DVB, *Dutch Government Gazette*. 2003, 122, p. 9 (extension); Decision by the Minister of Immigration and Integration van 23 January 2004, no. 5263444/04/DVB, *Dutch Government Gazette*. 2004, 18, p. 12 (termination)

### *Liberia*

A decision moratorium and departure moratorium applied to asylum seekers from Liberia from the beginning of the review period until 27 June 2004.<sup>90</sup>

### *Somalia*

A departure moratorium applied from 18 June 2004 to 20 February 2005 to asylum seekers from Somalia who belong to a minority and who do not have ties with Northern Somalia.<sup>91</sup> A departure moratorium applied from 20 February 2005 to 1 July 2005 to asylum seekers from Somalia who do not come from Somaliland, Puntland or Southern Mudug.<sup>92</sup>

### *Ivory Coast*

A decision moratorium and departure moratorium applied to asylum seekers from Ivory Coast from 27 November 2004 until 27 November 2005.<sup>93</sup>

### *Iran*

A decision moratorium and departure moratorium applied to homosexual asylum seekers from Iran from 2 October 2005 until 5 March 2006,<sup>94</sup> and again from 19 May 2006 to 2 October 2006.<sup>95</sup> A decision moratorium and departure moratorium applied to Iranian (born, converted and converting) Christians from 19 May 2006 until 19 May 2007.<sup>96</sup>

### *Libya*

A decision moratorium and departure moratorium applied to asylum seekers from Libya from 19 July 2006 until 1 July 2007.<sup>97</sup>

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<sup>89</sup> Decision by the Minister of Immigration and Integration van 27 June 2003, no. 5230798/03/DVB, *Dutch Government Gazette*. 2003, 122, p. 9 (establishment); Decision by the Minister of Immigration and Integration van 23 January 2004, no. 5263444/04/DVB, *Dutch Government Gazette*. 2004, no. 18, p. 12 (extension); Decision by the Minister of Immigration and Integration van 25 June 2004, no. 5290955/04/DVB, *Dutch Government Gazette*. 2004, 122, p. 12 (termination).

<sup>90</sup> Decision by the Minister of Immigration and Integration van 27 June 2003, no. 5231470/03/DVB, *Dutch Government Gazette*. 2003, 122, p. 9 (establishment); Decision by the Minister of Immigration and Integration van 23 January 2004, no. 5265473/04/DVB, *Dutch Government Gazette*. 2004, 18, p. 12 (extension); Decision by the Minister of Immigration and Integration van 25 June 2004, no. 5292943/04/DVB, *Dutch Government Gazette*. 2004, 122, p. 12 (termination)

<sup>91</sup> Decision by the Minister of Immigration and Integration van 11 June 2004, no. 5290526/04/DVB, *Dutch Government Gazette*. 2004, 112, p. 15 (establishment); Decision by the Minister of Immigration and Integration van 11 February 2005, no. 5336028/05/DVB, *Dutch Government Gazette*. 2005, 35, p. 22 (withdrawal)

<sup>92</sup> Decision by the Minister of Immigration and Integration van 11 February 2005, no. 5336028/05/DVB, *Dutch Government Gazette*. 2005, 35, p. 22 (establishment)

<sup>93</sup> Decision by the Minister of Immigration and Integration van 24 November 2004, no. 5319510/04/DVB, *Dutch Government Gazette*. 2004, 229, p. 12 (establishment); Decision by the Minister of Immigration and Integration van 27 May 2005, no. 5349656/05/DVB, *Dutch Government Gazette*. 2005, 103, p. 13 (extension)

<sup>94</sup> Decision by the Minister of Immigration and Integration van 28 September 2005, no. 5368748/05/DVB, *Dutch Government Gazette*. 2005, 190, p. 12 (establishment); Decision by the Minister of Immigration and Integration van 28 February 2006, no. 5404471/06/DVB, *Dutch Government Gazette*. 2006, 45, p. 19 (termination)

<sup>95</sup> Decision by the Minister of Immigration and Integration van 12 May 2006, no. 5417162/06/DVB, *Dutch Government Gazette*. 2006, 96, p. 11 (extension, subject to withdrawal of the previous decision until termination of the decision moratorium and departure moratorium). As mentioned above in paragraph 2.2.1, on the grounds of convincing reasons of a humanitarian nature, Iranian homosexuals, bisexuals and transsexuals have been designated as a specific group which, for reasons other than traumata, are eligible for an asylum residence permit on the grounds of Article 29, paragraph 1 (c) of the Aliens Act.

<sup>96</sup> Decision by the Minister of Immigration and Integration van 12 May 2006, no. 5417162/06/DVB, *Dutch Government Gazette*. 2006, 96, p. 11 (establishment); Decision by the Minister of Immigration and Integration van 13 July 2007, no. 5405947/07/DVB, *Dutch Government Gazette*. 2007, 96, p. 11 (termination)

<sup>97</sup> Decision by the Minister of Immigration and Integration van 07 July 2006, no. 5429257/06/DVB, *Dutch Government Gazette*. 2006, 136, p. 11 (establishment); Decision by the Minister of Immigration and Integration van 15 December 2006, no. 5458880/06/DVB, *Dutch Government Gazette*. 2007, 3, p. 12 (extension)

### *Sri Lanka*

A decision moratorium and departure moratorium applied to asylum seekers from Tamils from Sri Lanka from 10 March 2007 until 1 July 2007.<sup>98</sup>

### *Guinea*

A decision moratorium and departure moratorium applied to asylum seekers from Guinea from 5 May 2007 until 1 April 2008.<sup>99</sup>

### **Measures to increase the speed and precision of the asylum procedure**

The Cabinet intends to make the asylum procedure faster and more precise. The aim is to complete the legislation process before 1 July 2010. Extensive details of the proposed measures can be found in the Dutch Annual Policy Report 2008.<sup>100</sup> Put briefly the measures come down to the following.<sup>101</sup>

The asylum procedure at the application centre is to be extended to eight days. This offers more time to provide information and legal aid to asylum seekers. The expectation is that this measure will lead to more applications being processed at the application centre. Before the procedure starts, the asylum seeker will be allowed a rest and preparation period. This will provide time for a medical examination and an improved identification process. It will also allow the investigation to be started into documents which support the asylum application. The longer procedure at the application centre will probably mean that fewer asylum seekers will proceed to the extended asylum procedure. This extended procedure will be eight weeks shorter because of more process phases being completed at the application centre. The Cabinet wants to avoid a situation in which ex-asylum seekers submit repeated applications for asylum and regular applications. The Cabinet wants to achieve this by identifying medical aspects as soon as possible during the procedure and by extending what is known as 'ex nunc assessment'. This means that the IND will be able to make more extensive use of the possibilities for including facts and circumstances which only came to light after the decision was taken and for possibly withdrawing or amending a decision that has been taken.<sup>102</sup>

On 15 December 2009 the Lower House of Parliament adopted the Bill amending the Aliens Act 2000 in connection with the amendment of the asylum procedure.<sup>103</sup>

### **3.1.2. Regular procedures**

Chapter 2 examined a number of regular residence permits which offer a supplementary form of national protection to the asylum seeker. Some of these regular residence permits are granted after automatic assessment, while an application has to be submitted for others. Different rules and procedures apply to an application for a regular residence permit than to an application for asylum. The automatic granting of a regular residence permit is an exception to the rule that a regular residence permit is granted on the basis of an application. For that reason, this paragraph is structured differently than Chapter 2. The fact that the automatic granting of a regular residence permit is, in certain cases, the direct result of the application for asylum, the processing thereof referred to in Chapter 2 precedes the processing of the regular residence permit for which an application has to be submitted and which, therefore, does not result from the application for asylum.

Incidentally, preparations are in full swing for the introduction of a new migration policy, known as the Modern Migration Policy, which is expected to come into effect at the beginning of 2011. The new policy will be based more on the need for certain migrants that exists in Dutch society. Procedures are to be made faster and more flexible for immigrants who are able to contribute to the economy, science or

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<sup>98</sup> Decision by the State Secretary of Justice of 2 March 2007, no. 5468251/07/DVB, *Dutch Government Gazette*. 2007, 3, p. 12 (establishment); Decision by the State Secretary of Justice of 14 September 2007, no. 5504480/07/DVB, *Dutch Government Gazette*. 2007, 186, p. 7 (termination of departure moratorium).

<sup>99</sup> Decision by the State Secretary of Justice of 20 April 2007, no. 5480819/07/DVB, *Dutch Government Gazette*. 2007, 85, p. 7.

<sup>100</sup> INDIAC - NL EMN NCP 2009, p. 22 ff.

<sup>101</sup> See [http://www.regering.nl/Onderwerpen/Integratie\\_en\\_migratie/Asiel\\_procedures\\_en\\_regels](http://www.regering.nl/Onderwerpen/Integratie_en_migratie/Asiel_procedures_en_regels)

<sup>102</sup> See INDIAC - NL EMN NCP 2009, paragraph 3.3.2.

<sup>103</sup> See INDIAC - NL EMN NCP 2010.

culture in the Netherlands. Although ex-asylum seekers are not necessarily members of this target group, the introduction of the Modern Migration Policy in 2011 will also have consequences for the procedures examined below.

### **Regular residence permits for which an application has to be submitted**

As explained in paragraph 2.2.3, a number of regular residence permits, for which an application has to be submitted, provide a supplementary form of national protection to certain categories of foreign nationals whose asylum applications have not been accepted. The procedures that apply to these applications and the processing thereof are different to those that apply to an application for asylum. The procedural regulations relating to the application for a regular residence permit are laid down in Chapter B1/9 of the Aliens Act Implementation Guidelines.

#### *The application*

The application for a regular residence permit must be submitted in writing and in person to the IND. Fees will be payable for processing the application. Other formal requirements are that the application has to be signed and the necessary details provided to allow an assessment of the application. The fact that a temporary regular residence permit is always granted subject to a certain restriction means the applicant must indicate his purpose of stay.

In many cases this application procedure is preceded by the Regular Provisional Residence Permit procedure, which is described in more detail in paragraph 2.2.3. That same paragraph also examined the consequences of the situation whereby a (former) asylum seeker is already in the Netherlands prior to his application for a regular residence permit and therefore does not fulfil the Regular Provisional Residence Permit requirement.

If the requirements for processing the application are not fulfilled – for example because the fees have not been paid, or because the application has not been signed or does not contain the necessary details – the applicant will be given a reasonable time to rectify the failure. The reasonable time is not intended to be an extra opportunity for the foreign national to fulfil certain content-related conditions. In general a period of two weeks is regarded as reasonable. If the application does not fulfil the formal requirements after this period either, the processing of the application can be stopped.

#### *The decision on the application*

The decision on the application has to be taken no later than six months after receipt. That period can only be extended if third-party research is necessary for the assessment of the application. In the meantime, the foreign national will have lawful residence and he may, in principle, stay in the Netherlands until the application for a regular residence permit has been processed.

If the foreign national is granted residency, the IND will be invited to come and receive the residence document. Residence documents are only issued in person to the foreign national. The general rule is that the temporary residence permit is granted for a maximum of one year with renewal possible for a maximum of one year.

#### *Legal remedies*

If the application is rejected, the applicant must leave the Netherlands. If he does not leave of his own accord, he can be repatriated. The foreign national can submit an application for review in respect of the rejection to the IND. The general rule is that a foreign national who has filed an application for review against a rejection can stay in the Netherlands until the application has been processed. During that period, the rejection will not be implemented and the foreign national will have lawful residence.

The foreign national can also submit an appeal against a decision to reject an application for review with a District Court. Any appeal to a court will not result in a suspension of the decision. A Provisional Ruling can be requested to prevent repatriation until the appeal verdict has been passed. If the foreign national has submitted a request for a Provisional Ruling on time, repatriation will generally not take place until the court has passed a verdict.

Lastly, an additional appeal can be lodged against the court's verdict with the Administrative Jurisdiction Division of the Council of State.

#### *Medical treatment or medical emergency*

Applications for a regular residence permit for the purposes of medical treatment are subject to the standard procedure as detailed above. It has already been explained in paragraph 2.2.3 that an ex-asylum seeker will rarely or never be eligible for a residence permit subject to the restriction 'medical treatment', but will be eligible for residency in connection with a medical emergency. The fact that the medical emergency is a continuation of the application in connection with medical treatment, no separate application has to be submitted.

Non-medically qualified IND officials are not supposed to form medical opinions. For that reason, if the foreign national invokes medical grounds within the framework of an admissions procedure, the medical advisor of the Medical Advice Bureau [*Bureau Medische Advisering*] (BMA) of the IND will be called in. However, the IND will not ask the BMA to advise if the foreign national has not submitted a properly filled in and signed consent form, nor if the foreign national is not currently undergoing active medical treatment.

In 2009 the Cabinet announced a policy amendment relating to asylum seekers with medical problems who have exhausted all legal remedies. After an asylum seeker has exhausted all legal remedies, he loses the right to reception provisions. The policy amendment makes it possible, subject to certain conditions, for asylum seekers who apply for a residence permit on medical grounds and who are awaiting a decision in relation to that application to still be eligible for reception provisions. This is shown by a letter which the State Secretary of Justice sent to the Lower House of Parliament on 7 December 2009.<sup>104</sup> The scheme is going to take effect on 1 January 2010. It serves to prevent ill asylum seekers who have exhausted all legal remedies from ending up on the street.

#### *Article 64 Aliens Act*

If, on the grounds of Article 64 of the Aliens Act, it is stipulated that repatriation is not to go ahead as long as, in view of the state of health of the foreign national or of one of his family members, it would not be responsible to travel, the foreign national may indeed be granted lawful residence but will not be issued with a residence permit.

Article 64 may apply to a(n) (rejected) asylum seeker in a variety of ways.

Within the context of the processing of an application submitted by the (ex) asylum seeker with a view to undergoing medical treatment or due to a medical emergency, an automatic assessment will take place of whether repatriation should not be carried out on the grounds of Article 64 of the Aliens Act. This also takes place within the context of a follow-up procedure pursued by the applicant, and therefore during the processing of his objection or appeal. In these cases the decision to refuse the residence permit, or the decision to declare the appeal unfounded, in relation to the refusal to grant a residence permit, must communicate the following directly to the foreign national:

- that repatriation during a specified period is not going to take place on the grounds of Article 64 of the Aliens Act (this period is one year or so much shorter as the medical treatment is expected to last);
- that the foreign national can reside lawfully in the Netherlands during this period;
- that the foreign national is not legally obliged to leave the Netherlands on his own initiative during this period.

An asylum seeker who asserts that he cannot be repatriated in connection with his state of health, can invoke Article 64 of the Aliens Act, without having to submit an application for a regular residence permit for medical reasons.<sup>105</sup>

An invocation of Article 64 of the Aliens Act is an application made in writing to the IND and substantiated with all the data and documents needed for the assessment of the question of whether the repatriation can go ahead in view of the health of the person involved. During the investigation and

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<sup>104</sup> *Parliamentary documents II* 2009/10, 30 846, no. 16 (Letter and annexes)

<sup>105</sup> The applicable procedure is laid down in A4/7 of the Aliens Act Implementation Guidelines.

processing of the application, the foreign national does not have lawful residence and is therefore, in effect, still obliged to leave the Netherlands. However, in principle, the authority to repatriate will not be used as long as no decision has been taken regarding the application.

If the application is granted, the IND will inform the foreign national in writing that the repatriation is not going ahead and state the period of time for which the departure is suspended (the period the medical impairment is expected to last). The foreign national and his family members will have lawful residence and be entitled to reception provisions during this period. The obligation to leave and the authority to repatriate are suspended.

An appeal against a rejection of the application to suspend the repatriation can be submitted to the IND. The submission of an appeal does not lead to a suspension of the obligation to leave, repatriation or any termination of the provisions. However, an application can be made to the courts for a Provisional Ruling to prevent repatriation before a decision has been taken regarding the objection. In principle, the asylum seeker can stay in the Netherlands while this request for a Provisional Ruling is being processed.

Article 64 may also be relevant to a rejected asylum seeker if the Repatriation and Departure Service [*Dienst Terugkeer & Vertrek*] (DT&V) or the official charged with repatriation, suspects immediately, and on the basis of concrete indications, that the foreign national is unable to travel for medical reasons. In that case, the official charged with the repatriation, or the DT&V, will have to ascertain, on the grounds of Article 64 of the Aliens Act, whether repatriation should not go ahead and arrange for the IND to carry out an investigation to this effect. In most cases the IND will ask the BMA medical advisor for advice.

On the basis of the policy amendment discussed in the previous paragraph, ex-asylum seekers may be eligible, as from 1 January 2010, for reception provisions in the context of an invocation of Article 64 of the Aliens Act, subject to certain conditions, while awaiting a decision.<sup>106</sup>

#### **Automatic granting of a regular residence permit**

As explained in paragraph 2.2.2, it is possible to grant a temporary regular residence permit to an asylum seeker automatically, that is without an application having been submitted. This takes place either subject to the restriction of residency as an unaccompanied minor foreign national, or subject to the restriction of a foreign national who is unable to leave the Netherlands through no fault of his own.

The fact that no application has been made means, therefore, that there is also no decision open to an application for review. The foreign national cannot therefore submit an application for review against the automatic non granting of a residence permit subject to one of the two restrictions.

The decision to reject his application for asylum is also used to inform the asylum seeker as to whether or not a regular residence permit can be granted subject to the restriction of residency as an unaccompanied minor foreign national, or subject to the restriction of residency as a foreign national who is unable to leave the Netherlands through no fault of his own. The automatic assessment is therefore expressed in what is referred to as the double dictum of the asylum decision. This asylum decision can, of course, be appealed against as explained in the previous paragraph. The court also takes account of the aspect of automatic assessment in the assessment.

#### *Unaccompanied minor foreign nationals*

A minor foreign national who applies for asylum in the Netherlands, without being supervised by parents or a guardian, must complete the same procedure as adult asylum seekers. In addition, he will be assigned a guardian via the guardianship organisation Stichting Nidos, which helps the child during the asylum procedure. The latter is also responsible for the care for and upbringing of the child, for example in a foster family. If the child is not given an asylum residence permit, an assessment will automatically follow of whether he is eligible for an unaccompanied minor foreign national residence permit.

After the initial application, unaccompanied minor foreign nationals are sent to the AC at which the IND is going to start processing their application for asylum. In the case of foreign nationals who claim to be

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<sup>106</sup> *Parliamentary documents II* 2009/10, 30 846, no. 16 (Letter and annexes)

minors but whose age the IND doubts, an investigation to determine their age will be carried out during their residency at the AC. If unaccompanied minor foreign nationals are unable to submit the required documents to prove their age, they will be given an opportunity to have age testing carried out. Age testing is intended to determine the presumed age. To this end unaccompanied minor foreign nationals have to sign an application after the IND has explained the age testing to them during the initial interview<sup>107</sup>. The information is of such a nature that it is subject to informed consent. The unaccompanied minor foreign nationals can arrange an appointment on the same day with the Municipal Health Service [*Gemeentelijke Gezondheidsdienst*] (GGD) where a referral will be drawn up for X-rays.<sup>108</sup> The unaccompanied minor foreign nationals will be taken to the *Diagnostisch Centrum* in Eindhoven to have X-rays taken of their wrists and, if necessary, their collarbones. The unaccompanied minor foreign nationals will then return to the AC to await the radiologist's analysis. The radiologist assesses the maturity of the wrist area and, if necessary, of the collarbone as well. In practice the IND is usually informed of the results one day after the X-ray examination. This enables age testing to be carried out within 48 hours. Any second opinions relating to age testing can be requested from the age testing IND coordinator. X-rays are never issued to the legal assistance counsellor or the foreign national because these constitute confidential medical information. The x-rays can only be sent to an expert designated by the legal assistance counsellor which expert is going to carry out a second opinion. The costs of a second opinion are to be paid for by the applicant. Having a second opinion carried out will not result in a change in the legal consequences of any decision (on the application, the application for review or appeal). The second opinion does not, therefore, have any suspensive effect. Decisions on, for example, the obligation to leave the Netherlands, are not suspended due to a second opinion.

A young asylum seeker who fulfils the applicable conditions referred to above will first be given a residence permit for one year subject to the restriction: 'residency as an unaccompanied minor foreign national'. This permit can be extended twice by a period of one year. This permit is not an asylum residence permit, but a regular residence permit. That is why, from a procedural point of view, the regular rules and procedures apply. Among other things this means that fees are payable for extension applications. As soon as a child reaches the age of 18 or no longer fulfils all the conditions, the unaccompanied minor foreign national residence permit will be withdrawn or not extended. A young asylum seeker who, after 3 years of having had an unaccompanied minor foreign national residence permit, has still not reached the age of 18 may, in principle, stay in the Netherlands. He will then be given a permit for continued residence. A child that reaches the age of 18 year and, at that moment, has been in the Netherlands for less than 3 years on the basis of an unaccompanied minor foreign national residence permit, must return to his country of origin. Only in special cases will a permit for continued residence be issued.

This residency can only be granted after the application for asylum has been rejected (or the asylum permit has been withdrawn) and cannot be applied for by the foreign national himself. The IND will carry out an automatic test of whether the foreign national is eligible for the unaccompanied minor foreign national residence permit. In practice the investigation relating to the application for asylum will partly coincide with the assessment of whether the regular residence permit can be automatically granted.

*Foreign nationals who are unable to leave the Netherlands through no fault of their own*

If an asylum seeker is given a temporary regular residence permit subject to the restriction of residency as a foreign national who is unable to leave the Netherlands through no fault of his own, the term of validity is one year. The fact that this permit is not an asylum residence permit, but a regular residence permit, means it is subject to the regular rules and procedures. Among other things this means that, after this first year, an application to extend the term of validity can be requested, for which fees will then be payable.

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<sup>107</sup> If the foreign national does not give his permission for age testing, a start will still be made to processing the application for asylum but based on the point of departure that the foreign national is an adult.

<sup>108</sup> The information on the procedures relating to age testing has been taken from INDIAC – NL EMN NCP 2010a, paragraph 4.1.

In contrast to the granting of an unaccompanied minor foreign national permit, a residence permit subject to the restriction 'residency as a foreign national who, through no fault of his own, is unable to leave the Netherlands' not only takes place automatically but also via submission of an application. Automatic extension then takes place if a foreign national, whose application for admission has been rejected, can demonstrate during the asylum procedure<sup>109</sup> itself that he is unable to leave the Netherlands through no fault of his own. The permit is granted less frequently on the basis of an application. If, for example, the foreign national was unable to demonstrate during the asylum procedure that he was eligible for residency on the grounds of this policy, but now believes that he fulfils the conditions, he can still apply to the IND for a regular residence permit. This is subject to the usual regular procedures and the foreign national will also have to pay fees for the application to be processed. The fees will only not be payable if he receives a cover note from the Minister inviting him to apply for a residence permit on the grounds of this policy. This may apply in cases in which the DT&V has ascertained during the repatriation procedure that, despite the foreign national's willingness to cooperate with his own repatriation, it has not been possible to acquire the necessary travel documents.<sup>110</sup>

## 3.2. Rights granted

Every status based on legislation relating to foreign nationals is bound by certain rights as described below. The following is an analysis in succession of the rights associated with an asylum permit and the rights associated with the different regular residence permits. This primarily means the term of validity of the residence permit and the possibilities for extending it, the medical and social provisions, access to the employment market, travel possibilities, family reunification and family formation, and the naturalisation prospects. The question also arises as to what extent the long-term residents directive applies to the different residence statuses.

### 3.2.1. Rights attached to an asylum permit

As referred to in paragraph 1.1 of the Introduction, the Netherlands applies the 'single status system' which means that all asylum permits are linked to the same rights, no matter on what grounds the asylum permit is granted. As a consequence one type of residence permit applies to all asylum seekers who are admitted.

#### **Term of validity, extension of the term of validity, permanent residence permit**

The temporary asylum residence permit is, in principle, granted for the term of five years.<sup>111</sup> The residence permit is not subject to any regulations. The granting of the residence permit is accompanied by the issuing of a document showing lawful residence.<sup>112</sup>

After the foreign national has had five years of lawful residence on the grounds of a temporary asylum residence permit, he may be eligible for a permanent asylum residence permit. This residence permit is granted for an indefinite period of time and does not, therefore, have an end date. However, the residence document must always be replaced on time.<sup>113</sup>

A civic integration obligation applies in the Netherlands. Since 1 January 2010, applicants for permanent asylum residence permits must, in principle, have passed the civic integration examination.<sup>114</sup> The civic

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<sup>109</sup> Or during the regular procedure. However, regular procedures which are not related to an asylum procedure, are not covered by the scope of this report.

<sup>110</sup> B14/3.4.4 of the Aliens Act Implementation Guidelines.

<sup>111</sup> Provisions relating to the term of validity of the residence permit are laid down in Article 3.105 of the Aliens Decree and detailed in Article C/1.3 of the Aliens Act Implementation Guidelines. At the start of the review period the temporary residence permit asylum is granted for a period of three years. This applied to foreign nationals who had submitted an application for asylum before 1 September 2004. A temporary asylum residence permit for the term of five years is granted to foreign nationals who have submitted the application for asylum on or after 1 September 2004.

<sup>112</sup> Article 9, paragraph 1 of the Aliens Act; Article 3.1, paragraph 1, opening words and (c) Aliens Regulations; Article C/21.1.1 of the Aliens Act Implementation Guidelines

<sup>113</sup> Article C/6.2 of the Aliens Act Implementation Guidelines

<sup>114</sup> Decision by the State Secretary of Justice of 16 December 2009, no. WBV 2009/30, containing an amendment to the Aliens Act Implementation Guidelines 2000, *Dutch Government Gazette*. 2009 20192.



integration examination includes an assessment of Dutch verbal and written skills and knowledge of Dutch society which the asylum permit holder must have acquired due to having an obligation to integrate.<sup>115</sup>

Instead of an application for a permanent asylum residence permit, the foreign national can also opt to submit an application for an extension of the temporary asylum residence permit. In practice a person will only use this option if he is not eligible for a permanent asylum residence permit due to him not having fulfilled the civic integration obligation. The holder of a temporary asylum residence permit is, in principle, eligible for an extension thereof.

The temporary asylum residence permit is, in principle, extended for an additional term of five years.<sup>116</sup>

#### **Medical assistance, social provisions and education**

Holders of a temporary or permanent asylum residence permit are entitled to, among other things, education, medical care, legal aid, social provisions and student grants.<sup>117</sup> In general the holder of an asylum permit has the same rights in these areas and is entitled to the same provisions as a Dutch citizen.

This is only different in the area of accommodation. Accommodation is, in fact, arranged for the holder of an asylum permit. Once he has been granted a permit he will be allocated accommodation. This is not the case for Dutch citizens.

#### **Access to the labour market**

The holder of a temporary or permanent asylum residence permit is free to engage in employment. He does not need a work permit.<sup>118</sup> This means that his position on the employment market is equal to that of a Dutch person.

#### **Travel document**

Holders of a valid temporary or permanent asylum residence permit are also entitled to a Dutch travel document for refugees.<sup>119</sup> The term of validity of this travel document depends on the asylum permit that has been granted.

#### **Family reunification and family formation**

As explained in paragraph 2.2.1, an asylum permit can be granted on the e-ground or f-ground to the family members of a foreign national to whom an asylum permit has been granted on the a, b, c or d grounds if they have travelled to the Netherlands at the same time as this foreign national or have travelled to join him in the Netherlands within three months. This later travelling is interpreted quite loosely. If a Regular Provisional Residence Permit procedure is started on behalf of family members who travel later within a period of three months after the granting of the asylum permit to the sponsor (even if, for example, some family members are missing), the actual starting of the procedure safeguards the later travelling deadline and family members can, even if they are only traced later, still be eligible for a derived asylum permit on the grounds of Article 29 (e) or (f) of the Aliens Act 2000. In this context the requirements which apply within the framework of the regular family migration policy, such as the means requirement and civic integration requirement, do not apply to the acquisition of the derived asylum permit. Once this period of three months has passed, family reunification in the case of a holder of an asylum residence permit will be subject to the regular family reunification policy as laid down in Chapter B2 of the Aliens Act Implementation Guidelines.<sup>120</sup> This means that the holder's family members

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<sup>115</sup> Civic Integration Act, Article 13.

<sup>116</sup> Article 3.105 of the Aliens Decree, detailed in Article C/1.3 of the Aliens Act Implementation Guidelines.

<sup>117</sup> Article 11 of the Aliens Act, See also <http://www.justitie.nl/onderwerpen/migratie/asylum/>

<sup>118</sup> Article C/1.4 of the Aliens Act Implementation Guidelines, or Article C/6.3 of the Aliens Act Implementation Guidelines.

<sup>119</sup> See C/21.3 of the Aliens Act Implementation Guidelines.

<sup>120</sup> Article 2/2.4 of the Aliens Act Implementation Guidelines, on the grounds of Article 3,15, paragraph 1 (a) and (b) of the Aliens Decree.

will be eligible for a regular residence permit within the framework of family reunification or family formation, if the relevant additional conditions have been fulfilled.

### **Naturalisation**

After having had an asylum residence permit for five years the foreign national may be eligible for naturalisation if he has a permanent residence permit.<sup>121</sup> The foreign national can submit a request to this effect to the department of Civil Affairs in his place of residence. One of the other conditions for naturalisation is that the foreign national has to be sufficiently integrated. The foreign national does not need to renounce his other nationality, if he already has one.

Exceptions exist to the general rule that the foreign national must have had a residence permit for five years.<sup>122</sup> For example, a three year period applies to stateless persons and to foreign nationals who have cohabited for at least three years with an unmarried Dutch person.

A foreign national who is married to a Dutch person does not have to have had a residence permit for a number of years in order to be eligible for naturalisation. He can, in fact, submit a request for naturalisation as soon as he has lived together with his Dutch spouse. However, one condition is that, at the moment at which he submits his request for naturalisation, he has a non-temporary residence permit (see the following paragraph).

The fact that the holder of a temporary asylum residence permit can only become eligible for the permanent asylum residence permit required for naturalisation after five years, means that the exception deadline of three years for an asylum permit holder is not applied that often in practice. A shorter period of five years could, for example, apply to holders of a temporary asylum residence permit who, after entering into a marriage or partnership, have acquired a regular residence permit subject to a restriction relating to said marriage or partnership.

#### **3.2.2. Rights attached to the regular residence permits**

The temporary asylum residence permit is always granted subject to the restriction of the specific purpose of stay. In contrast to asylum permits, the same rights are not always attached to regular residence permits granted subject to these different restrictions. The Dutch policy distinguishes between a temporary and a non-temporary right of residence.<sup>123</sup> A non-temporary right of residence is, for example, attached to family reunification with a Dutch citizen. The difference is, for example, important in the context of the possibilities for being eligible for naturalisation. A possible invocation of rights, derived from the directive for long-term residents, may also depend on this difference.

If the residence permit is granted on the grounds of the discretionary power, as laid down in Article 3.4, paragraph 3 of the Aliens Decree, the right of residence is non-temporary, unless determined otherwise when the residence permit is granted.<sup>124</sup> In addition, all restrictions offered by supplementary national protection are accompanied by a temporary right of residence. However, foreign nationals who have been admitted within the framework of the policy relating to unaccompanied minor foreign nationals, the no fault criterion, or medical emergency subject to certain conditions, are eligible for a residence permit subject to the continued residence restriction. This is linked to a non-temporary right of residence.

### **Term of validity, extension of the term of validity, continued residence**

The temporary regular residence permit subject to all the restrictions which are relevant to this report is granted for the maximum term of one year and can be extended by a maximum of one year each time.<sup>125</sup> The granting or extension is usually for a single year. It is the personal responsibility of the foreign

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<sup>121</sup> The granting of Dutch citizenship is regulated in Chapter 4 (Articles 7 to 13) of the Netherlands Nationality Act [*Rijkswet op de Nederlanderschap*] (RWN).

<sup>122</sup> Article 8, paragraphs two and four of the RWN.

<sup>123</sup> Article 3.5 of the Aliens Decree.

<sup>124</sup> Article 3.5, paragraph 3 of the Aliens Decree.

<sup>125</sup> Article 3.57 of the Aliens Decree.

national to submit an application for the extension of the residence permit on time, that is before the end of the term of validity.<sup>126</sup>

The unaccompanied minor foreign national permit is granted or extended for one year but only until the day on which the foreign national becomes an adult.

#### *Continued residence*

There are different situations in which a regular residence permit can be converted into a residence permit for the purpose of 'continued residence'.

As explained in paragraph 2.2.2, only unaccompanied minor foreign nationals who, upon reaching the age of 18, have already had an unaccompanied minor foreign national residence permit for three years, are in principle entitled to a permit with the 'continued residence' purpose of stay (in so far as all other conditions are also met).<sup>127</sup>

If requested, a foreign national to whom residency has been granted because he is unable to leave the Netherlands through no fault of his own can be granted a temporary regular residence permit for the purpose of 'continued residence' if he has had a temporary regular residence permit for three years for 'residency as foreign national who, through no fault of his own, is unable to leave the Netherlands' and who still fulfils the relevant applicable conditions, if there are no other grounds for refusal.<sup>128</sup>

Lastly, after three years of residency as the holder of a residence permit subject to the restriction of residency due to a medical emergency, a foreign national can apply for a residence permit subject to a restriction relating to continued residence.<sup>129</sup>

The nature of the residence permit for the purpose of 'continued residence' implies that the residence permit is not withdrawn, and the application for an extension is not rejected, if the foreign national no longer fulfils the conditions of the special policy on which grounds previous residency was permitted.

The residence permit subject to a restriction relating to continued residence can be granted for the term of five years.<sup>130</sup>

#### **Medical assistance, social provisions and education**

As determined above in the case of holders of an asylum residence permit, the holder of a regular residence permit in these areas also enjoys the same rights and entitlements to the same provisions as a Dutch citizen.

#### **Access to the labour market**

A variety of employment market endorsements can be included on the residence document. These endorsements determine the possibilities the foreign national has to perform work. As a way of protecting the Dutch employment market, the employer is in many cases obliged to apply for a work permit (TWV) for the work the foreign national is to perform. A TWV will not generally be issued if a priority supply exists on the employment market for the work in question.

Holders of a residence permit subject to the restriction 'residency as unaccompanied minor foreign national' are only allowed to work if the employer has a TWV. A TWV will only be issued if the period of work within a period of time of 52 weeks is no longer than 24 weeks in total.

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<sup>126</sup> Article 3.80 of the Aliens Decree.

<sup>127</sup> Article B16/3.3.1 of the Aliens Act Implementation Guidelines.

<sup>128</sup> Article B16/3.4 of the Aliens Act Implementation Guidelines.

<sup>129</sup> Article B8/3.3 Aliens Act Implementation Guidelines, with reference to Article 3.51, paragraph 1, opening words and (b) or Article 3.52 of the Aliens Decree.

<sup>130</sup> Article B16/5 of the Aliens Act Implementation Guidelines, with reference to Articles 3.57 and 3.64 of the Aliens Decree.

Holders of a residence permit subject to the restriction 'residency as a foreign national who is unable to leave the Netherlands through no fault of his own' are only allowed to work if the employer has a TWV.

Holders of a residence permit subject to the restriction 'residency due to a medical emergency' are not allowed to work.

In most cases a residence permit for the purpose of continued residence makes it easier to access the employment market. If a foreign national previously held a residence permit for the purpose of 'residency due to a medical emergency', the employment market endorsement will read 'employment only permitted if employer has a TWV'. In the other cases the employment market endorsement in the case of the permit for continued residence will read, 'employment freely permitted, TWV not required'.

### **Travel document**

Those who have a valid regular permanent or temporary residence permit, but who do not have a passport may be eligible, subject to certain conditions, for a Dutch travel document for foreign nationals. On the basis of the Passport Act [*Paspoortwet*] a travel document can be issued to foreign nationals, within the framework established by this Act, who are unable to obtain a travel document from another country, or who can prove that they cannot reasonably be required to apply for a travel document from another country.<sup>131</sup> The Ministry of Foreign Affairs will perform the verification against this Article. The term of validity of this travel document depends on the permit that has been granted.

### **Family reunification and family formation**

If a foreign national has a non-temporary right of residence on the grounds of a regular residence permit, his family members will be eligible for family reunification or family formation, if the specific applicable conditions have been fulfilled. They will then be subject to the general family reunification policy, as laid down in Chapter B2 of the Aliens Act Implementation Guidelines.

Residency within the framework of family reunification and family formation is, in principle, not possible for foreign nationals who are family members of holders of a temporary regular residence permit based on a right of residence of a temporary nature.<sup>132</sup>

As explained in the opening words to this paragraph, a temporary right of residence is linked to a regular residence permit subject to almost all restrictions that can offer supplementary national protection to a (former) asylum seeker. This means that family members are, in principle, not eligible for family reunification or family formation.

The only exception to this is the regular residence permit granted on the grounds of the discretionary power, as laid down in Article 3.4, paragraph 3 VB. This is linked to a non-temporary right of residence, unless the granting determines otherwise. This means that family members will be eligible for family reunification or family formation, if the relevant additional conditions have been fulfilled.

It also applies that foreign nationals who have been admitted within the framework of the policy relating to unaccompanied minor foreign nationals, the no fault criterion, or medical emergency, but who later acquire a residence permit subject to the restriction of continued residence, will thereby have acquired a non-temporary right of residence. This means that their family members will, from that moment, be eligible for family reunification or family formation, if the relevant additional conditions have been fulfilled.

### **Naturalisation**

Foreign national holders of a regular residence permit may also be eligible for naturalisation if they have had a regular residence permit for five years which gives a non-temporary right of residence.<sup>133</sup> The

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<sup>131</sup> Passport Act, Article 14.

<sup>132</sup> Incidentally, a temporary right of residence based on a regular permit does not automatically mean that no family migration at all is possible. However, it is the case that the family member is also given temporary residency if the sponsor also has such, for example if study is the purpose of stay. In the case of some purposes of stay it is explicitly laid down that no family reunification is possible.

procedure is the same as for holders of an asylum permit, except that the foreign national must in principle renounce any other nationality he may already have.

Also in the case of holders of a regular permit, exceptions exist to the general rule that the foreign national must have had a residence permit for five years.<sup>134</sup> For example, a three year period also applies in this context to stateless people and to foreign nationals who have cohabited for at least three years with an unmarried Dutch person.

Holders of a regular residence permit which gives a temporary right of residence are not eligible for naturalisation. As already mentioned, this applies to almost all regular forms of supplementary protection. Any continuous continued residence does give a non-temporary right of residence.

The period of three years for foreign nationals who have a long-term relationship with a Dutch citizen will therefore only apply to an ex-asylum seeker who has either acquired continued residence, or has applied to have the restriction of his residence permit changed into a restriction linked to a non-temporary right of residence.

Similarly to a holder of an asylum permit, a foreign national who is married to a Dutch person does not have to have had a residence permit for a number of years in order to be eligible for naturalisation either. He can, in fact, submit a request for naturalisation as soon as he has lived together with his Dutch spouse. However, one condition is that, at the moment at which he submits his request for naturalisation, he has a non-temporary regular residence permit.

### 3.2.3. Relation of the rights granted to the long-term residents directive.

Directive 2003/109/EC<sup>135</sup> concerning the status of long-term resident citizens of third countries provides material and procedural standards for the allocation and withdrawal of a European residence permit for long-term residents and the corresponding rights and conditions which govern whether long-term residents may stay in other Member States of the EU.

The status of long-term resident does not come about by operation of law, but is granted following an application. The application is for the granting of a regular permanent residence permit.<sup>136</sup> If the applicant fulfils all the conditions for allocating the European status of long-term resident, the requested permit will be granted with the endorsement 'EC long-term resident'. This endorsement is referred to on the back of the residence document. One of the grounds for refusing is, however, lawful residence on the grounds of an asylum residence permit.

Holders of a temporary or permanent asylum residence permit are therefore not eligible for the allocation of a European residence permit for long-term residents and the corresponding rights which govern whether long-term residents are permitted to stay in other Member States of the EU.

This is in line with Article 3, paragraph 2 (c) of the directive, which states that this directive does not apply to citizens from third countries who are permitted to reside in a Member State on account of, among other things, subsidiary forms of protection, according to international obligations, national legislation or the practice of the Member States.

Neither are holders of a temporary or permanent regular residence permit eligible for the allocation of a European residence permit for long-term residents and the corresponding rights which govern whether long-term residents are permitted to stay in other Member States of the EU.<sup>137</sup> As explained in the previous paragraph this applies to almost all regular protection statuses. Non-temporary right of residence is only linked to residence permits granted on the grounds of the discretionary power, as laid

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<sup>133</sup> Chapter 4, Article 8 of the Netherlands Nationality Act [*Rijkswet op het Nederlanderschap*] (RWN).

<sup>134</sup> Article 8, paragraphs two, three, four and five of the RWN.

<sup>135</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:16:44:0053:NL:PDF>

<sup>136</sup> See Article B1/6 of the Aliens Act Implementation Guidelines for information on the way in which the directive has been implemented in Dutch legislation and regulations.

<sup>137</sup> B1/7.1.2 of the Aliens Act Implementation Guidelines.

down in Article 3.4, paragraph 3 of the Aliens Decree, unless determined otherwise when the residence permit is granted. Therefore, only this regular protection status gives an entitlement to the allocation of a European residence permit for long-term residents.

The fact that a temporary right of residence does not give any entitlement to this is in line with Article 3, paragraph 2 (e) of the directive, which states that this directive does not apply to citizens of third countries who reside in a Member State for reasons of a temporary nature.

## 4. Statistical data on protection

The statistical data in this chapter has been taken from the IND information system (INDIS). Considerably more detailed data is available on the asylum permits granted than on the regular residence permits granted. By contrast the statistical data on the regular residence permits granted cover the period 2005-2009, while the data on the asylum permits granted is limited to the years 2008 and 2009. It is outside the scope of this report to interpret this factual data or place it in a broader context.

### 4.1 Asylum

It has turned out to be no easy task to reproduce the categorisation into the six different grounds for granting an asylum permit during the years 2004 – 2007. That is why the statistical data on the granting of asylum permits in this report is limited to the years 2008 and 2009. The total figures for 2008 and 2009 differ very slightly from the Eurostat figures for the same years. This is because Eurostat makes a distinction between refugee status (a-ground), subsidiary protection status (b-ground) and other/national protection, with this latter category covering not just the c, d, e and f-grounds but also an almost negligible residual category.

**Table 1: Number of asylum residence permits granted on the grounds of Article 29 of the Aliens Act, according to ground for granting**

Ground for granting	2008	2009	total
a-ground	514 (9%)	696 (8%)	1210 (9%)
b-ground	1609 (28%)	3275 (40%)	4884 (35%)
c-ground	197 (3%)	346 (4%)	543 (4%)
d-ground	2543 (45%)	2075 (25%)	4618 (33%)
e-ground	724 (13%)	1738 (21%)	2462 (18%)
f-ground	78 (1%)	113 (1%)	191 (1%)
total	5665 (100%)	8243 (100%)	13908 (100%)

Source: INDIS

Table 1 shows, among other things, that recognised refugees do not even account for 10% of all asylum status holders. The majority of the asylum permits granted concern subsidiary protection within the meaning of the Qualification Directive, or categorical protection.

However, the 2009 proportions were different to those for 2008. The proportion of permits granted based on the a-ground has remained about the same. However, the other grounds were subject to considerable changes. The proportion of permits granted on the d-ground (categorical protection) decreased from 45% to 25%. This has to do with the termination of the categorical protection policy for asylum seekers from Iraq at the end of 2008. The proportion of permits granted on the e-ground (family members who travel later) increased substantially from 13% to 21%. The number of permits granted on the b-ground also increased significantly from 28% to 40%. As explained in paragraph 2.1.2, the b-ground is intended to offer subsidiary protection within the meaning of the Qualification Directive, while the a-ground relates to recognised refugees. This means that almost half of all asylum permits granted in 2009 were linked to EU harmonised protection.

Paragraph 1.1 of the Introduction stated that it would seem that an increasing percentage of statuses in the EU are granted for subsidiary protection or national forms of protection. The proportion of positive decisions on the grounds of the Geneva Convention (whereby the applicant is acknowledged as a refugee) has not substantially changed since 2003, while the percentage positive decisions, whereby subsidiary or other forms of protection were granted, increased by more than fourfold during these years. Table 1 confirms this view in the sense that, in the Netherlands as well, the proportion of positive decisions on the grounds of the Geneva Convention is far smaller than the proportion of subsidiary and national supplementary protection.

*Permits granted on the grounds of Article 29 (a)*

**Table 2: Number of asylum residence permits granted on the grounds of Article 29 (a) of the Aliens Act (refugee status) according to nationality**

nationality	2008	2009	total
<b>Iraqi</b>	180	200	380
<b>Iranian</b>	46	91	137
<b>Somali</b>	34	94	128
<b>Chinese</b>	52	55	107
<b>Ethiopian</b>	39	23	62
<b>Eritrean</b>	16	18	34
<b>Bhutan</b>	5	26	31
<b>unknown</b>	6	25	31
<b>Afghan</b>	7	22	29
<b>Sri Lankan</b>	13	15	28
<b>other nationalities</b>	116	127	243
<b>total</b>	514	696	1210

Source: INDIS

**Table 3: Number of asylum residence permits granted on the grounds of Article 29 (a) of the Aliens Act (refugee status) according to sex**

	male	female	total
<b>2008</b>	325 (63%)	189 (37%)	514
<b>2009</b>	499 (72%)	197 (28%)	696
<b>total</b>	824 (68%)	386 (32%)	1210

Source: INDIS

**Table 4: Number of asylum residence permits granted on the grounds of Article 29 (a) of the Aliens Act (refugee status) according to age**

	0 to 13	14 to 17	18 to 34	35 to 64	65+	unknown	total
<b>2008</b>	53 (10%)	21 (4%)	277 (54%)	154 (30%)	8 (2%)	1 (0%)	514
<b>2009</b>	18 (3%)	23 (3%)	405 (58%)	236 (34%)	14 (2%)	0	696
<b>total</b>	71 (6%)	44 (4%)	682 (56%)	390 (32%)	22 (2%)	1 (0%)	1210

Source: INDIS

Table 2 shows that almost one in three recognised refugees are of Iraqi nationality. Table 3 shows that more than twice as many men as women acquire refugee status. According to Table 3 more than half of all recognised refugees were in the age category 18 to 34.

*Permits granted on the grounds of Article 29 (b)*

**Table 5: Number of asylum residence permits granted on the grounds of Article 29 (b) of the Aliens Act (subsidiary protection) according to nationality**

nationality	2008	2009	total
<b>Somali</b>	334	1157	1491
<b>Iraqi</b>	469	987	1456
<b>Eritrean</b>	110	193	303
<b>Afghan</b>	84	165	249
<b>Myanmarese</b>	114	69	183
<b>unknown</b>	53	103	156
<b>Guinean</b>	62	74	136
<b>Iranian</b>	59	60	119
<b>Libyan</b>	26	88	114
<b>Sierra Leonean</b>	45	64	109
<b>other nationalities</b>	253	315	568
<b>total</b>	1609	3275	4884

Source: INDIS



**Table 6: Number of asylum residence permits granted on the grounds of Article 29 (b) of the Aliens Act (subsidiary protection) according to sex**

	male	female	total
<b>2008</b>	767 (48%)	842 (52%)	1609
<b>2009</b>	1582 (48%)	1693 (52%)	3275
<b>total</b>	2349 (48%)	2535 (52%)	4884

Source: INDIS

**Table 7: Number of asylum residence permits granted on the grounds of Article 29 (b) of the Aliens Act (subsidiary protection) according to age**

	0 to 13	14 to 17	18 to 34	35 to 64	65+	unknown	total
<b>2008</b>	351 (22%)	71 (4%)	800 (50%)	369 (23%)	18 (1%)	0	1609
<b>2009</b>	733 (22%)	222 (7%)	1568 (48%)	673 (21%)	76 (2%)	3 (0%)	3275
<b>total</b>	1084 (22%)	293 (6%)	2368 (48%)	1042 (21%)	94 (2%)	3 (0%)	4884

Source: INDIS

Table 5 shows that subsidiary protection is primarily granted to asylum seekers of Somali and Iraqi nationality. In fact, more than a third of all asylum permits granted on the b-ground in 2009 were granted to asylum seekers with Somali nationality. Table 6 shows that more than half of all cases were female asylum seekers. A noticeable feature of Table 7 is that a fairly large number of asylum permits granted on the b-ground were granted to young children.

#### *Permits granted on the grounds of Article 29 (c)*

**Table 8: Number of asylum residence permits granted on the grounds of Article 29 (c) of the Aliens Act (convincing reasons of a humanitarian nature) according to nationality**

nationality	2008	2009	total
<b>Somali</b>	39	117	156
<b>Iraqi</b>	24	37	61
<b>Iranian</b>	11	27	38
<b>Afghan</b>	13	20	33
<b>Sri Lankan</b>	109	18	27
<b>Armenian</b>	109	19	21
<b>Guinean</b>	109	16	20
<b>Burundian</b>	16	109	18
<b>Ethiopian</b>	109	10	18
<b>Congolese, Democratic Republic of Congo</b>	13	109	17
<b>other nationalities</b>	58	76	134
<b>total</b>	197	346	543

Source: INDIS

**Table 9: Number of asylum residence permits granted on the grounds of Article 29 (c) of the Aliens Act (convincing reasons of a humanitarian nature) according to sex**

	male	female	total
<b>2008</b>	97 (49%)	100 (51%)	197
<b>2009</b>	184 (53%)	162 (47%)	346
<b>total</b>	281 (52%)	262 (48%)	543

Source: INDIS

**Table 10: Number of asylum residence permits granted on the grounds of Article 29 (c) of the Aliens Act (convincing reasons of a humanitarian nature) according to age**

	0 to 13	14 to 17	18 to 34	35 to 64	65+	total
<b>2008</b>	19 (10%)	10 (5%)	110 (56%)	56 (28%)	10 (1%)	197
<b>2009</b>	29 (8%)	22 (6%)	206 (60%)	84 (24%)	10 (1%)	346
<b>total</b>	48 (9%)	32 (6%)	316 (58%)	140 (26%)	10 (1%)	543

Source: INDIS

The most striking feature of Table 8 is the substantial increase in the number of Somali asylum seekers to whom an asylum permit has been granted on the c-ground. Incidentally, these are still low numbers compared to the number of asylum permits granted on other grounds. As is evident from Table 9 the number of men and women is more or less equal. It can be deduced from Table 10 that almost three in five c-ground asylum status holders are in the age category 18 to 34.

*Permits granted on the grounds of Article 29 (d)*

**Table 11: Number of asylum residence permits granted on the grounds of Article 29 (d) of the Aliens Act (categorical protection) according to nationality**

nationality	2008	2009	total
<b>Somali</b>	1039	1953	2992
<b>Iraqi</b>	1422	17	1439
<b>Ivorian</b>	39	54	93
<b>unknown</b>	31	25	56
<b>Afghan</b>	109	109	109
<b>other nationalities</b>	11	20	31
<b>total</b>	2543	2075	4618

Source: INDIS

**Table 12: Number of asylum residence permits granted on the grounds of Article 29 (d) of the Aliens Act (categorical protection) according to sex**

	male	female	unknown	total
<b>2008</b>	1658 (65%)	885 (35%)	0 (0%)	2543
<b>2009</b>	1240 (60%)	834 (40%)	10 (0%)	2075
<b>total</b>	2898 (63%)	1719 (37%)	10 (0%)	4618

Source: INDIS

**Table 13: Number of asylum residence permits granted on the grounds of Article 29 (d) of the Aliens Act (categorical protection) according to age**

	0 to 13	14 to 17	18 to 34	35 to 64	65+	unknown	
<b>2008</b>	587 (23%)	146 (6%)	1283 (50%)	503 (20%)	23 (1%)	10 (0%)	2543
<b>2009</b>	485 (23%)	253 (12%)	1076 (52%)	241 (12%)	18 (1%)	10 (0%)	2075
<b>total</b>	1072 (23%)	399 (9%)	2359 (51%)	744 (16%)	41 (1%)	10 (0%)	4618

Source: INDIS

Table 11 clearly shows that the lion's share of categorical protection provided in recent years was granted to asylum seekers of Somali and Iraqi nationality. In 2009 the number of asylum permits granted to Iraqi asylum seekers on the d-ground was, of course, reduced to zero due to the termination of this specific categorical protection policy at the end of 2008. By contrast, Somali asylum seekers made up 94% of the total in 2009. Table 12 shows that considerably more men than women are eligible for categorical protection. According to table 13, slightly more than half of all cases were asylum seekers in the age category from 18 to m 34, while young children were also granted asylum permits on the d-ground quite frequently.

*Permits granted on the grounds of Article 29 (e) and (f)*

**Table 14: Number of asylum residence permits granted on the grounds of Article 29 (e) and (f) of the Aliens Act (family member of status holder) according to nationality**

nationality	2008	2009	total
<b>Iraqi</b>	119	604	723
<b>Somali</b>	27	518	545
<b>unknown</b>	57	125	182
<b>Afghan</b>	58	72	130
<b>Burundian</b>	63	44	107
<b>Iranian</b>	39	51	90
<b>Congolese, Democratic Republic of Congo</b>	48	30	78
<b>Nepalese</b>	45	27	72
<b>Sierra Leonean</b>	26	33	59
<b>Ethiopian</b>	25	31	56
<b>other nationalities</b>	295	316	611
<b>total</b>	802	1851	2653

Source: INDIS

**Table 15: Number of asylum residence permits granted on the grounds of Article 29 (e) and (f) of the Aliens Act (family member of status holder) according to sex**

	Male	Female	total
<b>2008</b>	360 (45%)	442 (55%)	802
<b>2009</b>	877 (47%)	974 (53%)	1851
<b>total</b>	1237 (47%)	1416 (53%)	2653

Source: INDIS

**Table 16: Number of asylum residence permits granted on the grounds of Article 29 (e) and (f) of the Aliens Act (family member of status holder) according to age**

	0 to 13	14 to 17	18 to 34	35 to 64	65+	unknown	
<b>2008</b>	444 (55%)	116 (14%)	171 (21%)	70 (9%)	1 (0%)	0	802
<b>2009</b>	1081 (58%)	259 (14%)	354 (19%)	144 (8%)	2 (0%)	11 (1%)	1851
<b>total</b>	1525 (57%)	375 (14%)	525 (20%)	214 (8%)	3 (0%)	11 (0%)	2653

Source: INDIS

Table 1 shows that only 191 of the asylum permits granted for family members who travel later were permits based on the f-ground. For that reason, family members who travel later in a narrower sense (e-ground) and in a wider sense (f-ground) have been combined in tables 14 to 16.

A significant number of all asylum permits, particularly those on the basis of the b-ground and the d-ground, have been granted to asylum seekers with Iraqi and Somali nationality. It should therefore come as no surprise that Table 14 shows that the vast majority of family members of asylum status holders had Iraqi and Somali nationality. A particularly striking feature is the significant increase of the number of asylum permits granted to family members of Somali nationality on the e-ground and f-ground in 2009. Table 15 shows that more than half of the cases were female family members. The fact that the majority were young children can be deduced from Table 16.

## 4.2 Regular

Statistical data on the granting of regular residence permits is available for the period 2005-2009. In 2004 a number of tasks were transferred from the Aliens Police to the IND. The conversion activities which had to be carried out in the IND's registration system mean no accurate figures are available for 2004. For that reason, the figures for 2004 are not included in this report.

No data has been provided on the issuing of unaccompanied minor foreign national permits for registration and technical reasons. These have therefore not been taken into consideration. As regards the other regular permits it should be noted that the figures supplied do not just relate to ex-asylum seekers. Therefore, they can only serve as an indication of the number of permits granted to ex-asylum seekers. This is also the reason why there is little point providing a more detailed specification of the data on the granting of these regular residence permits which is, however, relevant to the asylum figures.

The fact that a residence permit subject to the restriction 'residence in accordance with a decision by the State Secretary' is not granted in all cases to foreign nationals who are eligible for some form of protection, as detailed above in paragraph 2.2.3, means the corresponding figures would provide a very misleading picture. For that reason, these figures have not been taken into account either.

**Table 17: The number of regular residence permits granted according to restriction, 2005-2009**

	2005	2006	2007	2008	2009	Final total
B9 Aliens Act Implementation Guidelines (human trafficking)	73	155	144	225	285	882
Unable to leave the Netherlands through no fault of their own	31	63	28	41	44	207
Medical emergency	140	127	90	109	118	576

Source: INDIS

In the case of both purposes of stay referred to, the number of permits granted annually is relatively small. In addition, as already mentioned, only some of the cases involve former asylum seekers. A comparison with the number of asylum permits granted in Table 1 shows, in any event, that these regular forms of national supplementary protection did not add much numerical weight in 2008 and 2009.

## 5. National views on providing protection

There is little or no public debate on the national asylum statuses as such (traumata policy, categorical protection, protection of family members travelling with or immediately after the asylum seeker). The debate has focused on the application of these national asylum statuses, rather than their existence. For example, there has been a public debate on concrete cases of categorical protection. In more general terms there has also been criticism of Dutch asylum policy and a debate on the new asylum procedure.

Neither has there been any public debate on the regular forms of protection as such. There has been a debate, however, on the concrete interpretation of the policy, for example the reception of minors within the framework of the unaccompanied minor foreign national procedure.

Recently there has been some debate on the decision by the State Secretary to abolish categorical protection and unaccompanied minor foreign national policy as well.

This chapter touches briefly on the debates of different aspects of the protection policy in the period 2004-2009<sup>138</sup> and pays more attention to the recent debate on the abolition of the categorical protection policy and the unaccompanied minor foreign national policy. It is precisely these latter developments that have to be viewed in conjunction with the desire to achieve a harmonisation of protection policy at EU level.

### 5.1 Public debates in the period 2004-2009

The Lower House of Parliament debated the Cabinet's intention to introduce a faster and better asylum procedure<sup>139</sup> on a number of occasions in 2008. Those involved in legal aid, and particularly the Netherlands Association of Asylum Lawyers [*Vereniging asieladvocaten en -juristen Nederland*] (VAJN), have been very critical of the Cabinet's proposals. A number of social organisations such as Dutch Counsel for Refugees (VluchtelingenWerk Nederland) and Amnesty International have also added their voices to the debate.

Moreover, in 2009, the Human Rights Committee of the UN published a critical report on (among other things) the Dutch asylum procedure.

There was considerable public debate on homosexual asylum seekers from Iran in the period 2005-2006. This eventually resulted in Iranian homosexuals, bisexuals and transsexuals being designated as a specific group as of 29 November 2006, which, for reasons other than traumata, is eligible for an asylum residence permit on the c-ground.<sup>140</sup> During the same period there was also a lot of debate on Christian asylum seekers from Iran. However, this did not result in them being designated a specific group.

The categorical protection policy has always been the focus of much public attention.

In 2006 there was political and public opposition to the termination of categorical protection for asylum seekers from central Iraq. This protection was eventually reintroduced at the beginning of 2007. There was less political and public opposition in 2008 when the categorical protection policy was again abolished for asylum seekers from Iraq.

A debate has also been going on since the categorical protection policy for Central and Southern Somalia was terminated in May 2009.<sup>141</sup> Dutch Counsel for Refugees in particular was strongly opposed to this move. One of the issues at stake was the extent to which the categorical protection policy fuels fraud and

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<sup>138</sup> See the corresponding editions of the Policy Analysis Report / Annual Policy Report (INDIAC – NL EMN NCP 2006, 2007, 2008, 2009, 2010) for a more detailed clarification.

<sup>139</sup> See above in paragraph 3.1.1.

<sup>140</sup> See above in paragraph 2.2.1.

<sup>141</sup> See paragraph 2.2.1.

misuse and whether this can be deemed a reason for terminating the policy. The large numbers of family members who travel later was also the subject of much debate.

During the entire review period, unaccompanied minor foreign nationals received considerable public and political attention.<sup>142</sup>

First and foremost there was commotion about the disappearance of unaccompanied minor foreign nationals from the asylum reception centres, possibly due to them becoming victims of human trafficking. This resulted in considerable media attention and debate, including in the Lower House of Parliament. The debate was not on whether unaccompanied minor foreign national permits are useful, but rather on the reception facilities offered. As a result a pilot with the protected reception of unaccompanied minor foreign nationals started in 2008.

In 2007 a great deal of attention was focused on the situation of what are referred to as ex-unaccompanied minor foreign nationals and whether the reception provisions for them should be terminated when they reach adulthood.

In the past, various organisations (including the national Ombudsman and Dutch Counsel for Refugees) have been critical about age testing.

## 5.2 Public debate at the year end 2009-2010

As explained in Chapter 2, paragraph 2.2.1, the Cabinet has expressed its intention to discontinue the categorical protection policy. In paragraph 2.2.2 we mentioned that the State Secretary of Justice has announced that she will also abolish the unaccompanied minor foreign national permit. The State Secretary substantiates the abolition of the national categorical protection policy explicitly using the argument that the element of group protection the policy is oriented around is already safeguarded via the international subsidiary protection. She does not apply any similar argument to the abolition of the unaccompanied minor foreign national policy. However, in effect, any abolition of specific Dutch protection policy (and therefore of the unaccompanied minor foreign national policy) as well can be explained as a step towards far-reaching harmonisation of EU policy. Both intentions resulted immediately in debate.

Dutch Counsel for Refugees in fact believes that the protection of refugees is becoming increasingly threatened. 'The goal of the asylum policy ought to be proper protection for refugees. Instead of that the government is trying to keep them out wherever possible.'<sup>143</sup>

The announcements were made very recently and the corresponding debate has only just started. There has, for example, not yet been any detailed debate on the matter in the Lower House of Parliament. As a consequence, the spotlight has primarily been on critics.

### **Responses to the intention to abolish the categorical protection policy**

Dutch Counsel for Refugees calls the abolition of the categorical policy 'irresponsible'.<sup>144</sup> The categorical protection policy, with its restrictions, must continue to exist as a national safety net for as long as there is no satisfactory and adequate alternative. Dutch Counsel for Refugees argues that, from the point of view of humanity and solidarity, the Netherlands must not send people back to unsafe situations. As director Tineke Huizinga explains, 'The consequence of this policy is that people are sent back to life-threatening situations, or end up on the street in the Netherlands'. Dutch Counsel for Refugees believes that a safety net must stay in place in addition to the individual grounds for protection. 'Some conflicts

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<sup>142</sup> More detailed information on the debates relating to unaccompanied minor foreign nationals can be found not only in the relevant instalments of the Policy Analysis Report / Annual Policy Report (INDIAC – NL EMN NCP 2006, 2007, 2008, 2009, 2010), but also in the recent EMN report on unaccompanied minor foreign nationals in the Netherlands (INDIAC – NL EMN NCP 2010a).

<sup>143</sup> See

[http://www.vluchtelingenwerk.nl/index.php?option=com\\_content&view=article&id=625:actueel&catid=28:frontpage](http://www.vluchtelingenwerk.nl/index.php?option=com_content&view=article&id=625:actueel&catid=28:frontpage)

<sup>144</sup> See

[http://www.vluchtelingenwerk.nl/index.php?option=com\\_content&view=article&id=625:actueel&catid=28:frontpage](http://www.vluchtelingenwerk.nl/index.php?option=com_content&view=article&id=625:actueel&catid=28:frontpage)

in the world are so intense that it is inhuman to send people back to the affected areas. By abolishing the categorical policy you create a protection hole. It is then all well and good to invoke the European Qualification Directive which, according to the Ministry of Justice, also offers sufficient grounds for protection, but then you still have to apply it in the right way. As things stand, a lot of refugees will be wrongfully rejected.'

The intention to abolish the categorical protection policy also appears to be at odds with the advice of the Advisory Committee on Migration Affairs [*Adviescommissie voor Vreemdelingenzaken*] (ACVZ). Previously, in 2006, the ACVZ issued advice on group protection policy in a document entitled 'Categorical protection policy, a necessity' [*Categoriaal Beschermingsbeleid, een noodzaak*].<sup>145</sup> In this document the ACVZ advocates a continuation of what is referred to as group protection policy and observes that this policy has not had any demonstrable 'inducing effect'. In the update to this advice of 6 May 2009<sup>146</sup> the ACVZ points out that the variations in the intake of asylum seekers to a dozen European countries cannot be explained by the (minimal) differences in legislation and regulations relating to group protection. The differences in intake as revealed by the research carried out for the update by the International Centre for Migration Policy Development (ICMPD, Vienna) and the European Council for Refugees and Exiles (ECRE) may be the consequence of another policy implementation process or other factors varying from the presence of compatriots to economic opportunities. In the ACVZ's opinion, the update has not generated any results which justify a change in the categorical protection policy, or the single status system. In the update the ACVZ also recommends that initiatives be developed within the European Union for harmonising international law standards so that the group protection policy can be tailored to the European situation as regards regulations and execution.<sup>147</sup>

The intention to abolish the categorical protection policy appears to mean that the State Secretary of Justice has not complied with the ACVZ's advice.

#### **Responses to the intention to abolish the unaccompanied minor foreign national policy**

Following the letter on the unaccompanied minor foreign national policy, Unicef and Defence for Children-ECPAT sent a detailed response to the members of government involved on 16 December 2009.<sup>148</sup> The children's rights organisations were pleased that the Cabinet's policy starting point for a re-evaluation was inspired by International Convention on the Rights of the Child (CRC). The State Secretary makes numerous references to this Convention and the interests of the child, which have to take priority. However, Defence for Children-ECPAT and UNICEF do not agree with her on many points. For example, these organisations do not believe that the intended abolition of the unaccompanied minor foreign national permit is a good idea because it will lead to illegal residency. Defence for Children-ECPAT and UNICEF acknowledge that progress has also been made as regards children's rights and that unaccompanied minor foreign nationals will be detained less frequently and will acquire clarity sooner regarding their future prospects.

In a letter submitted to and published in the NRC Handelsblad newspaper of 15 December 2009, Carla van Os (Defence for Children) and Karin Kloosterboer (Unicef Nederland) write that many of Albayrak's ideas link up with the children's rights convention but that her policy intentions, perhaps unwittingly, transform a group of children into 'illegal' fellow citizens.<sup>149</sup> According to the letters authors, the abolition of the temporary residence permit for unaccompanied minor foreign nationals leads reduces these minors to the state of children without papers or 'illegal children'. Van Os and Kloosterboer are also of the opinion that children should be returned to their country of origin as soon as possible once it is clear that they have no future in the Netherlands. 'However, the repatriation must then be accompanied by all the necessary security guarantees. Intensive supervision is needed, both when preparing the repatriation and thereafter, by people who the child trusts. A plan needs to be drawn up regarding where the child is going to live and how his or her conditions for existence are safeguarded.' Above all, Van Os and

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<sup>145</sup> <http://www.acvz.org/publicaties/Advies-ACVZ-NR19-2006.pdf>

<sup>146</sup> <http://www.acvz.org/publicaties/Briefadvies%2012-2009.pdf>

<sup>147</sup> See the ACVZ press release at <http://www.acvz.org/publicaties/20090512%20Persbericht.pdf>.

<sup>148</sup> <http://www.defenceforchildren.nl/images/20/1012.pdf>

<sup>149</sup> [http://www.defenceforchildren.nl/p/21/1760/mo89-mc21/mo8-cgltxt=\\*nrc\\*/nieuwe-plannen-voor-kinderen-in-het-vreemdelingenrecht](http://www.defenceforchildren.nl/p/21/1760/mo89-mc21/mo8-cgltxt=*nrc*/nieuwe-plannen-voor-kinderen-in-het-vreemdelingenrecht)

Kloosterboer want an investigation to take place as to whether those who are going to take care of the child in the country of origin are actually capable of doing so. The guardian in the Netherlands has to agree to the repatriation.

Dutch Counsel for Refugees believes that repatriation should only take place after a careful procedure has been completed.<sup>150</sup> The general procedure of eight days is too short. Dutch Counsel for Refugees is of the opinion that all applications involving children must therefore be dealt with as standard within the framework of a continued asylum procedure, which lasts for a maximum of six months. The new unaccompanied minor foreign national policy also states that the Ministry of Justice has three years to ensure that a child returns. Dutch Counsel for Refugees urges the State Secretary to introduce a shorter period so that children are not left in the dark for so long. In addition, the policy should be clearer about when repatriation is actually possible. According to Dutch Counsel for Refugees, repatriation is only an option once it has been clearly demonstrated that this is in the interest of the child. If, after careful consideration, repatriation indeed turns out to be justified, a check must be carried out to ascertain how this can be done in a safe and dignified manner. For example, the reception provisions, medical care and education should be guaranteed in the country of origin.

In an article in the NRC Handelsblad newspaper of 12 December 2009, director Tin Verstegen of the guardianship organisation Nidos states that providing clarity quickly and acting quickly is all well and good,<sup>151</sup> 'but if it is impossible to repatriate a child, despite every effort having been made, for example because the country of origin does not want to issue any papers, the child must be given a permit after one or two years'. Nidos believes there has to be a guarantee that the child will be properly cared for. 'Not all families who claim that they are able or willing to care for a child are able to live up to that claim. In such cases the child will end up homeless and wandering the streets once the three weeks have passed.'

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<sup>150</sup> 'The protection of children takes precedence over repatriation' [*Bescherming kinderen gaat voor terugkeer*], [http://www.vluchtelingenwerk.nl/index.php?option=com\\_content&view=article&id=623:bescherming-kinderen-gaat-voor-terugkeer&catid=13:actueel&Itemid=35](http://www.vluchtelingenwerk.nl/index.php?option=com_content&view=article&id=623:bescherming-kinderen-gaat-voor-terugkeer&catid=13:actueel&Itemid=35), 11 December 2009

<sup>151</sup> 'Jonge asielzoeker snel naar huis. Zekerheid over goede opvang in land van herkomst moeilijk te krijgen', NRC-Handelsblad, 12 December 2009. For the English version of this article, see [http://www.nrc.nl/international/article2438223.ece/Minister\\_wants\\_to\\_make\\_it\\_easier\\_to\\_reject\\_refugees](http://www.nrc.nl/international/article2438223.ece/Minister_wants_to_make_it_easier_to_reject_refugees).



## 6. Conclusions

In the Netherlands there is a wide variety of national, non-EU harmonised protection. This protection partially falls outside the asylum domain.

Article 29 of the Aliens Act gives six different grounds on which an asylum permit can be granted. Four of these offer national protection – the c-ground (referred to as the traumata policy), the d-ground (categorical protection policy), the e-ground (family members who travel later in a narrower sense) and the f-ground (family members who travel later in a wider sense) – in addition to the refugee status and the subsidiary protection status of the Qualification Directive which are laid down in the a-ground and b-ground of Article 29 of the Aliens Act. There has also been some debate about whether Article 29 (b) of the Aliens Act indeed offers the subsidiary protection within the meaning of the Qualification Directive. This debate focused on Article 15c of the Qualification Directive. The State Secretary's intended textual amendment of Article 29 (b) of the Aliens Act, which will mean the literal inclusion of the text of Article 15c of the Qualification Directive, appears to have put an end to this debate.

Apart from the four supplementary grounds for providing an asylum permit, Dutch immigration policy also has a number of regular residence permits which still offer an additional form of non-EU harmonised protection to asylum seekers whose asylum applications have been rejected. Some of these residence permits can be granted automatically either for residency as an unaccompanied minor foreign national, or for residency as a foreign national who is unable to leave the Netherlands through no fault of his own. A number of regular residence permits, which cannot be granted automatically but for which an application has to be submitted, can provide a supplementary form of national protection to certain categories of foreign nationals whose asylum applications have not been accepted. This relates to residency subject to the medical treatment restriction or, following on from this, a medical emergency. A special case is the discretionary power to grant a residence permit.

Not only do the procedures for all these different residence permits vary, the rights related to the different statuses also differ considerably. The Netherlands applies a single status asylum system which means that all asylum permits are subject to the same rights, no matter what ground they have been granted on. In a general sense these rights are more robust than those associated with the different regular residence permits. The various regular residence permits do not always offer the same rights. In general these rights only become stronger if, after a number of years, the foreign national is able to obtain a permit for continued residence.

As regards the asylum permits granted, reliable figures, which are relevant to this report, are available for the years 2008 and 2009. Reliable figures are available on the regular permits granted which are referred to in this report for the years 2005 to 2009. Their relevance to this report is limited, however, because these regular residence permits are not only reserved for former asylum seekers, while it is not possible to deduce from the registration system in which cases such a residence permit has or has not been granted to a former asylum seeker.

The statistical overview shows, among other things, that recognised refugees do not even account for 10% of all asylum status holders. The majority of the asylum permits granted concern subsidiary protection within the meaning of the Qualification Directive, or categorical protection. The proportion of asylum permits on the grounds of categorical protection decreased drastically in 2009 as a consequence of the termination of the categorical protection policy for asylum seekers from Iraq. Somali asylum seekers are now by far the largest group to whom asylum permits on the d-ground have been granted. However, the categorical protection policy for asylum seekers from Somalia has now also been terminated, meaning that the number of d-ground asylum permits has become significantly less important.

At the end of 2009 the Cabinet announced its intention to abolish both the permit for unaccompanied minor foreign nationals and the categorical protection policy. The State Secretary of Justice justified these intentions by, for example, referring to far-reaching harmonisation of the European asylum and migration policy. The intention immediately resulted in criticism from, among others, Dutch Counsel for

Refugees, Unicef and Nidos. It is still unclear how the public debate will continue to develop. The Lower House of Parliament still has to debate the issue.

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