



Decentring the Study of Migrant  
Returns and Return Policies

# Legal and Policy Infrastructures of Returns in the Netherlands

## Country Dossier (WP2)

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## List of abbreviations

AMIF	Asylum, Migration and Integration Fund	
AVIM	Aliens Police	Vreemdelingen Politie
AZC	Asylum Seekers Reception Centre	Asielzoekers Centrum
CJEU	Court of Justice of the European Union	
COA	Central Agency for the Reception of Asylum Seekers	Centraal Orgaan voor opvang van Asielzoekers
DGM	Directorate General for Migration	Directoraat Generaal Migratie
DJI	Judicial Institutions Service	Dienst Justitiële Inrichtingen
DV&O	The Transport and Support Service	Dienst Vervoer en Ondersteuning
ERRIN	European Return and Reintegration Network	
E&S	The Dutch Information System “Implementation and Detection”	Executie & Signalering
ECHR	European Convention on Human Rights	
ECtHR	European Court of Human Rights	
INS	Immigration and Naturalisation Service	Immigratie en Naturalisatie Dienst (IND)
IOM	International Organisation of Migration	
KMar	Royal Military Police	Koninklijke Marechaussee
MS	Member State	
NP	National Police	Nationale Politie
REAN	Return and Emigration Assistance from the Netherlands	
R&DS	Repatriation and Departure Service	Dienst Terugkeer en Vertrek (DT&V)
RvS	Council of the State	Raad van State
TCN	Third-country national	Derdelander
The Minister	The Minister of Justice and Security	
UAM	Unaccompanied Minor	Alleenstaande minderjarige vreemdeling (Amv)
VB	The Aliens Decree of 2000	Vreemdelingenbesluit
VC	The Aliens Act Implementation Guidelines	Vreemdelingencirculaire
VV	Regulation for Aliens 2000	Voorschrift Vreemdelingen
VW	The Aliens Act of 2000	Vreemdelingenwet
ZHP	Sea Port Police	Zeehaven Politie

## Summary

This report has mapped out the legislative, institutional and procedural frameworks and infrastructures concerned with returning the unauthorised migrants from the Netherlands. A focus on the period 2015-2023 was maintained. An overview on the return statistics is provided. Furthermore, the policy and legislative developments were tracked down. The relation between the Dutch national legislation, the European and international law has been explained. The procedures regarding return both at the border and from within the national territory, return of the unaccompanied minors, forced and voluntary return have been explained in detail in section 4. In addition to special cases regarding the obligation to return, entry bans, detention and safeguards. The institutional framework has been outlined where the organisations and involved actors in implementing returns were enlisted as well as the dynamics of their collaboration within the so-called “Migration Chain”. The report has included the readmission efforts of the Netherlands both with EU and non-EU countries, regarding the readmission of the undesirable and the unauthorised migrants in sections 4 and 6. Additionally, the fundings allocated to the return efforts and programs are included under section 7. Finally, the gaps in the legislative, institutional and international cooperation frameworks were highlighted under section 8.

It is concluded that, there has been an increased interest in return enforcement in the last two decades during which the return policy became a priority on the Dutch migration agenda. At the same time, the policy discretion in this area was increasingly constrained with the adoption of the EU Return Directive in 2008, and the CJEU caselaw developed since then. Regarding relevant issues, the Dutch policy tends to implement the EU obligations in a very limited way, for instance regarding the principle of detention as a measure of last resort, including the narrow judicial scrutiny of detention measures, and the detention regime, which does not reflect the nature of immigration detention as an administrative measure. Thus, the immigration detention policy is at odds with the principles of necessity and proportionality. Although regarding the return of unaccompanied minors, the Dutch policies have been found in violation of the Return Directive. The Dutch government still seeks or stretches the limits of that judgment by retaining a different treatment between UAMs of 15 years old and those who are younger than 15. Also, by leaving room for a legal limbo after the issuance of a return decision to UAMs. This renders the Dutch policy and its latest amendments non-compliant with the EU legislation and principles, in particular, the principal of the best interest of the child. The active role of national courts, however, has brought these gaps to light with preliminary questions, and enforced improvements.

Litigation by NGOs has led to shelter, healthcare and basic needs for rejected asylum seekers who stay irregularly at the Dutch territory. They had filed collective complaints on the basis of the European Social Charter, after the Dutch government had decided in 2001 to withdraw all support to rejected asylum seekers who had exhausted their judicial means, and at the same time introduced the so-called Linking Act, which excluded irregular migrants from public services. Since the decisions of the European Committee on Social and Economic Rights that this policy is against the ESH and the principle of human dignity, the government offers shelter to them, however on a temporary basis and under the condition that they cooperate with their return. Individual regularisation of rejected asylum seekers or other irregular migrants who face obstacles to be returned, takes place scarcely, and the last group regularisation for rejected asylum seekers happened in 2007, followed by a regularisation specifically for irregular

children in 2013 (with a review of those who initially were rejected in 2019).<sup>1</sup> The lack of regularisation leaves many irregular migrants in legal limbo, homeless, and deprived of basic care, provisions and rights.<sup>2</sup> Also in this case, the government implemented the EC SER decision, but partially. Since these decisions, the Dutch government has refused to ratify any optional protocol to human rights treaties, impeding NGOs and lawyers to invoke human rights obligations towards the state.

Based on these findings, this report proposes the following policy recommendations to the Dutch migration authorities, which also serve as points of attention for the European Commission while supervising the Netherlands' compliance with the Union Law:

- I- Better implementation of the Return Directive and the EU case law by adhering to the principles of necessity and proportionality, anchoring the best interest of the child and respecting the fundamental rights of migrants.
- II- Structurally practice less coercive enforcement measures instead of using detention to avoid absconding. Detention must be a measure of last resort and implemented for the shortest term possible and only if no other measures are possible. Also, migrants must have the opportunity to be heard before the decision of detention and its extension.
- III- Detention must be held as an administrative measure where the restrictions and duration are reduced to the minimum while taking into consideration the needs and vulnerabilities of the migrants held in detention.
- IV- The protection of the child's rights and best interest should be emphasised in the national legislation (Aliens Act, Decree and Implementation Guidelines). Clear guidelines and criteria on the assessment of the availability of adequate reception for unaccompanied minors in the countries of return must be provided and uncertainty must be avoided.
- V- There must be independent bodies that monitor the return and detention practices. The recent intention to transfer the National Prevention Mechanism to the National Institute for Human Rights is strongly encouraged.
- VI- Given the success of the LVV scheme, the government should consider renewing the agreement with the Dutch Municipalities Association (VNG) and turn it into an improved and sustainable structure.
- VII- Finally, there will always be immigrants who cannot be returned: no return policy can guarantee a 100% success rate. Instead of leaving those who cannot be returned in a legal and humanitarian limbo, which is currently the case, they should be entitled to a residence permit. The current threshold for in-country applications on this ground is far too high and regularisations are rare in the Dutch context. In sum, the absence of options for legal residence renders the overall migration management policy ineffective.

**Keywords:** return, deportation, detention, unaccompanied minors, return policy, return migration governance.

<sup>1</sup> "Generaal pardon," Amnesty Int., <https://www.amnesty.nl/encyclopedie/generaal-pardon>; Kamerbrief over uitvoering motie Van Dijk, March 14, 2022, <https://www.rijksoverheid.nl/documenten/kamerstukken/2022/03/14/tk-uitvoering-motie-van-dijk-sp>.

<sup>2</sup> See also the publication of Lisa Berntsen, Tesseltje de Lange and Conny Rijken, *Migranten zonder verblijfsvergunning: Rechten en sociaaleconomische positie in Nederland* (Amsterdam: Amsterdam University Press, 2022), [www.aup.nl/en/book/9789462989740/migranten-zonder-verblijfsvergunning](http://www.aup.nl/en/book/9789462989740/migranten-zonder-verblijfsvergunning).



## The GAPs Project

GAPs is a Horizon Europe project that aims to conduct a comprehensive multidisciplinary study on the drivers of return policies and the barriers and enablers of international cooperation on return migration. The overall aim of the project is to examine the disconnects and discrepancies between expectations of return policies and their actual outcomes by de-centring the dominant, one-sided understanding of “return policymaking.” To this end, GAPs:

- examine the shortcomings of EU’s return governance;
- analyse enablers and barriers to international cooperation, and
- explore the perspectives of migrants themselves to understand their knowledge, aspirations and experiences with return policies.

GAPs combines its decentring approach with three innovative concepts:

- a focus on return migration infrastructures, which allows the project to analyse governance fissures;
- an analysis of return migration diplomacy to understand how relations between EU Member States and with third countries hinder cooperation on return; and
- a trajectory approach that uses a socio-spatial and temporal lens to understand migrant agency.

GAPs is an interdisciplinary 3-year project (2023-2026), co-coordinated by Uppsala University and the Bonn International Centre for Conflict Studies with 17 partners in 12 countries on 4 continents. GAPs' fieldwork has been conducted in 12 countries: Sweden, Nigeria, Germany, Morocco, the Netherlands, Afghanistan, Poland, Georgia, Turkey, Tunisia, Greece and Iraq.

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## 1. Statistical Overview regarding Returns and Readmissions at the National Level

In the Netherlands, the statistics on return and readmissions are provided by the Repatriation and Departure Service (DT&V). The statistics are generated through the aggregate numbers of returns provided by the cooperating organisations working on the asylum procedure, reception and return of the migrants who do not or no longer have the right to stay in the Netherlands.\* The existing data are disaggregated into two categories of return, namely the demonstrated departures from the Netherlands and the category of people that are assumed to have left the country. The category of demonstrated returns include both forced and assisted/voluntary returns. The ones that are assumed to have returned are TCNs who have left on their own, without supervision. As they are not registered anymore, the authorities tend to report that they have departed ‘independently’.

The data on the demonstrated returns are also disaggregated based on the nationality of the returnees and country of return which can be a non-EU country or a MS under the Dublin regulation.<sup>3</sup> Forced return is counted by the DT&V through aggregating the numbers of returns from the immigration and criminal detention. Independent return is calculated through aggregating the numbers of migrants who have received basic departure or reintegration support from the IOM or from one of the NGOs working on returns.<sup>4</sup>

Furthermore, there are data available on the top five nationalities that return from the Netherlands and on the return numbers from migration detention. These data are publicly accessible on the DT&V [website](#). It is important to mention there are great variances between the return statistics provided by the DT&V and those provided by the European Migration Network which draws on statistics provided by Eurostat. Also, the statistics provided in EMN reports and factsheets do not match the statistics provided by the Eurostat for the years 2015, 2016 and 2017 specially the numbers of migrants refused entry at the borders, found to be illegally staying, ordered to leave and returned following an order to leave. In addition to that, in the years 2016, 2017 and 2018 the EMN provides different forced return figures than the DT&V, EMN provides 5520, 5510 and 5470 for these three years,<sup>5</sup> while the DT&V provides 2220, 3390 and 2650.

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\* IND, DT&V, COA, KMar, IOM, NP, Aliens Police, DJI, DVO.

<sup>3</sup> Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” *Dienst Terugkeer en Vertrek*, August 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

<sup>4</sup> Ibid

<sup>5</sup> European Migration Network, “The Netherlands EMN country factsheet, main developments in migration and international protection including latest statistics,” *European Commission* (2018), 8.

## 2. The Political Context/Framework

This section focuses on the policy developments since 2015. However, it is of great importance to outline the policy context and general framework starting with the Aliens Act 2000, by which the government departed from its policy to continue offering rejected asylum seekers reception facilities as long as they cooperated with their return. This policy had been introduced in 1997, which led to a procedure aiming to receive travel documents from the embassy of the country of origin. The rejected asylum seeker was under the obligation to cooperate with the immigration authorities to receive a *laissez passer* to return.

In case the immigration authorities concluded that he/she insufficiently cooperated, the person would no longer be entitled to reception facilities.<sup>6</sup> As in the same period, the government introduced the Benefit Entitlement Act, (often called the Linking Act, referring to the Dutch term *Koppelingswet*), which conditioned entitlement to social rights to legal residence, these rejected asylum seekers ended up in the streets without any access to services, except education for minors, necessary health care and legal aid.<sup>7</sup> The deprivation from reception facilities led to initiatives from churches and civil society organisations offering shelter to those rejected asylum seekers and contesting that they had not cooperated with their return. This was followed by a parliamentary debate about the criteria determining the actual cooperation, leading to the instalment of an independent committee tasked to review the criteria for non-cooperation.<sup>8</sup>

In 1999 the government introduced a new policy, based on the principle that rejected asylum seekers must take their own responsibility to return and that it is therefore not the responsibility to assess the level of cooperation.<sup>9</sup> According to the government, the interaction between the returnee and the embassy is a 'black box', which makes the attitude of the returnee difficult to verify. In the new reasoning of the government, rejected asylum seekers have in principle always the possibility to return. Since then, reception facilities automatically end 28 days after the decision in appeal, or in case no appeal has been submitted, 28 days after the rejection decision. This new exclusion policy is called the 'no-fault policy', referring to the exception made for migrants who prove that they cannot return due to external, objective circumstances. For instance, if authorities of their state of residence are not responsible, or in case of a failed state. As the risk of refoulement has already been assessed in the asylum procedure, these criteria don't play a role at this stage. Migrants who can prove such objective obstacles would keep their entitlement to reception and would be issued a temporary residence permit. If after three years they would still be unable to return, their permit would become permanent. However, a residence permit has only been issued in very few cases, mainly to stateless people, for instance stateless Palestinians. In 2005, this criterion was extended to migrants with a nationality, who could prove the existence of objective obstacles to return.<sup>10</sup>

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<sup>6</sup> Letter of 3 June 1997, Notitie over het terugkeerbeleid, *Kamerstukken II 1996/97*, 25386, no. 1.

<sup>7</sup> Staatsblad, 1998, no. 203. See also Joanne van der Leun, "Excluding illegal migrants in The Netherlands: Between national policies and local implementation," *West European Politics*, no. 29:2 (2006): 310-326, <https://doi.org/10.1080/01402380500512650>.

<sup>8</sup> *Handelingen II 1996/97*, p. 655-685; for the final advice see *Kamerstukken I 1997/98*, 19637, no. 322.

<sup>9</sup> Letter of the Secretary of Justice of 6 July 1999, Notitie over het terugkeerbeleid, *Kamerstukken II 1998/99*, 26646, no. 1.

<sup>10</sup> *Kamerstukken II 2010/13*, 29344, no. 109.

Since the so-called no-fault policy, most rejected asylum seekers were forced to leave the reception centres in which they resided, without an alternative accommodation at their disposal. These practices, which were heavily contested by parts of society, led to local initiatives by civil society and municipalities developing alternative housing and support to them.<sup>11</sup> Two main developments have significantly reduced the number of people without shelter. The first happened in 2007, when a newly elected coalition of Christian Democrats (CDA), Social Democrats (PvdA) and a small Christian party (CU) agreed to regularise rejected asylum seekers who already filed an asylum application before the entry into force of the Aliens Act 2000.<sup>12</sup>

This decision was coupled with the aim to reach an agreement with municipalities to dismantle their local shelters and to refrain from accommodating rejected asylum seekers under the Aliens Act 2000. The second development was the outcome of a collective complaint filed in 2008 by the Dutch department of Defence for Children with the European Committee on Social Rights, a Council of Europe body that supervises compliance by Member States with the European Social Charter.<sup>13</sup>

In its decision of October 2009, the Committee concluded that the policy to deprive children from all basic needs, was a violation of Articles 31(2) and 17(1) of the European Social Charter, and that the Dutch government has to provide adequate shelter and basic care to children who are unlawfully present in the Netherlands.<sup>14</sup> As Dutch courts recognised this decision and ordered the government to implement it, the government appealed to the highest civic court. The *Gerechtshof* ruled in 2011 that depriving children of basic needs is inhuman and unlawful and that children, with their parents, have to be provided with adequate shelter and care.<sup>15</sup> This ruling was confirmed by 2012 the *Hoge Raad* decision.<sup>16</sup> Since then, the government provided closed family centres (*gezinslocaties*) for rejected asylum seeker families and children, with the aim to return them.<sup>17</sup> According to the DT&V, detention for families with minor children is considered as a “last resort and might not last for longer than two weeks”.<sup>18</sup>

A complaint to the ECSR\* by the Conference of European Churches (CEC) followed in January 2013, requesting the provision of these basic needs for adults. In October 2013, the European Committee invited the Dutch government to take immediate measures to ensure that basic needs (shelter, clothes and food) are met for undocumented migrants.<sup>19</sup> In its decision on the merits, the ECSR decided that denying irregular migrants the right to necessary food, water, clothing and shelter constitutes a breach of the right to human dignity. According to the ECSR,

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<sup>11</sup> Katie Kuschminder and Talitha Dubow, “Moral Exclusion, Dehumanisation, and Continued Resistance to Return: Experiences of Refused Afghan Asylum Seekers in the Netherlands,” *Geopolitics*, no. 28:3 (2023): 1057-1078, <https://doi.org/10.1080/14650045.2022.2055462>.

<sup>12</sup> Coalition agreement Christen Democratisch Appel (CDA), Partij van de Arbeid (PvdA) en ChristenUnie (CU), “Samen werken, samen leven,” 7 February 2007, p. 43.

<sup>13</sup> ECSR, 14 January 2008, Complaint: Defence for Children International (DCI) v. the Netherlands, compliant no. 47/2008.

<sup>14</sup> ECSR, 20 October 2009, Decision on the merits: Defence for Children International (DCI) v. The Netherlands, complaint no. 47/2008, [www.coe.int](http://www.coe.int).

<sup>15</sup> *Kamerstukken II* 2010/11, 29344, no. 79.

<sup>16</sup> HR 21 September 2012, no. 11/01153, ECLI:NL:HR:2012:BW5328.

<sup>17</sup> *Kamerstukken II* 2011/12, 29344, no. 85.

<sup>18</sup> European Migration Network. “Annual Policy Report 2015 Migration and Asylum in the Netherlands,” (June 2016): 71.

\* European Committee of Social Rights.

<sup>19</sup> ECSR, 25 October 2013, Decision on Immediate Measures: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013.

the equal treatment provision regarding social and medical assistance of Article 13(4) of the RESC\* (which refers to lawfully present migrants), is also applicable to migrants in an irregular situation. It concluded that the right to shelter, as enshrined in Article 31(2) RESC must unconditionally apply to adult migrants in an irregular situation, “even when they are requested to leave the country”.<sup>20</sup> The highest administrative court ruled in December 2014 that, based on the ECSR decision, municipalities are obliged to offer adequate shelter (bed, bread and bath) to irregular migrants.<sup>21</sup>

The government decided to finance the implementation of this ruling by the municipalities. The Council of Europe Committee of Ministers’ resolution upheld the validity of the ECSR, but also echoed the concerns expressed by the Dutch government that, as irregular migrants are explicitly excluded from the scope of the Charter, ECSR’s ‘unwarranted interpretation’ could discourage Member States from accepting the collective right of complaint.<sup>22</sup> The Dutch government decided to only partially implement the decision, by providing reception facilities to irregular migrants, but under the condition that they cooperate on their return. In April 2015, the governing coalition parties, the conservative liberals (VVD) and social democrats (PvdA), finally reached an agreement to implement the ECSR decision by providing reception facilities to irregular migrants, but for a limited period and under the condition that they cooperate on their return.<sup>23</sup> These two restrictions were not in accordance with the ECSR’s decision and the national case-law. This policy measure was confirmed in the 2017 coalition agreement of the conservative liberals (VVD), Christian democrats (CDA), social liberals (D66) and the Christian party (CU), where the number of the LVV’s was extended to eight facilities, and the reception was offered under the condition of cooperation with return.<sup>24</sup> It led to an agreement between the Ministry of Justice and Security and the Dutch Association of Municipalities (VNG) in 2018 and was implemented as a pilot project from 2019 until 2022.<sup>25</sup> The evaluation report of the LVV-project, concluded that for 60 percent of the irregular migrants hosted and supported in these facilities a (semi-) sustainable solution was found in the form of legal residence, return or migration to another country.<sup>26</sup>

The evaluation makes clear the high burden of proof for meeting the objective ‘no-fault’ criterion impedes a solution for rejected asylum seekers. Another political development impedes a solution for this category of irregular migrants as well, which is the decision to abolish the possibility for the Secretary of State for Immigration to make use of his ‘discretionary competence’ to regularise a person on humanitarian grounds, who had

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\* Revised European Social Charter.

<sup>20</sup> ECSR, 1 July 2014, Decision on the merits: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013, report to the Committee of Ministers, published 10 November 2014.

<sup>21</sup> CRvB 17 December 2014, ECLI:NL:CRVB:2014:4178.

<sup>22</sup> ECSR, 15 April 2015, Resolution CM/ResCHS(2015)5 of the Committee of Ministers: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013.

<sup>23</sup> Ibid.

<sup>24</sup> Coalition Agreement VVD, CDA, D66 and Christen Unie, “Vertrouwen in de Toekomst,” 2017-2021, 10 October 2017, <https://www.rijksoverheid.nl/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertrouwen-in-de-toekomst>.

<sup>25</sup> European Migration Network. “Annual Policy Report 2018 Migration and Asylum in the Netherlands,” (April 2019).

<sup>26</sup> Annemieke Mack, Laura Buimer, Johanneke Rog, Miranda Witvliet, “Eindevaluatie Landelijke Vreemdelingenvoorziening,” *Regioplan*, (October 2022).

exhausted all legal remedies to achieve legal residence.<sup>27</sup> The Advisory Board for Migration Affairs advised the government to re-introduce this competence, however without any result.<sup>28</sup> Yet, many of the group of approximately 90 failed asylum seekers who lived in Amsterdam and had organised themselves in the 'We are here' group did eventually get a residence permit on individual humanitarian grounds.<sup>29</sup>

Criminalisation of irregular stay as a deterrence measure, has often been the topic of proposals and discussions in the political arena. In 1999, as part of a new return policy, irregular migrants who repeatedly had not complied with their reporting obligation, could be subjected to an entry ban.<sup>30</sup> The consequence of the entry ban is that they cannot (re)gain legal residence (unless the length of the entry ban does not exceed 2 years) and that remaining on the Dutch territory can be penalised with a fine of 3900 euros or imprisonment of six months maximum.<sup>31</sup> In 2010, the coalition agreement of a right-wing government (a minority government of CDA and VVD, supported by the populist party PVV) included the announcement to criminalise irregular stay in general.<sup>32</sup> This led to a legislative proposal submitted to the parliament in 2013 (by the centre-left coalition (VVD and PvdA), formed in 2012.<sup>33</sup> The bill was criticised by the Advisory Department of the Council of State, and led to heightened resistance within the coalition party of the social-democrats. One year later, it was withdrawn as a result of a package deal within the coalition.<sup>34</sup>

In 2015, the government proposed a uniform regime for the immigration detention in the context of forced returns, through the Repatriation and Detention of Aliens Act.<sup>35</sup> This bill aimed to finally implement the obligation of the Return Directive by enshrining the principle that detention is a measure of last resort and by ensuring that the regime of immigration detention (which was still prison-like in the Netherlands) is proportionate, reflecting the nature of administrative detention. It included for instance the obligation to take into account vulnerabilities of the TCNs. However, this legislative proposal is still pending in the Senate, because of severe criticism which reflects doubts about conformity with the Return Directive.<sup>36</sup> This criticism is concerned with the lack of safeguards, including to ensure that detention is used as a measure of last resort and to protect vulnerable people (including children), the lack of alternatives to detention and of a tailor-made approach, as well as the broad interpretation of the risk of absconding.<sup>37</sup> Experts also criticised the proposed regime of immigration

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<sup>27</sup> Regeling van de Staatssecretaris van Justitie en Veiligheid van 26 April 2019, no. 2570168, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderddrieënzestigste wijziging), *StcR.* 2019, nr. 24697, April 30, 2019.

<sup>28</sup> Adviescommissie voor Vreemdelingenzaken, "Wetadvies: Afschaffing van de algemene discretionaire bevoegdheid," (July 2019).

<sup>29</sup> See for instance Tom Kieft, "Woordvoerder krijgt na 16 jaar verblijfsvergunning," *Het Parool*, July 18, 2018, <https://www.parool.nl/nieuws/we-are-here-woordvoerder-krijgt-na-16-jaar-verblijfsvergunning~b7a7df8c/?referrer=https://www.google.com/>; <http://wijzijnhier.org/>.

<sup>30</sup> Letter of the Secretary of Justice of 6 July 1999, Notitie over het terugkeerbeleid, *Kamerstukken II* 1998/99, 26646, no. 1.

<sup>31</sup> See Articles 67 (1) sub a and 108 Aliens Act 2000.

<sup>32</sup> *Kamerstukken II* 2010/11, 32 417, no. 15.

<sup>33</sup> Coalition agreement VVD-PvdA, "Bruggen Slaan", 29 October 2012,

<https://www.rijksoverheid.nl/documenten/rapporten/2012/10/29/regeerakkoord>; See the legislative proposal *Kamerstukken II* 2012/12, 33512, no. 2.

<sup>34</sup> *Kamerstukken II* 2013/14, 33512, no. 3 and 13.

<sup>35</sup> *Kamerstukken II* 2015/2016, 34309, no. 2.

<sup>36</sup> *Kamerstukken II* 2015/2016, 34309, no. 2.

<sup>37</sup> See *Kamerstukken I* 2018/2019, 34309, nos. B, D, and E; see also Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (I): Detentie-omstandigheden onder huidig

detention, which implied that returnees would start their detention in a very restrictive regime, where they could be awarded with more freedoms if they show ‘good behaviour’. According to experts the regime does not sufficiently reflect the administrative nature of the detention, by using excessive restrictions of the liberties of detainees and by the possibility for the director of the detention centre to isolate people on very broad grounds.

Based on this criticism and other new developments, the government announced in 2019 that it would propose amendments to the legislative proposal.<sup>38</sup> As a consequence, the Senate decided to further await the proposed amendments, among them an amendment to the rules towards immigrants causing nuisance and hindrance which has been submitted to the parliament in June 2020.<sup>39</sup> In February 2023, the government informed the Senate again that it intended to submit another amendment to the legislative proposal, regarding measures to be made in case of security incidents in detention, for instance by exceeding the maximum period of isolation, and regarding a legal ground for immigration detention for categories not falling under EU law. The government therefore requested further postponement of the adoption of the initial legislative proposal (which had already been submitted in 2015).<sup>40</sup>

In 2022, the VC was amended regarding the return of UAMs whose asylum application had been rejected, but where their access to adequate reception facilities in the country of origin was not yet verified. Through this amendment UAMs were provided with a legal right to stay in the Netherlands pending the period of the investigation.<sup>41</sup> This amendment was the result of the CJEU ruling in the T.Q. case, in which the Court ruled that the differentiation made in the Dutch return practices and rules between UAMs younger than 15 and UAMs aged 15 or older, was in breach of Article 10 of the Return Directive.<sup>42</sup> The EU Return Directive prescribes that before taking a return decision for an UAM, the MS shall determine whether the child is returned to a family member, a nominated guardian or adequate reception facilities in the country of origin (Article 10(2)). In the Dutch Aliens Circular, this was only investigated for children who are younger than fifteen years old (see VC B8/6). For an UAM whose asylum claim had been rejected and who is aged 15 or older at the date of applying for asylum, a return decision was taken without the verification of adequate reception. In practice, children were often not returned until they reached adulthood. This left them in a legal vacuum, with no perspective to integrate at all.<sup>43</sup> The CJEU ruled that this distinction based on age was not in line with the Return Directive. To offer children perspective for the future, the MS needs to determine whether there is adequate protection in the country of origin for each UAM (para. 57). If not, the child must be granted legal residence. The Court denounced the legal vacuum that the Dutch policy leaves and emphasised that Member States have only two options: either to issue a return decision and enforce it, in case of available adequate reception in the country of origin. Or make use of Article 6(4) Returns Directive and allow for residence. In its ruling, the Court refers to the best interests of the child, as enshrined in Article 24(2) CFR and Article 5(a) EU Returns Directive, emphasising that a long period of insecurity harms the interests of

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regime en onder wetsvoorstel getoetst aan internationale normen,” *A&MR*, no. 8 (2019) and Annemarie Busser, Revijara Oosterhuis and Tineke Strik, “Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht,” *A&MR*, no. 9 (2019).

<sup>38</sup> *Kamerstukken I* 2018/2019, 34309, no. I.

<sup>39</sup> *Kamerstukken II* 2019/2020, 35501. See also *Kamerstukken I* 2021/22, 34309 / 35501, no. M.

<sup>40</sup> *Kamerstukken I* 2022/2023, 34309, no. N.

<sup>41</sup> European Migration Network, “Annual Report on Migration and Asylum 2022,” July 2023.

<sup>42</sup> CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (TQ v Staatssecretaris van Justitie en Veiligheid).

<sup>43</sup> Ministerie van Justitie en Veiligheid, “Buiten schuld,” (July 19, 2020).

the child. For a further explanation on the policies towards UAMs whose asylum claims were rejected, see section 4.7 of this report.

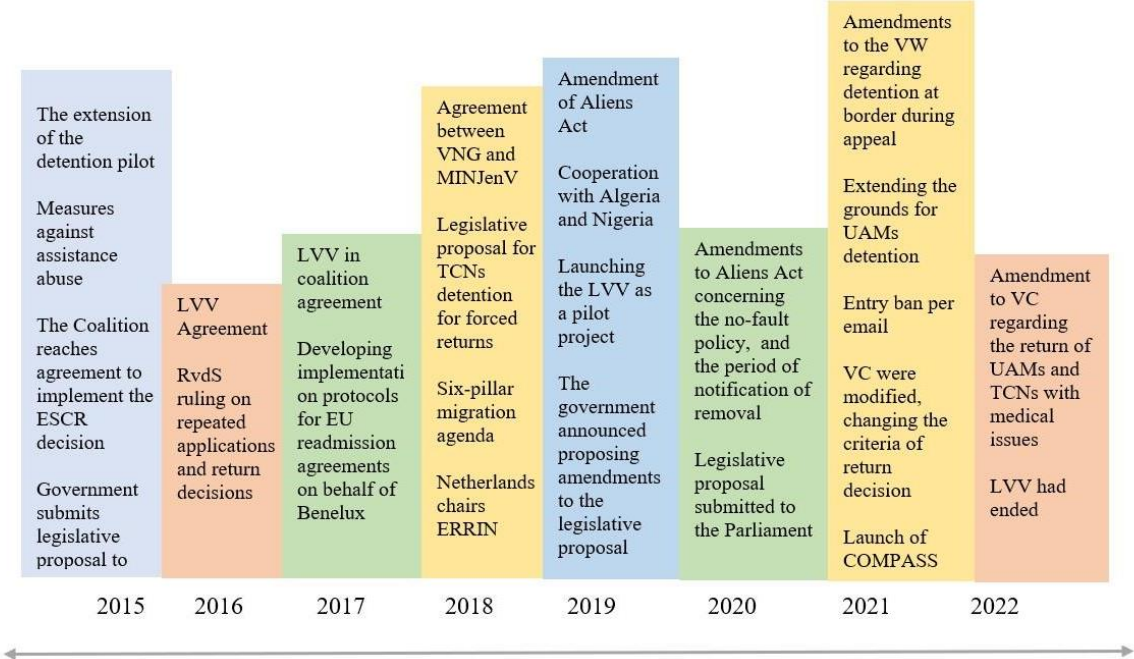


Figure (1) Return Policy Developments Timeline



### 3. Relationship between national law/EU law/public international law

The Netherlands has a moderately monist legal system that is characterised by relative openness towards international law which means that the national and international legal orders are complementary, and that national authorities are bound by the national and international obligations and international law can be invoked before national courts, also, that treaties automatically become binding for the state and constitute a part of the national legal order.<sup>44</sup> Article 93 of the Dutch constitution provides that international law becomes part of the national legal order when it enters into force.<sup>45</sup> Article 94 prohibits the application of national legislation if it conflicts with treaties' provisions.<sup>46</sup> Both articles provide for the direct effect and primacy of international law. These provisions not only refer to international law but also to the binding decisions of international organisations, including the ECtHR and the CJEU.<sup>47</sup> Furthermore, a yearly report is provided by the minister of foreign affairs to the parliament on the judgements made against the Netherlands and against the state parties which might affect the Dutch legal system.<sup>48</sup>

The Netherlands has signed and ratified 12 human rights treaties, and the United Nations treaties such as the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (ICRC), International Covenant on Civil and Political Rights (ICPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1951 Refugee Convention (RC) and its 1967 Protocol and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (ICRPD). It is important to mention that the Netherlands has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).<sup>49</sup> The Netherlands has ratified the optional protocols to the CAT (OPCAT), the ICPR and CEDAW. However, the OPCAT is only applicable at the European territory of the Kingdom of the Netherlands, not on the islands overseas.

The government signed the optional protocols to the ICESCR and the ICRC (on a communications procedure) in 2009, but it remained reluctant to ratify these protocols,

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<sup>44</sup> European Commission for Democracy Through Law (Venice Commission), "Comments on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, September 30, 2014), accessed August 1, 2023.

<sup>45</sup> European Commission for Democracy Through Law (Venice Commission), "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, December 8, 2014), accessed August 1, 2023.

<sup>46</sup> The Constitution of the Kingdom of the Netherlands 2002  
<https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf>.

<sup>47</sup> European Commission for Democracy Through Law, "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts," (Council of Europe, December 8, 2014), accessed August 1, 2023.

<sup>48</sup> See for the latest report "Jaarbericht 2022. Procesvertegenwoordiging Hof van Justitie van de EU: Inbreng van de Nederlandse regering," Ministerie van Buitenlandse Zaken, 1 May 2023,  
<https://ecer.minbuza.nl/ecer/hof-van-justitie/jaarverslagen-procesvoering-nederland.html>.

<sup>49</sup> OHCHR, "View the Ratification Status by Country or by Treaty," United Nations Human Rights Treaty Bodies, accessed August 3, 2023,  
[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN).

despite several calls from the Senate to do so.<sup>50</sup> The Dutch government even failed to sign the optional protocol to the ICRPD. As a result, citizens or NGOs are not able to file a complaint if in their view, the Dutch policy breaches the obligations stemming from the convention concerned. This reluctance seems to be related to the decisions of the supervisory committee to the European Social Charter (ECSECR), in response to collective complaints on the exclusion of basic rights regarding irregular migrants (see further chapter 2).<sup>51</sup> Apart from the lack of collective complaints, the supervisory committees of the treaties provide evaluations with recommendations, which have a non-binding but authoritative status. The government either implements them, or argues why it doesn't. In addition to the UN instruments, the Council of Europe has a number of binding or normative instruments, of which the most relevant is the European Convention of Human Rights (ECHR) with the right of individual complaints at the ECtHR. The Committee against Torture (CAT), which acts based on the ECHR and the prison rules, monitors the situation of people deprived of their liberty, including in transit zones or immigration detention centres. Its recommendations are taken seriously, but are not binding. The ECSECR, monitoring the application of the European Social Charter, is also part of the normative framework of the Council of Europe.

Treaty provisions that are self-executing, can be applied directly by the court. As an EU Member State, the Netherlands is not allowed to take measures that conflict with or fail to satisfy the obligations arising from the EU treaties and laws.<sup>52</sup> EU Directives have to be transposed through national legislation, but during the transposition period, the state is not allowed to change its policy in a way that contradicts the EU directive. Self-executing provisions can be invoked from the moment that the directive has entered into force. EU Regulations are immediately binding and invocable, as they need not to be transposed into national law. Concerning EU law, the Netherlands transposed the Return Directive end of 2011, exceeding the deadline for implementation with one year.<sup>53</sup> The EU legal instruments on return, asylum and legal migration are transposed into national legislation through amendments of the Aliens Act (*Vreemdelingenwet*, Vw) or Aliens Decree (*Vreemdelingenbesluit*, Vb). Further detailed guidelines are laid down in the Aliens Circular (*Vreemdelingencirculaire*, Vc).

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<sup>50</sup> Motion Strik c.s. adopted 18 March 2014, *Kamerstukken I* 2013–2014, 33750, no. VI, M.

<sup>51</sup> ECSECR, 20 October 2009, Decision on the merits: Defence for Children International (DCI) v. The Netherlands, complaint no. 47/2008, [www.coe.int](http://www.coe.int). ECSECR, 1 July 2014, Decision on the merits: Conference of European Churches (CEC) v. the Netherlands, complaint no. 90/2013, report to the Committee of Ministers, published 10 November 2014.

<sup>52</sup> Netherlands Court of Audit <https://english.rekenkamer.nl/publications/frequently-asked-questions/european-union/how-do-the-netherlands-comply-with-eu-law>.

<sup>53</sup> Staatsblad 2011, no. 663.

## 4. The Institutional Framework

In the field of migration governance in the Netherlands there are multiple organisations cooperating on managing admissions, reception and return. Also, on developing and coordinating policies and their implementation.<sup>54</sup> These organisations exist on the national and local levels and their cooperation is known as the “Migration Chain”.<sup>55</sup> There are two migration chains in which organisations collaborate, the small chain consists of the IND, DT&V and COA, which are the bodies that focus exclusively on admission, reception and return of foreign nationals and have close collaboration and consultation moments during the return procedures and removability checks,<sup>56</sup> while the large chain is more diverse and consists of governmental, intergovernmental, and non-governmental organisations that have a role in the return process such as the IOM.

The main organisation responsible for conducting the returns is the DT&V which has various partners with whom there is close collaboration, for example, the DT&V receives case files from the IND, AVIM and KMar, while the collaboration with the COA entails that COA focuses on removing the factors hindering the departure and prepare the individuals for the “future”.<sup>57</sup> In addition to that, there is the DJI and its support department DV&O, the first is responsible for implementing the detention of TCNs in case the DT&V or a public prosecutor issues a detention order while the second is responsible for providing the logistical support. This includes transport to the detention facility or to the airport from which the TCN would be removed whether on a regular commercial flight that is booked by a contracted travel agent or on a state charter flight coordinated by Frontex and other MSs. The KMar provides escorts to accompany the returnee in case of forced removal. In the wider migration chain there is the Ministry of Foreign Affairs which is a major partner to the DT&V and the vital point of contact between the Dutch government, foreign governments and international organisations as it is responsible for creating and negotiating return and readmission agreements with the countries of origin and funding the readmission and reintegration activities of the IOM and DT&V.

In the field of assisted returns, IOM is the main partner to DT&V. The DT&V refers to individuals who want to return voluntarily or require and are eligible for return assistance to the IOM which is subsidised by the Ministry of Justice and Security, Ministry of Foreign Affairs and the EU. There are also various NGOs that work on the return and readmission of TCN such as Goedwerk Foundation, Solid Road, Stichting Wereldwijd, Stichting ROS and the Dutch Council for Refugees.<sup>58</sup>

In case of returning UAMs, the Guardianship Organisation (NIDOS) is the main contact point for the DT&V, while the Dutch Council for Refugees helps in providing information and in drawing a return plan and connect the returnees to partner organisations where they can receive support in their countries of origin.<sup>59</sup> To a lesser extent the Association of Dutch Municipalities is also a partner to the DT&V and collaborates on providing relevant information for the implementation of the return policy and to whether migrants are departing

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<sup>54</sup> Ministerie van Justitie en Veiligheid, “Samen regelen we terugkeer,” Migratieketen, June 27, 2018, <https://magazines.rijksoverheid.nl/jenv/migratieketen/2018/01/samen-regelen-we-terugkeer>.

<sup>55</sup> See Appendix III

<sup>56</sup> Repatriation and Departure Service corporate brochure, “The Repatriation and Departure Service the professional implementer of the return policy,” Ministry of Justice and Security, 2020, p. 22.

<sup>57</sup> COA, “Reception Centres for Return”.

<sup>58</sup> “Refugee Help – Return to Nigeria,” n.d.

<sup>59</sup> Ibid.

the Netherlands or ending up homeless. This cooperation is managed by the Migration Chain Management Directorate (DRM) which falls under the Directorate General for Migration within the Ministry of Justice and Security. The DRM focuses on enabling the organisations in the migration chain to quickly and accurately implement the provisions of the VW and migration policies.<sup>60</sup> Furthermore, the DRM formulates clear and feasible goals and agreements to achieve them, monitor their implementation and their effects on the whole chain.<sup>61</sup>

DT&V, COA and Police work together in asylum seekers centres and have regular consultation meetings (LKO) where they discuss matters such as signals of human trafficking or smuggling, nuisance causing behaviour, changes in the policy and mutual cooperation. Such consultations can also be aimed at designing and coordinating a departure strategy or discussing specific files. The IND is often included in such consultations while NIDOS, VWN or the municipality can be invited if relevant. In case one of the organisations indicates the inability to implement the supposed strategy or if implementation fails, scaling up to the Regional Coordination Consultation (RAO) would take place.<sup>62</sup> The RAO is a periodic consultation meeting per region which can be one or two provinces, between the department manager of the DT&V, team chief AVIM, COA regional manager and a senior IND employee. More parties can be invited to the RAO such as IOM or NIDOS if needed, such consultations aim to solve the bottlenecks facing the LKOs.<sup>63</sup> However, complex issues that might have publicity or political impact are referred by the RAO to the Asylum Council that consists of representatives from IND, KMar, DT&V, COA, National Police, Migration Chain, DMB and connected to a chain marine.<sup>64</sup> Furthermore, calamities or incidents such as attempted suicide or threat of self-harm must be reported to the Chain-wide Calamity Team.<sup>65</sup>

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<sup>60</sup> Ministerie van Algemene Zaken, “Directoraat-Generaal Migratie (DGM),” Ministerie Van Justitie En Veiligheid | Rijksoverheid.nl, March 17, 2023, <https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/organisatie/organogram/directoraat-generaal-migratie-dgm>.

<sup>61</sup> Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, “Carolien Posthumus afdelingshoofd Ketensturing bij JenV,” Nieuwsbericht | Algemene Bestuursdienst, October 7, 2021, <https://www.algemenebestuursdienst.nl/actueel/nieuws/2021/10/07/carolien-posthumus-afdelingshoofd-ketensturing-bij-jenv>.

<sup>62</sup> Ministerie van Justitie en Veiligheid, “Lokaal Ketenoverleg (LKO),” Over DT&V | Dienst Terugkeer En Vertrek, October 27, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/lokaal-ketenoverleg-lko>.

<sup>63</sup> Ibid., “Regionaal afstemmingsoverleg (RAO),” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/regionaal-afstemmingsoverleg-rao>.

<sup>64</sup> Ibid., “Deelberaad Asiel (DA),” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/overlegvormen/da>.

<sup>65</sup> Ibid., “Calamiteiten en incidenten,” Over DT&V | Dienst Terugkeer En Vertrek, September 28, 2021, <https://www.dienstterugkeerenvertrek.nl/over-dtv/leidraad-terugkeer-en-vertrek/knelpunten-en-oplossingen/calamiteiten-en-incidenten>.

## 4.1 List of Authorities Involved in the Return Migration Governance as Defined and Authorised by the Law

Authority (English and original name)	Tier of government (national, regional, local)	Type of organisation	Area of competence in the fields of return (Briefly explain the role)	Link
Immigration and Naturalisation Service INS  Immigratie en Naturalisatie Dienst IND	National	Governmental	Issuing/ postponing/ lifting of return decisions and entry bans  Granting residence permit	<a href="https://ind.nl/en">https://ind.nl/en</a>
Return and Departure Service R&DS  Dienst Terugkeer en Vertrek	National	Governmental	Removal, support in obtaining travel documents	<a href="https://english.dienstterugkeerenvertrek.nl/">https://english.dienstterugkeerenvertrek.nl/</a>
Custodial Institutions Agency  Dienst Justitiële Inrichtingen DJI	National	Governmental	Migrant detention	<a href="https://www.dji.nl/">https://www.dji.nl/</a>
Transport and Support Service  Dienst Vervoer en Ondersteuning DV&O	National	Governmental	Transport	<a href="https://www.dji.nl/over-dji/organisatie-dji/landelijke-diensten/dienst-vervoeren-ondersteuning/organisatie-dvo">https://www.dji.nl/over-dji/organisatie-dji/landelijke-diensten/dienst-vervoeren-ondersteuning/organisatie-dvo</a>
Royal Military Police  Koninklijke Marechaussee KMar	National	Governmental	Apprehension, detention, issuance of return orders and escorting	<a href="https://www.defensie.nl/organisatie/marechaussee">https://www.defensie.nl/organisatie/marechaussee</a>
National Police/ Aliens Police AVIM	National	Governmental	Apprehension and issuance of return orders	<a href="https://www.politie.nl/">https://www.politie.nl/</a>
Seaport Police  Zeehaven Politie ZHP	National	Governmental	Apprehension and issuance of return orders	
Centraal Orgaan Opvang Asielzoekers COA	National	Governmental	Housing, counselling and coordinating with DT&V and police	<a href="https://www.coa.nl/en">https://www.coa.nl/en</a>
The Guardianship Organisation NIDOS	National	Governmental	Guardianship and contact point for DT&V	<a href="https://werkenbijnidos.nl/">https://werkenbijnidos.nl/</a>

Table (1) Authorities Involved in Return Migration Governance

## 5. The National Legal Framework Regarding Return

### 5.1. Definitions and Concepts

**Return decision:** decision in which the Minister informs a foreign national in writing that he/she has no right to stay and has to leave the EU territory within a certain period of time. In the same decision, it is provided that, in case of the rejection of an asylum claim, he/she has to leave the reception centre.<sup>66</sup>

**Departure:** boarding a ship or aircraft intended for departure from the Netherlands.<sup>67</sup>

**Voluntary Departure period:** a period between 0 and 28 days after the end of the lawful residence or after the rejection of the residence application or appeal within which the TCN has to leave the Netherlands on his/her own initiative. If the person complies with this obligation, no entry ban will be imposed.<sup>68</sup>

**Entry ban:** a decision that the person concerned is not allowed to re-enter the EU territory for a certain amount of time. If a voluntary departure term was granted, but the person has not complied with it, an entry ban will be imposed. If no voluntary departure term is granted, the return decision also encompasses an entry ban.<sup>69</sup>

**Expulsion:** the deportation of the TCN that takes place by handing him/her over to the border authorities, and placing him/her on board of an aircraft or ship of the same carrier that has transported him/her to the Netherlands, directly or with stopover in a country where he/she is granted entry.<sup>70</sup>

**Foreigner:** anyone who does not have Dutch nationality and who must not be treated as a Dutch national based on a statutory provision. This definition encompasses both Union citizens and third country nationals.<sup>71</sup> The Dutch legislation and authorities use the term 'aliens'.

**Independent departure:** departure by a person which is registered or proven, without the use of force.

**Unauthorised departure:** 'assumed departure' (as it was not observed) to unknown destination (met onbekende bestemming MOB).

**Third-country nationals:** non-EU and non-community citizens/ Persons who have nationality of a third state.

**Irregular stay of a third-country national:** a TCN is staying irregularly in the Netherlands if this person does not fulfil, or no longer fulfils the conditions of entry as set out in Art. 5 of the Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence, and if there are no obstacles to return or a pending application for residence permit.<sup>72</sup> Although Article 1 of the Return Directive uses the term 'illegally staying',

<sup>66</sup> Ibid.; Article 62 and 62a Aliens Act 2000.

<sup>67</sup> Article 4.1 (2) Aliens Decree 2000.

<sup>68</sup> Article 62 Aliens Act 2000.

<sup>69</sup> Articles 7 (4) and 45 (8) Aliens Act 2000.

<sup>70</sup> Implementation Guidelines A, section A3, subsection 6.

<sup>71</sup> Article 1 Aliens Act 2000.

<sup>72</sup> Ibid. Article 8 Aliens Act 2000.

we prefer the term irregular, which refers to something that does not conform to a set of rules or standards, but may not necessarily be illegal. Furthermore, illegal implies an action or behaviour considered as a criminal offense which is punishable, while irregular refers to a person (staying without authorisation).<sup>73</sup>

**Voluntary departure:** the foreign national must leave the Netherlands of his own accord within the departure period.<sup>74</sup>

**Safe third country of origin:**\* based on Aliens Regulation 2000 Article 3.37F, a country is considered safe if there are legal provisions in a democratic system where on a lasting basis there is no persecution, torture, inhuman or degrading treatment, punishment, nor threats of indiscriminate violence. Additionally, the degree of protection against persecution or ill-treatment by means of law, regulations, respect for international human rights obligations, non-refoulement and the legal remedies against violations of rights or freedoms.

**Vulnerable persons:** (not explicitly named vulnerable) unaccompanied minors, foreign nationals for whom it is not possible to travel in view of the state of health, and foreign nationals who are victims of or witnesses reporting human trafficking.<sup>75</sup>

## 5.2 Return at the Border

While transposing the Return Directive, the Dutch government chose to use the optional clause of Article 2(2)(a) of the directive and to exclude application of the directive at the borders. As a justification, the government reasoned that Article 13 of the Schengen Border Code is already applicable, offering ground for a refusal of entry, for which the reasons are communicated to the TCN. Adding the Return Directive would imply the obligation to also issue a return decision. Furthermore, the Dutch Aliens Act offers refusal of entry as a legal ground for detaining a TCN, which is absent in the Return Directive. Regarding the duration of this border detention, the Netherlands does apply the Return Directive. This detention ground is only applied at the Schiphol airport. That means that TCNs who arrive at the Dutch territory by crossing the land border and express their wish to apply for asylum, are referred to an open reception centre where their asylum claim is registered. Other irregular TCNs who are detected or apprehended at the territory, are issued a return decision according to the Return Directive.

According to Article 6 of the Aliens Act, the Dutch authorities may hold foreign nationals who have been denied entry at the airport in immigration detention in preparation for their removal. If a foreign national is refused entry or apprehended at the border or if a foreign national enters the Netherlands without a valid travel document or without the required financial means or in case of posing a threat to the public order or security they would be placed in a closed area designated by the border control authorities that is secured against absconding. This measure amounts to de-facto border detention, as foreigners stay on the Dutch territory where the so-called fiction of non-entry applies to them. In case the TCN applies for a residence permit or asylum, they have to remain in the place designated by the border control officer as

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<sup>73</sup> <https://thecontentauthority.com/blog/illegal-vs-irregular>.

<sup>74</sup> Ibid. Article 27b Aliens Act 2000.

\* The Aliens Decree enlists the EEA, Albania, Algeria, Andorra, Armenia, Australia, Bosnia and Herzegovina, Brazil, Canada, Georgia, Ghana, India, Jamaica, Japan, Kosovo, Morocco, Monaco, Mongolia, Montenegro, New Zealand, North Macedonia, Ukraine, San Marino, Senegal, Serbia, Togo, Trinidad and Tobago, Tunisia, Vatican City, United States, Switzerland as safe countries of origin.

<sup>75</sup> Article 17 Aliens Act 2000.

part of the procedure as long as there is no decision yet on the lodged application. The maximum duration of the asylum border procedure and detention is four weeks, in line with Article 43(2) Directive 2013/32.<sup>76</sup> In case further investigation is needed, the TCN would be placed in an open reception centre (AZC).<sup>77</sup>

If the asylum request is rejected during the border procedure, the detention of TCNs will be prolonged during the appeal procedure. Rejected asylum seekers have one week to appeal, after which the court has to take a decision within four weeks. In 2020, amendments were made to the Aliens Act which created a legal basis for continuing detention at the border during the (further) appeal procedure of those whose entry was denied or asylum application rejected.<sup>78</sup> If the asylum seeker fails to appeal, or after the court has taken a negative decision in appeal, the detention will be prolonged on the basis of the Return Directive. On that legal basis, the maximum total duration of the border detention can last up to 18 months from the moment of the negative decision in appeal. Mostly, migrants are detained for a period less than 3 months at the border and on the territory, yet, there are migrants who have been detained for longer than 6 months.<sup>79</sup> Families with minor children who apply for asylum, are immediately subject to a screening procedure, after which they are relocated to an open reception centre. The asylum border procedure is not applicable to UAMs neither to people who need special procedural safeguards related to their traumatised experiences in the past, and asylum seekers for whom detention is ‘disproportionally cumbersome’.

### 5.3 Regular Procedure to Issue a Return Decision

A TCN detected or apprehended while irregularly staying in the Netherlands, can be issued a return decision immediately if he or she does not apply for legal residence. When the TCN lodges an application for legal residence and this application is rejected, the negative decision implies a return decision at the same time. Since 7 March 2023, when issuing a return decision, the government enters an alert for the return decision into the Schengen Information System (SIS) which is visible to border authorities and police in the Schengen countries until the foreign national leaves the EU. The return decision is an administrative decision that is issued by the IND, the Aliens Police, ZHP or the Kmar, and includes the departure term that the TCN needs to comply with. If the TCN fails to meet this term, he/she might be subject to forced removal and could receive an entry ban, which applies to the whole EU and EEA territory. As a rule, the entry ban has a duration of two years, but in case of a serious threat to the public order or national security, the duration can be up to twenty years. Prior to the imposition of an entry ban, the TCN needs to be heard to assess the individual circumstances, to ensure that

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<sup>76</sup> “Border Procedure (Border and Transit Zones),” Asylum Information Database | European Council on Refugees and Exiles, April 11, 2023, <https://asylumineurope.org/reports/country/netherlands/asylum-procedure/procedures/border-procedure-border-and-transit-zones/>.

<sup>77</sup> Ministerie van Justitie en Veiligheid, “Border Detention: Return of Foreign Citizens,” Government.nl, August 2, 2022, <https://www.government.nl/topics/return-of-foreign-citizens/border-detention>.

<sup>78</sup> Staatsblad 2020, 136.

<sup>79</sup> “Duration of Detention,” Asylum Information Database | European Council on Refugees and Exiles, April 12, 2023, <https://asylumineurope.org/reports/country/netherlands/detention-asylum-seekers/legal-framework-detention/duration-detention/#:~:text=The%20majority%20of%20persons%20are,%2C%20see%20AIDA%202020%20update>.



humanitarian reasons are taken into account in deciding whether or not to impose an entry ban, and if so, with which duration.

In principle, the TCN is granted a voluntary departure term of 28 days, but the Minister can decide to shorten or completely refrain from it. The latter is for instance applicable in case of a risk of absconding or if the TCN poses a threat to public order, policy or national security or has committed a criminal offence. In the latter case the return decision is usually accompanied with an entry ban (see section 4.8 for the exact conditions and criteria). An entry ban cannot be issued without issuing a return order and is only issued to non-EU/EEA nationals. A return decision is also issued when the IND revokes a residence permit or refuses to renew an expiring one.

Thus, a return decision has more legal consequences at the same time: it is a formal decision that the stay is irregular, it implies an order to leave the country within a voluntary departure term (provided for in the decision). If no voluntary departure term is granted, the return decision includes an entry ban. In case of a previous application, the decision includes the rejection of that application. Furthermore the return decision offers the possibility to appeal the decision, and it grants the authorities the competence to enter a place without permission of the owner in order to enforce the decision.<sup>80</sup> In the specific situation of a rejected asylum claim, the return decision also implies the obligation to leave the reception facilities within the same period.<sup>81</sup> In case of an appeal against the rejection, the term for departure and for leaving the reception facilities is extended until 28 days after the judicial decision in appeal. The appeal against the rejection/return decision in the first instance has automatic suspensive effect, but regarding an appeal in the second instance, the court decides on the suspensive effect based on a request for an interim measure. In case of inadmissibility as another (Member) State is responsible based on the Dublin Regulation, the decision serves as a transfer decision as well, but it does not lead to irregular stay.<sup>82</sup> It also offers the asylum seekers a voluntary departure term, and if this is not complied with, the transfer will be enforced. As a consequence of the CJEU judgement in *Gnandi*, all effects of the return decision are suspended as long as the appeal procedure is pending, and the asylum seeker is allowed to await this procedure.<sup>83</sup>

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<sup>80</sup> Article 27 Aliens Act 2000.

<sup>81</sup> Article 45 Aliens Act 2000.

<sup>82</sup> Article 44a Aliens Act 2000.

<sup>83</sup> CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*) and CJEU 5 July 2018, C-269/18 PPU, ECLI:EU:C:2018:544 (C).

## 5.4 Special Cases and their relation with the Obligation to Issue a Return Decision

### Inapplicability of apprehension measures

- I. The Aliens Act 2000 Article 50(1) authorises the Dutch police to stop persons in order to check their identity, nationality, and residence status if there is a reasonable suspicion of irregular residence.<sup>84</sup> However, based on Article 12(b) of the General Law on Entry of 2010, police entry to spaces intended for religious services or for meetings of philosophical nature for the purpose of arrest or apprehension is not allowed during the religious service or the reflection meeting except in the case of red-handed detection.<sup>85</sup> Under Article 6.5(2-3) of the Aliens Decree 2000, an entry ban will not be issued or will be lifted in case that the TCN is a victim of human trafficking, smuggling, domestic violence, honour-related violence or a witness eligible for reflection time for reporting human trafficking or smuggling. In case that the TCN is involved in procedures before the ICC or other international courts\*, the departure term would be extended if the foreigner's presence is necessary.

### Apprehension during exit check

- II. In case the Police or KMar finds a TCN at the border during an exit check and the IND provides that the TCN has been staying in the Netherlands irregularly due to the lack of a valid residence permit or due to that the TCN has not applied for a residence permit in the first place, he/she will receive a return decision. It is possible to lodge an objection to the IND or appeal to the court against the decision.<sup>86</sup>

### Return decision from another EU MS

- III. If the authorities detect or apprehend a TCN who holds return decision from another EU MS, he or she can be transferred to that country in case of a bilateral agreement without an additional return decision to be taken. In other cases, the Dutch authorities have to issue a return decision based on Dutch law, before they can give effect to such decision, such as a detention measure. Normally, a TCN who is apprehended in the Netherlands due to irregular residence would be issued a return decision and in case of receiving more than one return decision (including in another MS), the TCN would be

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<sup>84</sup> Ruben Timmerman, Arjen Leerkes, Richard Staring, and Nicola Delvino. "Free In, Free Out': Exploring Dutch Firewall Protections for Irregular Migrant Victims of Crime," *European Journal of Migration and Law* 22, 3 (2020): 427-455, doi: <https://doi.org/10.1163/15718166-12340082>.

<sup>85</sup> Article 12 Algemene Wet op het Binnentreden.

\* The Special Tribunal for Lebanon, the International Yugoslavia Tribunal, the Special Court for Sierra Leone, the Kosovo Relocated Specialist Judicial Institution, or the International Residual Mechanism for Criminal Tribunals.

<sup>86</sup> Immigratie en Naturalisatiedienst, "Return Decision".

issued an entry ban.<sup>87</sup> Furthermore, in case the TCN has received a return decision from a MS that enters an alert in the SIS, if he/she is found at the border, the border control officer imposes an entry ban based on Implementation Guidelines of the Aliens Act section A2 subsection 12.4.

### Stay during appeal or pending renewal

- IV. In case a TCN is awaiting the outcome of an application for the issuance or renewal of a residence permit, or of appeal in first instance, he/she is allowed to reside in the Netherlands. An appeal in second instance does not have automatic suspensive effect, but the court has to decide on the request for an interim measure by the applicant. However, due to the judgement in *Gnandi*, in the case of an asylum procedure, all effects of the return decision are suspended as long as the appeal procedure is pending, and the asylum seeker is allowed to await this procedure.<sup>88</sup> As a safeguard in case of a pending residence permit renewal, the foreign national receives a residence endorsement sticker in his/her passport which provides that the foreign national is allowed to reside in the Netherlands during the procedure. In case of delayed decisions or renewal procedures it is possible to receive a second residence endorsement sticker if the first has expired. The validity of the sticker depends on the individual situation with a maximum of six months.<sup>89</sup>

### Return decision to TCNs holding residence permit in another EU MS

- V. Under the Article 62a of the Aliens Act, the Minister issues a return decision unless the TCN is in possession of a valid residence permit or another authorisation to stay issued by another MS. In this case the TCN is instructed to enter the territory of the responsible MS immediately, however, in case of non-compliance or if immediate departure is required in the interest of national security or public order, a return decision will be issued.<sup>90</sup> Furthermore, if a TCN has a valid residence permit in one of but has not complied with the conditions and obligations stated in Article 12 of the Aliens Act concerning means of subsistence, employment, threatening public order or national security, he/she shall be expelled by the officer charged of border control who submits an alert request to the IND.<sup>91</sup> In case the TCN who holds a residence permit from another MS is to be issued a return decision that entails a strict entry ban, consultation procedure has to take place between the authority issuing the return decision (IND, KMar, ZHP, the police) and the MS that has issued the residence

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<sup>87</sup> Immigratie en Naturalisatiedienst, “Entry Ban”.

<sup>88</sup> CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*).

<sup>89</sup> Immigratie en Naturalisatiedienst, “Appointment Residence Endorsement Sticker,” IND, July 4, 2023, <https://ind.nl/en/appointment-residence-endorsement-sticker#:~:text=A%20residence%20endorsement%20sticker%20is,to%20apply%20for%20a%20stick>er. Accessed August 6, 2023.

<sup>90</sup> Article 62a Aliens Act; Aliens Circular 2000 VC(A), section A3, subsection 2.

<sup>91</sup> Aliens Circular 2000 VC(A), section A2, subsection 12.2.

permit.<sup>92</sup> Upon consultation the MS having issued the residence permit might withdraw it and the TCN would receive a return decision and an entry ban with a SIS notification.

### Readmission Agreements concerning TCNs declared undesirable

- VI. Concerning TCNs who are declared undesirable, and irregularly staying TCNs, there are various readmission agreements between the Netherlands and other MSs. The agreement between the Netherlands, Belgium and Luxembourg established in 1960 concerning the External Borders of the Benelux Territory stipulates in Article 9 that each of the three countries take back the so called TCNs who are declared undesirable, who entered the territory of the other contracting state from their territory. Furthermore, Article 10 entails that an undesirable foreigner in any of the three states is undesirable in all the Benelux territory.<sup>93</sup> Additionally, the Netherlands as part of the Benelux has readmission agreement with Germany established in 1966,<sup>94</sup> and readmission agreement with France in 1964 which entails that the Benelux countries shall take back foreigners whom France wants to expel and that France takes back foreigners whom the Benelux countries want to expel without formalities or diplomatic intervention.<sup>95</sup> Similarly with Austria in 1965,<sup>96</sup> Slovenia in 1992,<sup>97</sup> Poland in 1991, Romania in 1995,<sup>98</sup> Armenia in 2009 (readmission agreement however not without formalities).<sup>99</sup> Provisions concerning admitting and taking back foreign nationals under such agreements are enlisted in the VC, section A3 (6.5).

### Transfers under the Dublin regulation

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<sup>92</sup> Aliens Circular 2000 VC(C), section A3, subsection 2.

<sup>93</sup> Overeenkomst tussen het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden, inzake de verlegging van de personencontrole naar de buitengrenzen van het Beneluxgebied, September 14, 2022.

<sup>94</sup> Overeenkomst tussen de Regering van de Bondsrepubliek Duitsland enerzijds en de Regeringen van het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden anderzijds, inzake het overnemen van personen aan de grens - BWBV0004479," July 1, 1966.

<sup>95</sup> Overeenkomst tussen de Regeringen van het Koninkrijk der Nederlanden, het Koninkrijk België en het Groothertogdom Luxemburg enerzijds, en de Regering van de Franse Republiek anderzijds, inzake het overnemen van personen aan de gemeenschappelijke grens van het grondgebied van de Beneluxlanden en Frankrijk - BWBV0004480, May 16, 1964.

<sup>96</sup> Overeenkomst tussen de Bondsregering van de Republiek Oostenrijk, enerzijds, en de Regeringen van het Koninkrijk België, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden, anderzijds, betreffende de overname van personen aan de grens - BWBV0004481," April 1, 1965.

<sup>97</sup> Overeenkomst tussen de Regeringen van het Koninkrijk der Nederlanden, het Koninkrijk België en het Groothertogdom Luxemburg, enerzijds, en de Regering van de Republiek Slovenië, anderzijds, betreffende de overname van onregelmatig binnengekomen of verblijvende personen - BWBV0001062, November 16, 1992,

<sup>98</sup> "Internationale Overeenkomsten," *SDU* 8 (January 1994).

<sup>99</sup> Tractatenblad 2009, 124. Officiële bekendmakingen September 16, 2009. Overeenkomst tussen de Benelux-Staten (het Koninkrijk België, het Groothertogdom Luxemburg, het Koninkrijk der Nederlanden) en de Republiek Armenië betreffende de overname van onregelmatig verblijvende personen (met Uitvoeringsprotocol) Brussel, June 3, 2009.

VII. In principle, the Return Directive is not applicable if the Dublin Regulation applies, as this Regulation has its own system for transfers. If an irregularly staying TCN can be transferred to another MS under the Dublin rules, there are two scenarios; the first is that a MS has entered a return decision alert in the SIS; in that case the Netherlands may proceed with a removal procedure, after having issued a return decision based on Dutch law. The second scenario is if a TCN is apprehended in the Netherlands while having a pending asylum procedure in another MS. In that case the take back notification or transfer under the Dublin Regulation will be triggered. According to Article 62(b) of the Aliens Act, the written notification to the TCN on his/her transfer to the responsible MS, counts as the transfer decision. When a transfer decision is issued, the TCN must leave the Netherlands of own volition within four weeks, however, the Minister may shorten the departure term.<sup>100</sup> If the person has not left the Netherlands within the departure term, he/she transferred by force.<sup>101</sup>

### Non-removability

VIII. If the TCN cannot be removed from the Netherlands due to humanitarian reasons such as medical treatment, reporting, witnessing or being a victim of human trafficking, war outbreak in the country of return or other reasons due to no-fault, the concerned TCN would be granted a residence permit on humanitarian or no-fault grounds.<sup>102</sup>

### 5.5 Voluntary Departure and Voluntary Return

Article 60(1) of VW provides that after the end of the lawful residence the TCN should leave the Netherlands voluntarily within four weeks. However, under subsection (4) of the same Article it is possible that the Minister shortens the departure term in the interest of the expulsion of the foreigner, for instance if there is a risk of absconding, or if there is a threat to public policy or national security.<sup>103</sup>

Previously, the Dutch policy which stipulated that immigration authorities automatically refrained from a voluntary departure period if the TCN was suspected or convicted for a criminal offence, was in violation of Article 7(4) Return Directive according to the CJEU ruling on 11 June 2015.<sup>104</sup> This provision in the Directive includes the possibility to refrain from or reduce the period of voluntary departure in case of a threat to public order, public or national security, but this has to be conducted on a case-by-case basis, taking into consideration a person's fundamental rights and circumstances. A threat to public policy has to be interpreted as genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court also made clear that the proportionality principle requires first the assessment if reduction of the term is necessary and sufficient, as reduction prevails over completely refraining from the voluntary departure term. Refraining has more far-reaching

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<sup>100</sup> Article 62c Aliens Act 2000.

<sup>101</sup> Article 63 Aliens Act 2000.

<sup>102</sup> Immigratie en Naturalisatiedienst, "Other Residence Permits," IND, January 16, 2023, <https://ind.nl/en/residence-permits/other-residence-permits/other-residence-permits>. Accessed August 7, 2023.

<sup>103</sup> See Article 62(2) sub c, Aliens Act 2000.

<sup>104</sup> HvJ EU, 11 May 2015, C-554/13, ECLI:EU:C:2015:377 (*Zh. v. O*); HvJ EU, 12 February 2015, C-554/13, ECLI:EU:C:2015:94 (*Zh. v. O*).

consequences, for instance the immediate imposition of an entry ban. Since this judgement, the decision making regarding the voluntary departure term includes an individual assessment.

The Dutch authorities can also shorten or refrain from a voluntary departure term in case of a risk of absconding, if the application for legal residence has been rejected as manifestly unfounded or if the applicant has submitted incorrect or incomplete information.<sup>105</sup> The latter ground is ambiguous, as the Directive only allows 'fraudulent applications', while incorrect or incomplete information can also be submitted without the intention to mislead authorities.

The Minister has the competence by Article 62(3) VW to extend the departure term granted to the foreigner based on the individual circumstances. Based on the Article 6.3 of the VV, the departure period can be extended to a maximum of 90 days or maximum of 6 months in case the foreigner's presence is mandatory in the Netherlands for implementing procedures before ICC or other courts.\* This Article also provides that the extension decision of the departure period takes into consideration the presence of social and family ties as well as the presence of school-going children.<sup>106</sup> The TCN has to return to the country of origin or to a third country where he/she has the right to reside. Foreign nationals who do not comply with the departure term are issued an entry ban and might be subject to forced return and detention in case of apprehension. In case no voluntary departure term is granted, an entry ban is immediately issued, potentially followed by forced removal.

The DT&V is responsible for the return of the unlawfully residing foreigners whether this return is coerced or assisted. The Aliens Act makes a distinction between independent departure, where the TCN leaves the country without being forced to (most of the time within the voluntary departure term), expulsion, where the TCN is forcefully returned, and unauthorised departure, which means that the person has disappeared and assumed to have left the country (see section 4.1). In case of an independent return, the departure is registered/observed, but in the case of unauthorised departure, the person is registered as 'departed with destination unknown'.

There are various organisations in the Netherlands involved in AVR(R) programs such as the IOM, the Dutch Council for refugees and other NGOs that cooperate with the IOM and DT&V. The VC includes clauses concerning the provision of return assistance to foreign nationals through IOM to return independently from the Netherlands and the eligibility to receive this assistance.<sup>107</sup> There are also provisions regarding the collaboration between the governmental organisations (DT&V, IND, KMar, ZHP) and IOM, where the IND has to consult the DT&V on granting or withholding the permission for the foreign national to leave with the assistance of IOM. Generally, the DT&V provides return assistance based on specific conditions such as that the TCN does not have a pending asylum or residence permit application or in case the TCN has tried to leave the Netherlands and failed due to lacking travel documents, in this case DT&V can provide mediation to obtain the required documents such as a Laissez-Passer.<sup>108</sup> In 2015

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<sup>105</sup> Article 62(2) sub a and b Aliens Act 2000. See also Article 7(4) Return Directive 2008/115/EC.

\* The Special Tribunal for Lebanon, the International Yugoslavia Tribunal, the Special Court for Sierra Leone, the Kosovo Relocated Specialist Judicial Institution, or the International Residual Mechanism for Criminal Tribunals.

<sup>106</sup> Article 6.3 (4) Aliens Act 2000.

<sup>107</sup> Aliens Circular 2000 VC(A), section A3, subsection 5.

<sup>108</sup> Ministerie van Justitie en Veiligheid, "Hulp van DT&V," Ondersteuning Bij Terugkeer | Dienst Terugkeer En Vertrek, August 4, 2023, <https://www.dienstterugkeerenvertrek.nl/ondersteuning-bij-terugkeer/hulp-van-dtv>. Accessed August 7, 2023.

and 2016, the government has restricted the financial support for departure and reintegration, inter alia by abolishing the additional support granted to nationals from visa-exempted countries. The argument for the latter decision was that it served to prevent abuse by migrants who travelled visa-free just to benefit from this return-related financial support.

There is qualitative as well as quantitative evidence to support the idea that issuing a return decision without imposing an entry ban yet, can encourage persons to leave the Netherlands.<sup>109</sup> The quantitative data indicate that individuals who received a return decision in 2013 had a two times smaller chance of being found (apprehended) in the Netherlands within a year than individuals who received a return decision in 2012. This could mean that, in 2013, a higher number of illegally residing foreigners left after the return decision was issued, in order to avoid an entry ban. This interpretation assumes that foreigners who received a return decision in 2013 were more aware of the risks of an entry ban than foreigners who received a return decision in 2012, the year that the entry ban was introduced. (The Netherlands was late to implement the Return Directive and the entry ban was introduced quite quickly, and without much publicity, in order to meet the deadline set by the EU; it therefore seems probable that a relatively large number of migrants initially did not know what the entry ban meant).

Such a deterrent effect does not seem to occur once an entry ban has been imposed. There are no indications (quantitative or qualitative) that illegally residing foreigners with an entry ban leave the Netherlands voluntarily to avoid the criminal sanction that comes with the violation of the entry ban. Thus, the tendency to impose entry bans with some restraint makes sense in that respect. These observations also suggest that the deterrent effect of the entry ban itself is stronger than the deterrent effect of criminalising violations of the entry ban (in other words: some irregularly staying TCNs are keen to avoid the entry ban, but once an entry ban has been imposed, they seem unimpressed by the criminal sanctions that may follow).<sup>110</sup>

## 5.6 Forced Return

Based on the Article 63(1) VW, if the TCN fails to leave the Netherlands on his/her own initiative within the departure period indicated in the return order, he/she might be subject to forced removal. In the Netherlands, there is an obligation to specify the country of removal/destination of return. In 2021, an amendment was made to the VW by which the return decision has to include the country that the foreign national should return to.<sup>111</sup>

Forced Return in collaboration with FRONTEX is most commonly conducted by air through commercial or dedicated charter flights.<sup>112</sup> However, in the Netherlands it is also possible to conduct return through seagoing vessels, in this case KMar sends removal order to the concerned carrier which is known as form M30.<sup>113</sup> The Netherlands collaborates with FRONTEX not only in the implementation of forced returns through joint operations and

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<sup>109</sup> WODC-rapport, “Het lot van het inreisverbod: Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland,” Memorandum 2014-2.

<sup>110</sup> WODC-rapport, “Het lot van het inreisverbod: Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland, Memorandum 2014-2, para. 4.2.1.

<sup>111</sup> European Migration Network, “Annual Report on Migration and Asylum 2022.” July 2023.

<sup>112</sup> Frontex “Return Operations,” n.d., <https://frontex.europa.eu/return-and-reintegration/return-operations/return-operations/>. Accessed August 8, 2023.

<sup>113</sup> Ministerie van Justitie en Veiligheid, “Sample Model M30,” Publication | Repatriation and Departure Service, August 11, 2020, <https://english.dienstterugkeerenvertrek.nl/duty-to-return/documents/publications/2016/09/12/sample-model-m30-aanwijzing-terugvoerverplichting-maritime-border>. Accessed August 8, 2023.

charter flights that are organised by FRONTEX or by another MS, but also in the field of voluntary return. In 2020 the first collaboration took place in a joint operation to return 50 individuals voluntarily from Belgium, France, Germany and the Netherlands to Iraq.<sup>114</sup>

In case the TCN indicates having health issues, a medical examination would be carried out before departure to determine whether the individual is fit to travel. If there is an indication of medical circumstances that may hinder deportation, the DT&V invites a doctor to examine the individual and determine his/her medical fitness. If there are no deterring medical circumstances, the individual would be declared fit to fly.<sup>115</sup> If the TCN cooperates on return and yet cannot be returned due to no fault of their own such as lack of cooperation on the side of the origin country in issuing the necessary travel documents, the IND would issue a no-fault residence permit.<sup>116</sup> Also, in case of war outbreaks or natural disaster in the destination of return, the IND is entitled to issue a temporary residence permit.<sup>117</sup>

According to Article 64 VW, removal is postponed if the TCN is physically unable to travel. However, a Dutch court wanted to inquire from the CJEU if in cases of serious illness, a return decision or removal order can be issued if there is no adequate treatment in the country of return, and what criteria apply in such cases. The CJEU ruled on the 22 November 2022 that Article 5 of the Return Directive, reads in conjunction with Articles 1, 4 and 19(2) of the Charter, thus, prohibits a Member State to issue a return decision or a removal order regarding a TCN who suffers from a serious illness, if there is a serious risk of rapid, significant and permanent increase in his pain.<sup>118</sup> Any requirement on a strict period within which this increase is likely to happen, is prohibited, but the severity threshold of Article 4 of the Charter must be reached. Therefore, only assessing whether a person is able to travel is not sufficient.

The coercive measures in use are not explicitly specified in the forced return operations from 1 January 2013 on. However, those in use are the metal handcuffs, Velcro straps, bite/spit mask, French body belt.<sup>119</sup> There are at least two escorts per returnee and a medical staff on board of the flight. The Justice and Security Inspectorate which is an “independent system”, is responsible for monitoring the forced return activities and for monitoring the performed tasks within the migration chain which consists of multiple organisations among others the IND, DT&V, and Kmar.<sup>120</sup> This is stated by the Regulation on the Supervision of the Return of Foreign nationals 2013.<sup>121</sup>

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<sup>114</sup> Frontex, “Frontex Assists in First Joint Voluntary Return with a Charter Flight,” n.d., <https://frontex.europa.eu/media-centre/news/news-release/frontex-assists-in-first-joint-voluntary-return-with-a-charter-flight-WqednO>.

<sup>115</sup> Dienst Terugkeer en Vertrek, “Dan Zet Je Ze Toch Gewoon Uit Een Kijkje Achter de Schermen Bij de Dienst Terugkeer En Vertrek,” Ministerie van Justitie en Veiligheid, January 2018.

<sup>116</sup> Ministerie van Justitie en Veiligheid, “Buiten schuld,” Het Terugkeerproces | Dienst Terugkeer En Vertrek, July 29, 2020, <https://www.dienstterugkeerenvertrek.nl/het-terugkeerproces/bijzondere-omstandigheden/buiten-schuld>. Accessed August 8, 2023.

<sup>117</sup> Ministerie van Justitie en Veiligheid, “How We Work,” The Return Process | Repatriation and Departure Service, July 18, 2023, <https://english.dienstterugkeerenvertrek.nl/the-return-process/how-we-work>. Accessed August 9, 2023.

<sup>118</sup> CJEU 22 November 2022, C-69/21, ECLI:EU:C:2022:913 (X. / Stscr. (NL)).

<sup>119</sup> Fondazione ISMU (2019), Monitoring of forced return in Europe. Strategies, critical issues and best practices, National Guarantor for the rights of persons detained or deprived of liberty.

<sup>120</sup> Ministerie van Justitie en Veiligheid, “Migratie,” Toezichtgebieden | Inspectie Justitie En Veiligheid, April 5, 2022, <https://www.inspectie-jenv.nl/toezichtgebieden/migratie>. Accessed August 9, 2023.

<sup>121</sup> Aliens Return Monitoring Regulation (Regeling toezicht terugkeer vreemdelingen) Law Gazette (Staatscourant) of 23 December 2013, no. 35638.



## 5.7 Return of Unaccompanied Minors (UAMS)

After in January 2021 the CJEU had ruled in *T.Q.* that the Dutch authorities are not allowed to issue a return decision if the UAM cannot be returned nor to make a distinction between minors younger and minors older than 15 (see Chapter 2), the Secretary of State refrained from issuing a return decision towards UAMs until the end of that year.<sup>122</sup> Since then, a new policy was introduced, granting UAMs with a rejected asylum claim an official postponement of departure as long as a return decision cannot be issued due to further investigations on adequate protection in the country of origin/return. This policy was already used for TCNs who cannot be deported if that would lead to a medical emergency situation.<sup>123</sup> The new policy does not end the distinction between minors younger and older than 15 as only for the first group, the authorities have to investigate whether there is adequate protection in the country of origin. This investigation is only based on information about the applicant's family during his/her asylum procedure. Furthermore, by granting postponement of departure, the Secretary of State refuses to issue a return decision not because of the perspective of granting a lawful residence, as Article 6(4) of the Return Directive refers to, but to wait until the UAM reaches the age of 18.

The new policy implies the continuation of 'tolerating residence' until the age of eighteen, however now without issuing a return decision. The stay does not become irregular, but solely granting postponement of departure, without clear rules on assessing adequate reception in the country of origin, is at odds with the Court's ruling. The Court ruled that an in-depth assessment of the situation of the UAM is necessary to determine what is in the best interests of the child and to comply with the requirements of the Returns Directive. Furthermore, the Dutch policy does not allow for a hearing of the UAM on the possible reception in the country of origin. This is explicitly required by the Court in *T.Q.* (see para. 59). So, despite the CJEU's emphasis on the need to take the best interest of the child into account, the new policy still violates this principle.

According to scholars, the amendment is a clear attempt to implement the Court's ruling in the most minimalist way.<sup>124</sup> In June 2022, the Judicial Department of the Council of State, the highest administrative judiciary body, concluded that the new policy is not a correct implementation of the *T.Q.* judgement, as it violates Article 10 Return Directive and Article 24(2) Charter of Fundamental rights.<sup>125</sup> According to the Council of State, the authorities must proceed as early and quickly as possible with investigating the existence of adequate protection in the country of origin, which should already start during the asylum procedure. In response to this judgement, the Secretary of State decided in July 2022 to start with the investigation

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<sup>122</sup> CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (*T.Q. v. State Secretary of Justice and Security*).

This policy was condemned in several national judgements as a wrongful implementation of the *T.Q.* judgement, see. i.a. *Rb. Den Haag, nevenzittingsplaats Den Bosch*, 15 February 2021, ECLI:NL:RBDHA:2021:1103.

<sup>123</sup> The legal basis for that policy was Article 64 Aliens Act 2000. Ministerie van Justitie en Veiligheid, "Unaccompanied Minor Aliens (AMV)," Asylum Policy | Government.nl, August 30, 2023, <https://www.government.nl/topics/asylum-policy/unaccompanied-minor-foreign-nationals-umfns>. Accessed September 1, 2023

<sup>124</sup> Mark Klaassen, "No Perspective for Unaccompanied Minors: The Wrong Implementation of *T.Q.*," Leiden Law Blog, January 14, 2022, <https://www.leidenlawblog.nl/articles/no-perspective-for-unaccompanied-minors-the-wrong-implementation-of-t-q>; Carolus Grütters, "Hoe het belang van het kind wederom niet wordt geaccepteerd: Curieuze aanpassing AMV-beleid vanwege arresten *T.Q.* en *Westerwaldkreis*," *A&MR*, no. 2 (2022): 70-76.

<sup>125</sup> *ABRvS*, 8 juni 2022, ECLI:NL:RVS:2022:1530.

during the asylum procedure, but in case of no clear outcome at the moment of rejection, one year would be granted to the Repatriation and Departure Service to finalise the investigation.<sup>126</sup> If after one year there is no adequate protection identified, despite the full cooperation of the minor, a residence permit will be granted. In case of a lack of cooperation, or disappearance by the minor, the assessment will stop and no residence permit will be granted.

In an analysis of the judgement and response by the government, it is regretted that the interests of the child still has not been put at the centre of the procedure and investigation. As main problematic elements, scholars mention the strict interpretation of ‘full cooperation’ requiring that the minor gives plausible declarations on his identity and nationality (which can easily be challenged by the authorities), and the lack of clear consequences if during that additional year of investigation the minor turns eighteen.<sup>127</sup> Also, it is only after three years of holding temporary ‘no-fault’ residence permit that the holder is entitled to a permanent status. Moreover, it is still unclear what the consequences are in respect of this entitlement for the minor who turns eighteen during these three years.

### 5.8 Entry bans

If the TCN has failed to leave the Netherlands independently within the granted departure term, or if the TCN has been ordered to leave the Netherlands immediately without being granted a departure term, or if the TCN has received more than one return decision, an entry ban would be issued. Article 6.5a of the Aliens Decree (AD) provides the criteria for the duration of the entry ban. In regular cases, the duration of an entry ban is a maximum of two years, however, a shorter duration of less than a year is enforced if the TCN has exceeded the free period after the expiry of the lawful residence by more than three days and less than 90 days. The duration of the entry ban can be extended to no longer than three years in case that the foreign national has been sentenced to prison for a period less than six months. This extension can be up to five years in case of a custodial punishment for six months or longer, of fraud, of a repetitive issuance of a return decision or in case the TCN is found on the territory in violation of an entry ban. The maximum duration is ten years if the TCN poses a threat to public order or safety, such as being convicted for a violent or opium crime, sentenced or imprisonment for a crime longer than six years, or has committed crime against peace, humanity or war crime. In case the Minister takes the view that the TCN poses threat to the national security, the maximum duration of the entry ban is twenty years.<sup>128</sup>

The Minister may lift the entry ban on request of the TCN, if he/she proves to have met the obligation to leave the Netherlands, or after a stay outside the Netherlands for at least half of the duration of the entry ban, without having committed a crime. The Minister may lift the entry ban temporarily in very exceptional and urgent cases, under strict conditions.<sup>129</sup> Under Article 108 Aliens Act violating the entry ban by travelling to or residing in the Netherlands is a criminal offence, and can lead to a prison sentence of six months maximum or a fine of few thousand euros.<sup>130</sup> This is also seen as an indirect criminalisation of irregular stay.

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<sup>126</sup> *Kamerstukken II 2022/2023*, 29344, no. 152.

<sup>127</sup> S, Kok, “ABRvS 8 juni 2022, ECLI:NL:RVS:2022:1530. Duidelijker kader, maar onzekerheid blijft. Toelatings- en terugkeerprocedures voor alleenstaande minderjarige vreemdelingen,” *A&MR*, no. 8 (2022).

<sup>128</sup> Article 6.5a subsections 1-6 Aliens Decree 2000.

<sup>129</sup> Article 6.5c Aliens Decree 2000.

<sup>130</sup> See also the Aliens Circular 2000 VC(A), section A2, subsection 12.4.

An entry ban is issued as a separate/independent decision or as a decision that would amend the already issued return decision.<sup>131</sup> Not only the IND can issue an entry ban but also the Aliens Police, ZHP and KMar.<sup>132</sup> The contents, the legal consequences and the possible legal action against the entry ban are communicated in verbal or written form to the foreigner in a language that they understand. Since 2021 it is possible to send the TCN an entry ban per email after they have left the Netherlands, however only the officer of the IND is authorised to issue, amend or lift the entry ban.<sup>133</sup> The entry ban is calculated from the date on which the foreign national has demonstrably left the Netherlands.<sup>134</sup>

## 5.9 Procedural Safeguards

When an asylum or other type of residence application is rejected the IND issues, on behalf of the Secretary of State of the Ministry of Justice and Security, a comprehensive decision, this decision contains the negative outcome on the application accompanied by the return decision by which the foreign national is obliged to leave the Netherlands normally within a departure term of 28 days. Decisions are sent to the TCN in a written form to the last known address or to his/her legal representative. The foreign national can appeal the IND's decision to the district administrative court, which outcome can be awaited in the Netherlands.

In case the court confirms the rejection, an appeal in second instance can be submitted (by the applicant or the Secretary of State) at the Council of State. As an automatic suspensive effect in second instances appeal is absent, the TCN can request the Council of State to rule that he/she is allowed to await the outcome. If the TCN believes that the upheld decision is in violation of the European Convention on Human rights, he/she can submit a complaint with the European Court of Human Rights, and request for an interim measure on the basis of Article 39 ECHR in order to await this procedure.<sup>135</sup> Also, based on the CJEU's ruling in *Gnandi*, all effects of the return decision are suspended as long as the TCN is allowed to stay in the Netherlands during a pending procedure.<sup>136</sup>

The DT&V which is responsible for implementing the return decisions, conducts removability checks in various moments and consults with the IND on whether the foreign national is still required to leave the Netherlands.<sup>137</sup> During the return procedures, the TCN concerned is obliged to leave the Netherlands independently within the granted departure term, or, if the departure term has expired, the TCN is subject to forced removal and an entry ban. However, when a TCN has exhausted all legal means to stay in the Netherlands and cannot be removed due to no fault of his/her own, such as lack of cooperation from the country of return on the issuance of documents, the DT&V could request the IND to grant the TCN on behalf of the Secretary of State a no-fault residence permit.<sup>138</sup> In case of medical circumstances that prevent the removal of the TCN or a family member, or if the TCN is a victim, witness of or has reported

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<sup>131</sup> Article 66a Aliens Act 2000.

<sup>132</sup> Immigratie en Naturalisatiedienst, "Entry Ban," IND, August 1, 2023, <https://ind.nl/en/entry-ban#when-do-you-get-an-entry-ban>. Accessed August 5, 2023.

<sup>133</sup> European Migration Network, "Annual Report on Migration and Asylum 2022." July 2023.

<sup>134</sup> Article 66a Aliens Act 2000.

<sup>135</sup> "Beroepsprocedure na algemene asielaanvraag," De Rechtspraak, n.d., . Accessed August 10, 2023.

<sup>136</sup> CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (*Gnandi*) and CJEU 5 July 2018, C-269/18 PPU, ECLI:EU:C:2018:544 (C).

<sup>137</sup> Repatriation and Departure Service corporate brochure, "The Repatriation and Departure Service the professional implementer of the return policy," Ministry of Justice and Security, 2020, p. 22.

<sup>138</sup> Immigratie en Naturalisatiedienst, "Unaccompanied Minors," IND, March 13, 2023, <https://ind.nl/en/about-us/background-articles/unaccompanied-minors>.

human trafficking, the return will be postponed, in some cases followed by the granting of a residence permit based on humanitarian grounds.

Pending return individuals are provided accommodation in freedom limiting locations for 12 weeks in case of cooperating on returns. Families are also provided accommodation in closed family locations and it is possible to detain them. In case of families with minor school-going children, return might be postponed till the youngest child reaches the age of 18.<sup>139</sup> Moreover, children may not be separated from their parents and detaining families and UAMs should not last longer than two weeks unless there is resistance against the removal or delay in obtaining the required documents.<sup>140</sup> The detention decision is reported within four weeks to the court which conducts a judicial review to determine the lawfulness of the decision. Also, the decision to extend the detention period is reviewed by the court to assess its necessity and proportionality.

The national policy guidelines for the application of the Aliens Act include safeguards to the TCN in case of being detained at the border, the border officer charged with border control or aliens supervision has to inform the foreign national about their rights to receive assistance from a legal counsel, diplomatic or consular representation in the Netherlands, the right to appeal against the detention and the right to notify third parties (e.g. spouse, family) about the detention as well as the foreigner's right to appeal against the detention.<sup>141</sup>

Furthermore, the detained TCN has the right to contact emergency services, relatives, diplomatic and consular representation as well as the right to be assisted by a lawyer and has the right to be questioned in his/her language through an interpreter.

However, because an interview prior to a (prolonged) detention measure was not conducted in the Netherlands, the Council of State asked the CJEU if that practice was in line with the right to be heard. The Court answered that the right to be heard of Article 15(2) of the Return Directive (also enshrined in Article 41(2) sub a of the Charter), implies the possibility for the returnee to express his views or arguments prior to the decision to impose or prolong a detention measure.<sup>142</sup> The right to be heard before the adoption of a return decision implies that the competent national authorities must enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced.<sup>143</sup> The CJEU ruled that the right to be heard requires an interview prior to a decision to detain or prolong the detention, and that the court can lift the detention in case of a breach of this obligation, however if respect for the right to be heard would have influenced the decision on detention.

The IND performs a check on removability and possible ongoing asylum procedures (or potential refoulement risks) in two different steps in the return procedure; the first is before the TCN is conferred with their diplomatic representation for issuing a laissez-passer and the second is before the departure. If the TCN applies for asylum just before departure, a specialised IND team assesses the presence of new facts or elements. Additionally, there are

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<sup>139</sup> Immigratie en Naturalisatiedienst, "Other Residence Permits," IND, January 16, 2023, <https://ind.nl/en/residence-permits/other-residence-permits/other-residence-permits>.

<sup>140</sup> Aliens Circular 2000 VC(A), section A5, subsection 2.4 and C.

<sup>141</sup> Aliens Circular 2000 VC(A), section A2, subsection 2.5.

<sup>142</sup> CJEU 10 September 2013, C-383/13 PPU, ECLI:EU:C:2013:533, (*G and R*).

<sup>143</sup> See also the judgment in *HvJ EU 11-12-2014, C-249/13, ECLI:EU:C:2014:2431, par. 51 (Boudjlida)*.

postponements and temporary permits in case of medical circumstances.<sup>144</sup> If a TCN holds a residence permit in another MS based on international protection, the IND, KMar, police and ZHP ensure that the return decision will not be enforced as it contradicts the international obligation of prohibiting the *refoulement*.<sup>145</sup>

## 5.10 Detention

### Legal grounds

In the Dutch context, immigration detention is considered as an administrative measure rather than a punishment that should be used as a last resort. In line with Article 15 Return Directive, it is only allowed when there is a real prospective of expulsion, and when there is a risk of absconding to evade removal.<sup>146</sup> The authorities need to conduct the return procedure with due diligence.<sup>147</sup> Detention decisions are issued by DT&V officers or by assistant public prosecutors from the Ministry of Justice and Security.<sup>148</sup> Immigration detention can also be imposed on asylum seekers if this is necessary for identification, prevention of absconding, or if the applicant poses a risk to public order or national security.<sup>149</sup> Detention can be imposed for a maximum period of six months, which can be extended with twelve months if the return, despite due diligence procedures, requires more time due to a lack of cooperation by the migrant or the lack of necessary documentation from third countries.<sup>150</sup> However, a real perspective of return needs to exist and the documentation has to be expected within a short term.

In order to respect the principle of last resort and necessity, less far-reaching measures must be assessed and available. The Aliens Act provides the legal infrastructure to restrict the freedom of a TCN who is residing unlawfully in the Netherlands and for designating a place and space that would be secured against unauthorised departure.<sup>151</sup> Freedom-restriction can imply the obligation for the TCN to report daily to the centre and to cooperate fully with the authorities to establish his/her identity and nationality.<sup>152</sup> Other ways to keep persons under supervision is the obligation to pay a deposit, which is refunded upon return, seizure of travel documents or the reporting obligation which means that the foreign national has to report to the aliens police or to the asylum seekers centre on weekly or daily basis or even the ban on

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<sup>144</sup> European Migration Network, “Ad-Hoc Query on The Return Directive (2008/115/EC) and the Obligation to Respect the Non-*refoulement* Principle in the Return Procedure,” (European Commission, August 13, 2018).

<sup>145</sup> Aliens Circular 2000 VC(A), section A3, subsection 2.

<sup>146</sup> Ministerie van Justitie en Veiligheid, “Aliens Detention,” Return of Foreign Citizens | Government.nl, April 13, 2023, <https://www.government.nl/topics/return-of-foreign-citizens/aliens-detention>. Accessed August 11, 2023.

<sup>147</sup> See for the criteria on immigration detention Article 59 Aliens Act 2000.

<sup>148</sup> Ministerie van Justitie en Veiligheid, “Aliens Detention,” Return of Foreign Citizens | Government.nl, April 13, 2023, <https://www.government.nl/topics/return-of-foreign-citizens/aliens-detention>. Accessed August 11, 2023.

<sup>149</sup> Article 59b Aliens Act 2000.

<sup>150</sup> Article 59 (6) Aliens Act 2000.

<sup>151</sup> Articles 54 and 56 Aliens Act 2000.

<sup>152</sup> Aliens Circular 2000, VC(A), section A2, subsection 10.3 and 10.4. Ministerie van Justitie en Veiligheid, “Pre-Departure Accommodation,” The Return Process | Repatriation and Departure Service, August 10, 2020, <https://english.dienstterugkeerenvertrek.nl/the-return-process/predeparture-accommodation>. Accessed August 14, 2023

leaving the borders of the municipality.<sup>153</sup> The Dutch context lacks criteria based on which an option or alternative for detention is implemented, the detention's necessity and proportionality depends on the individual situation and circumstances, the possibility of return and the TCN's level of cooperation which are considered as factors in the balancing of interests.<sup>154</sup> However, in practice, during the assessment if a detention measure is necessary and proportionate, these alternatives are normally not considered sufficient. They are only seriously considered if detention doesn't seem to be adequate due to vulnerability of the TCN. The Council of State adopts the same reasoning (see further 8.1.1).<sup>155</sup> The government takes the view that detention is more effective than limited freedom restrictions.<sup>156</sup> This is at odds with the EU principle of proportionality, reflected in the Return Directive which prioritises the least coercive measure.

The Dutch law has structured the judicial procedure for challenging the detention of a TCN in such a way that it prohibits the courts from carrying out an *ex officio* review and assessment of all aspects of lawfulness of detention, and from ordering, when it finds out that the detention is unlawful, that the unlawful detention be ended and the TCN be released immediately. Since the Mahdi judgment of 2014 (a Belgian case), this limited scrutiny is under discussion in the Netherlands (see paragraph 8.1.1). The Council of State referred a preliminary question to the CJEU in December 2020, if the court must review the lawfulness of a detention measure *ex officio*. While the Council of State only referred to Article 5 ECHR, a lower court has supplemented these questions to seek clarification if the Dutch policy complies with Article 47 of the Charter. Furthermore, the district court wanted to know whether the court not only has the power to review the lawfulness of detention *ex officio*, but also the obligation to do so.

The Court ruled that Article 15 (2) and (3) Return Directive, read in conjunction with Articles 6 and 47 CFR, imply the competence for the judicial authority to raise on its own motion any failure to comply with a condition governing lawfulness. Even if it has not been invoked by the person concerned. This is based on the facts brought to the court's attention (including at the hearings).<sup>157</sup>

## Children in detention

For families with minor children and unaccompanied minors, the authorities must assess (and motivate if a detention measure is imposed) if detention would not be a disproportionate burden. In addition, unaccompanied minors can only be detained if there is a weighty interest for the authorities to keep the minor at their disposal.<sup>158</sup> Since 2011, UAMs can only be detained if they are subject to a criminal procedure, if their departure can be realised within two weeks, if they have violated an obligation to report or have disappeared earlier, or if they are refused

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<sup>153</sup> Aliens Circular 2000, VC(A), section A2, subsection 10.3 and 10.4; Ministerie van Algemene Zaken, "Forced Return," August 2, 2022.

<sup>154</sup> Immigration and Naturalisation Service the Netherlands, "Information on Procedural Elements and Rights of Applicants Subject to a Dublin Transfer to the Netherlands," (European Union Agency for Asylum, April 12, 2023) p.12.

<sup>155</sup> Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht," *A&MR*, no. 9 (2019), [http://www.stichtinglos.nl/sites/default/files/los/vreemdelingendetentie\\_ii\\_brusser\\_oosterhuis\\_strik.pdf](http://www.stichtinglos.nl/sites/default/files/los/vreemdelingendetentie_ii_brusser_oosterhuis_strik.pdf).

<sup>156</sup> *Kamerstukken II* 2018/2019, 19637 no. 2473.

<sup>157</sup> CJEU 8 November 2022, joined cases C-704/20 and C-39/21, ECLI:EU:C:2022:858 (*C, B and X*).

<sup>158</sup> *Kamerstukken II* 2010/11, 27062, no. 68.

entry at the external border, as long as their age has not yet been verified.<sup>159</sup> Yet, while normally the maximum duration of detention of families with minor children doesn't exceed fourteen days, the average detention duration for UAMs turns out to be slightly longer.<sup>160</sup> According to the Ministry, this is related to the fact that most detained UAMs were detected irregularly, without having applied for asylum. As the preparation for return can only start after apprehension, the maximum duration in these cases is four weeks. After the maximum duration, UAMs are referred to the association responsible for their guardianship (NIDOS), which takes care for a proper accommodation and support.

Usually, families with children and unaccompanied minors are held in family accommodations or freedom restricting locations instead of detention, and are moved to a closed family centre if deemed necessary.<sup>161</sup> However, it is possible to hold a family with children in a detention centre. Detaining families should not be longer than two weeks before their removal, yet, it can be extended in case of resistance, waiting for obtaining travel documents or lodging a new asylum application. It is also possible to detain one parent in the case of a family with minor children, while the other family members remain in restrictive accommodation centre.<sup>162</sup>

### Detention Regime

Immigration detention is held in separate facilities than the punitive prisons; there are three locations in the Netherlands for detaining foreigners which are Zeist, Schiphol and Rotterdam. Pre-removal detention is held in DJI facilities which are built and operated through a public private partnership (PPP) between the government and one or more private companies. Detainees have the right to have a lawyer free of charge, access to communication through telephone either in their rooms or in the common areas to be used at their own expense. Also, detainees can receive visitors according to the rules of the centre. However, the offer of activities is very limited, and due to limited staff, detainees have to stay on their cells for the vast period of time.<sup>163</sup>

The national Ombudsman has directed criticism to the conditions of immigrant detention concluding that it is an inappropriate regime that seriously jeopardises respect for the immigrants' fundamental rights and that in practice it is not used as a last resort. Also, in some cases immigration detention is more strict than penal detention.<sup>164</sup> The Ombudsman expressed particular concern towards the frequent use of the measure of solitary confinement (also as a sanction for two weeks on the refusal to share a cell with another person), the lack of privacy and the lack of daily activities.

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<sup>159</sup> *Kamerstukken II* 2010/11, 27062, no. 68.

<sup>160</sup> *Kamerstukken II* 2018/2019, 19637 and 27062, no. 2473. In 2018 the average duration was three weeks.

<sup>161</sup> COA, "Reception Centres for Return," <https://www.coa.nl/en/reception-centres-return>. Accessed August 14, 2023.

<sup>162</sup> Ministerie van Justitie en Veiligheid, "Pre-Departure Accommodation," August 10, 2020.

<sup>163</sup> Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (I): Detentie-omstandigheden onder huidig regime en onder wetsvoorstel getoetst aan internationale normen," *A&MR*, no. 8 (2019), <https://www.stichtinglos.nl/sites/default/files/los/140919%20A%26MR8%20artikel%20Vreemdelingendetentie.pdf>.

<sup>164</sup> De Nationale Ombudsman, "Immigration Detention: penal regime or step towards deportation? About respecting human rights in immigration detention," August 7, 2012, [https://www.nationaleombudsman.nl/uploads/report\\_2012105\\_immigration\\_detention.pdf](https://www.nationaleombudsman.nl/uploads/report_2012105_immigration_detention.pdf).

### 5.11 Emergency Situations

The Netherlands has transposed Article 18 of the Return Directive concerning the emergency situations which the state might adopt. Speedy reviews take place in case of Dublin cases where the concerned TCN has a pending application, decision or protection in another Member state and applies for asylum in the Netherlands also, if the TCN applies for a last-minute asylum procedure. Families awaiting their removal are held in restrictive accommodation. It is possible to detain families, however, family detention may not be longer than two weeks unless there is resistance or that the family has applied for a new application for residence permit.<sup>165</sup> Furthermore, TCNs who are found without a residence permit or have never applied for a permit and apprehended by the KMar or the police, or might abscond are placed in aliens detention, while those who do not leave the Netherlands within the granted departure term are placed in freedom-limiting locations (VBL) where they are allowed to leave the centres but are obliged to report to the centre on a daily basis and to cooperate fully in the investigation of their identity and nationality.<sup>166</sup>

### 5.12 Readmission Process

In the period from 2015 till September 2023, the Netherlands was part of six readmission agreements and implementing protocols held between the Benelux countries, Serbia, Georgia, Kazakhstan, Armenia, Ukraine, Bosnia and Herzegovina. These agreements were either concluded or have entered into force from 2015 on (see section 6).

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<sup>165</sup> Ministerie van Justitie en Veiligheid, “Pre-Departure Accommodation,” August 10, 2020.

<sup>166</sup> Ibid.



## 6. International Cooperation

	Type of Bilateral Agreements and Negotiations	Title	Signatory State/Target Third Country	Date		Link to document & media coverage
				Signature	Entry into force	
1	<b>Standard Readmission agreements signed<sup>167</sup></b>					
1.1	Protocol to EU Readmission Agreement Benelux-third countries <sup>168</sup>	Protocol between the Governments of the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Government of the Republic of Serbia on the implementation of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation	Serbia	25/01/2013	01/02/2019	<a href="https://wetten.overheid.nl/BWBV0006121/2019-02-01#Verdrag_1">https://wetten.overheid.nl/BWBV0006121/2019-02-01#Verdrag_1</a>
1.2	Protocol to EU Readmission Agreement Benelux-third countries <sup>169</sup>	Protocol between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Georgia on the implementation of the Agreement between the European Union and Georgia on the readmission of persons residing without authorisation	Georgia	05/09/2013	01/06/2018	<a href="https://wetten.verheid.nl/BWBV0006294/2018-06-01">https://wetten.verheid.nl/BWBV0006294/2018-06-01</a>
1.3	Agreement Benelux – third country <sup>170</sup>	Agreement between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Republic of Kazakhstan on readmission, and its implementing protocol	Kazakhstan	02/03/2014	01/06/2017	<a href="https://wetten.verheid.nl/BWBV0006473/2017-06-01">https://wetten.verheid.nl/BWBV0006473/2017-06-01</a>
1.4	Protocol to EU Readmission Agreement Benelux-third countries <sup>171</sup>	Protocol between the Republic of Armenia and the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) implementing the Agreement between the European Union	Armenia	20/06/2018	01/09/2023	<a href="https://wetten.verheid.nl/BWBV0006769/2018-06-20">https://wetten.verheid.nl/BWBV0006769/2018-06-20</a>

		and the Republic of Armenia on the readmission of persons residing without authorisation				
1.5	Implementing protocol European readmission agreement <sup>172</sup>	Implementing Protocol between the Benelux States (The Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Ukraine to the Agreement between the European Community and Ukraine on the Readmission of Persons	Ukraine	17/12/2018	01/09/2023	<a href="https://wetten.overheid.nl/BWBV0006809/2018-12-17">https://wetten.overheid.nl/BWBV0006809/2018-12-17</a>
1.6	Implementing protocol European readmission agreement <sup>173</sup>	Protocol between The States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Bosnia and Herzegovina implementing the agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation	Bosnia and Herzegovina	05/12/2013	01/08/2021	<a href="https://wetten.overheid.nl/BWBV0006319/2021-08-01">https://wetten.overheid.nl/BWBV0006319/2021-08-01</a>
2	<b>Ongoing standard readmission agreement negotiations</b>					
2.1	Implementing protocol European readmission agreement <sup>174</sup>	Protocol between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and Sri Lanka on the implementation of the agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation	Sri Lanka			

<sup>167</sup> European Migration Network, “Bilateral Readmission Agreements,” September 2022.

<sup>168</sup> European Migration Network, “Inventory on Bilateral Readmission Agreements signed by or entered into force in EU Member States in 2014-2021,”.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

2.2	Cooperation on migration with Niger*		Niger	01/02/2023	Further details about the cooperation shall be available at the end of the year	<a href="https://www.government.nl/documents/media-articles/2023/02/01/joint-press-communicate-working-visit-niger-liesje-schreinemacher-eric-van-der-burg">https://www.government.nl/documents/media-articles/2023/02/01/joint-press-communicate-working-visit-niger-liesje-schreinemacher-eric-van-der-burg</a>  <a href="https://www.government.nl/latest/news/2023/02/01/the-netherlands-and-niger-to-strengthen-cooperation-on-migration#:~:text=The%20Netherlands%20and%20Niger%20to%20strengthen%20cooperation%20on%20migration,-News%20item%20%7C%2001&amp;text=The%20Netherlands%20and%20Niger%20plan,management%20and%20combating%20people%20smuggling.">https://www.government.nl/latest/news/2023/02/01/the-netherlands-and-niger-to-strengthen-cooperation-on-migration#:~:text=The%20Netherlands%20and%20Niger%20to%20strengthen%20cooperation%20on%20migration,-News%20item%20%7C%2001&amp;text=The%20Netherlands%20and%20Niger%20plan,management%20and%20combating%20people%20smuggling.</a>
3	<b>Non-standard readmission arrangements</b>					
3.1	Police cooperation agreement <sup>175</sup>		Italy	14/03/2000		

\* The Dutch Cooperation with Niger is temporarily suspended on 4<sup>th</sup> August 2023  
<https://www.government.nl/latest/news/2023/08/04/the-netherlands-suspends-direct-cooperation-with-nigerien-government>

<sup>175</sup> Jean-Pierre Cassarino “The Netherlands’ Bilateral Agreements Linked to Readmission,” December 11, 2017, <https://www.jeanpierrecassarino.com/datasets/ra/nl/>

3.2	Memorandum of understanding <sup>176</sup>	Tripartite Memorandum of Understanding (the MoU) between the Islamic Transitional State of Afghanistan, the Government of the Netherlands and the United Nations High Commissioner for Refugees (UNHCR).	Afghanistan UNHCR	18/03/2003		<a href="https://zoek.officielebekendmakingen.nl/kst-19637-732-b1.pdf">https://zoek.officielebekendmakingen.nl/kst-19637-732-b1.pdf</a>
3.3	Memorandum of understanding <sup>177</sup>		Somalia	01/07/2009		<a href="https://www.hrw.org/news/2010/07/22/netherlands-do-not-deport-somalis">https://www.hrw.org/news/2010/07/22/netherlands-do-not-deport-somalis</a>
4	<b>Migration partnerships, including a clause on the readmission/ removal of irregular foreigners</b>					
4.1	COMPASS	The global Cooperation on Migration and Partnerships for Sustainable Solutions	Afghanistan, Algeria, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, Sudan, Tunisia	01/01/2021		
5	<b>Deals/ Statements</b>					
5.1	Migration deal (action plan)	Non-interference in the Moroccan internal affairs (human rights situation) in exchange for cooperation on returns through providing travel documents for the Moroccans whom the Netherlands wants to expel	Morocco	July 2021 Made public in December 2022		<a href="https://nos.nl/collectie/13941/artikel/2477440-marokkodeal-over-overlastgevende-asielzoekers-heeft-nog-weinig-effect">https://nos.nl/collectie/13941/artikel/2477440-marokkodeal-over-overlastgevende-asielzoekers-heeft-nog-weinig-effect</a> <a href="https://nos.nl/artikel/2479780-gewortelde-marokkanen-uitgezet-na-43-jaar-in-nederland-geboeid-op-vliegtuig">https://nos.nl/artikel/2479780-gewortelde-marokkanen-uitgezet-na-43-jaar-in-nederland-geboeid-op-vliegtuig</a>

<sup>176</sup> Ibid.<sup>177</sup> Ibid.

5.2	Strengthening cooperation on migration	Ministerial meetings to discuss (among other things) the consolidation of migration cooperation	Morocco	11/05/2022 21/02/2023	<a href="https://www.linkedin.com/posts/eric-van-der-burg-marokko-is-een-belangrijke-partner-voor-nederland-activity-7033802872513253376-rW t/">https://www.linkedin.com/posts/eric-van-der-burg-marokko-is-een-belangrijke-partner-voor-nederland-activity-7033802872513253376-rW t/</a> <a href="https://www.government.nl/documents/diplomatic-statements/2022/05/11/communiqu-e-morocco-the-netherlands#:~:text=The%20two%20countries%20are%20strengthening,the%20spirit%20of%20constructive%20engagement.">https://www.government.nl/documents/diplomatic-statements/2022/05/11/communiqu-e-morocco-the-netherlands#:~:text=The%20two%20countries%20are%20strengthening,the%20spirit%20of%20constructive%20engagement.</a> <a href="https://nos.nl/artikel/2464725-staatssecretaris-van-der-burg-overlegt-in-marokko-over-terugkeer-asielzoekers">https://nos.nl/artikel/2464725-staatssecretaris-van-der-burg-overlegt-in-marokko-over-terugkeer-asielzoekers</a> <a href="https://www.rtlnieuws.nl/nieuws/nederland/artikel/5367208/marokko-nederland-asiel-staatssecretaris-asielzoekers">https://www.rtlnieuws.nl/nieuws/nederland/artikel/5367208/marokko-nederland-asiel-staatssecretaris-asielzoekers</a>
5.3	Joint Statement of Ministers	Agreeing on containing the secondary movements through among other things swift return procedures	Belgium, France, Germany, UK	08/12/2022	<a href="https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2022/12/08/joint-statement/JOINT+STATEMENT+v+8-12.pdf">https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2022/12/08/joint-statement/JOINT+STATEMENT+v+8-12.pdf</a>

Table (2) International Cooperation

## 7. Funding of Return and Related Programmes

Program	Responsible organisations	Target countries/regions	Funding
COMPASS <sup>178</sup>	IOM and the Ministry of Foreign Affairs of the Netherlands	Afghanistan, Algeria, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, Sudan, Tunisia	55 € million (1 January 2021- 31 December 2023)
Return and Emigration Assistance from the Netherlands (REAN)  Assisted Voluntary Return and Reintegration (AVRR)*	IOM	<a href="#">List of targeted/eligible nationalities</a>	2018: 53,69\$ million <sup>179</sup> 2019: 53,17\$ million <sup>180</sup> 2020: 33, 18\$ million <sup>181</sup> 2021: 64,95\$ million <sup>182</sup> 2022: 57,91\$ million <sup>183</sup>
EU Trust Funds for Africa  EU-IOM Joint Initiative	IOM	North Africa, Horn of Africa  Sahel/Lake Chad	2016: 9 € million <sup>184</sup> 2017: 23,362 € million <sup>185</sup> 2018: 26.362 € million <sup>186</sup> 2019: 26.362 € million <sup>187</sup> 2020: 29.362 € million <sup>188</sup> 2021: 26.362 € million <sup>189</sup> 2022: 29.362 € million <sup>190</sup>

<sup>178</sup> IOM, “COMPASS Guiding Safe Migration,”

[https://www.iom.int/sites/g/files/tmzbd1486/files/documents/compass-leaflet\\_en.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/documents/compass-leaflet_en.pdf).

\* Data about the exact contributed amounts for these programs are not available. The amounts in the funding section are the earmarked contributions from the Dutch government to the IOM.

<sup>179</sup> IOM Migration Resource Allocation Committee, “2018 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2019).

<sup>180</sup> IOM Migration Resource Allocation Committee, “2019 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2020).

<sup>181</sup> IOM Migration Resource Allocation Committee, “2020 Annual Report on the Use of the Unearmarked Funding,” (IOM, 2021).

<sup>182</sup> IOM, “2021 Annual Report on Unearmarked Funding.”

<sup>183</sup> IOM, “2022 Annual Report on Unearmarked Funding.”

<sup>184</sup> European Commission, “2016 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>185</sup> European Commission, “2017 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>186</sup> European Commission “2018 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>187</sup> European Commission “2019 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>188</sup> European Commission “2020 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>189</sup> European Commission “2021 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

<sup>190</sup> European Commission “2022 Annual Report The Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa”.

			Total: 170.172 € million
ERRIN	DT&V, Ministry of Justice and Security*		n/a
<a href="#">Migration Management Diploma Program (MMDP)</a>	UNU-MERIT and Maastricht University	Cape Verde, Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia, Jordan, Belarus, Ethiopia, Nigeria, India, Western Balkans, Turkey, the EU's Southern and Eastern neighbourhood, Sub-Saharan Africa, South-Asia	September 2023-February 2025 543,978 € million <sup>191</sup>

Table (3) Funding of Return and Related Programs

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\* Frontex Joint Reintegration Program and ICMPD Return and Reintegration Facility (RRF) have taken over the return and reintegration operations of the ERRIN per 1 July 2022  
<https://returnnetwork.eu/2022/06/07/errin-closing-conference/>

<sup>191</sup> ICMPD, "Migration Partnership Facility, Capacity Building for Migration Management. Migration Management Diploma Programme (MMDP) and Moving the Migration Policy Agenda Forward (MMPAF) Programme," <https://www.migrationpartnershipfacility.eu/mpf-projects/50-migration-management-diploma-programme-mmdp-and-moving-the-migration-policy-agenda-forward-mmpaf-programme/preview>, 2023. accessed January 5, 2024.

## 8. Gaps

This section lists and explains the various gaps in the legal, institutional and international cooperation frameworks in the Dutch return field.

### 8.1 Gaps in the legal framework

#### 8.1.1 The scope of judicial review (for the prolongation) of detention

Dutch courts are restricted in their scrutiny of detention measures or their prolongation. For a long time, they were supposed to conduct a marginal scrutiny and leave the actual assessment of the facts and the personal interests to the administrative authorities, and were not allowed to replace the administrative decision with their own decision. In the *Mahdi case*, the CJEU clarified in 2014 that the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the TCN.<sup>192</sup> Also, the authority must be able to consider any other element that is relevant for its decision should it deem this necessary. The judicial authority dealing with an application for extension of the detention must be allowed to decide, on a case-by-case basis, on the merits of whether the detention of the TCN should be extended, and whether it can be replaced with a less coercive measure or whether the TCN concerned should be released. In 2015 the Council of State concluded that the concept of marginal judicial scrutiny is not in line with the *Mahdi* judgement.<sup>193</sup> Since then, the *Mahdi* judgement has not only reinforced the competences of the judiciary, but also forced administrative authorities to increase the intensity of the individual assessment prior to the decision to impose or prolong a detention measure. Yet, the judicial competences only became in line with EU law after the CJEU had ruled in 2022 on a preliminary request from the Council of State, that judicial authorities must scrutinise any (un)lawfulness of a detention order *ex officio*.<sup>194</sup>

#### 8.1.2 Immigration detention not in compliance with the Directive

Apart from the scope of judicial scrutiny, courts still refrain from assessing in all cases if a less far-reaching measure could suffice to ensure return. This assessment is only conducted in situations where the TCN may not be fit for detention, because of certain vulnerabilities of that person. One could argue that the principles of proportionality and necessity always require such assessment. The Council of State seems to adopt the approach that detention is always necessary and therefore justified in case of a risk of absconding, which does not align with the principle of detention as a last resort.<sup>195</sup> The law and practice of immigration detention in the

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<sup>192</sup> CJEU 5 June 2014, C-146/14 PPU, ECLI:EU:C:2014:1320 (*Mahdi*).

<sup>193</sup> ABRvS 23 January 2015, ECLI:NL:RVS:2015:232.

<sup>194</sup> CJEU 8 November 2022, joined cases C-704/20 and C-39/21, ECLI:EU:C:2022:858 (*C, B and X*).

<sup>195</sup> Annemarie Busser, Revijara Oosterhuis and Tineke Strik, "Vreemdelingendetentie (II): Gronden getoetst aan wetsvoorstel en aan Europees en internationaal recht," *A&MR*, no. 9 (2019). Galina Cornelisse, "Van Magna Carta naar *Mahdi*," *A&MR*, nos. 6/7 (2015); Wouter van der Spek, "Rechtsbescherming bij inbewaringstelling en detentie van asielzoekers: Gebreken op alle fronten," *A&MR*, no. 4 (2018).



Netherlands is not a proper implementation of the Return Directive in respect to the concept of proportionality and the principle of using detention as a last resort.<sup>196</sup> This also holds true for the regime of immigration detention. Where Member States have to avoid prison-like situations and reflect the nature of immigration detention in the regime and the rights of detainees, the regime of administrative detention in the Netherlands is even more restrictive than the regime of penal detention, according to the National Ombudsman. It therefore concluded that the policy does not satisfy the administrative nature nor the principle of proportionality.<sup>197</sup> The Ombudsman expressed particular concern towards the frequent use of the measure of solitary confinement (also as a sanction for two weeks on the refusal to share a cell with another person), the lack of privacy and the lack of daily activities.

A proposal for a new law, already pending before the parliament since 2015, which was intended to align the detention regime with the principles of the Return Directive, received heavy criticism, as the TCN would be placed in detention in a very strict regime from the start, and would be able to obtain the 'award' of certain programmes and privileges afterwards.<sup>198</sup> The broadened grounds for solitary confinement and other restrictive measures would still imply a frequent use and a risk of arbitrariness. This proposal was adopted by the House of the Representatives in June 2018. However, the consideration of this bill is suspended until the bill announced by the State Secretary has reached the Senate.

### 8.1.3 No-fault residence permit for unremovable TCNs

By observing the legal framework in the Netherlands regarding returns, various protection gaps can be noticed. The first is concerned with the fact that the migration authorities seldomly do grant residence permits in case of unremovable TCNs. Even if TCNs cannot be removed due to no fault of their own they do not easily receive a so called 'no fault' residence permit although the law stipulates that they should be granted residence permit in such circumstances. The threshold for obtaining a 'no-fault' residence permit is very high, for instance because of the requirement of authentic documents on identity and nationality and a high burden of proof of the impossibility to return. Furthermore, a person must always have cooperated with the authorities to effectively return. Statistics show that only a minority of 13,5% of the no-fault residence permit applications achieved positive outcomes in the period 2008-2012.<sup>199</sup> The last few years, approximately 20 no-fault residence permits have been issued per year, while the number of applications was three times higher.<sup>200</sup>

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<sup>196</sup> Amnesty International, "The Netherlands: the detention of the irregular migrants and asylum-seekers," June 2008,

<https://www.amnesty.nl/content/uploads/2017/01/eur350022008eng.pdf?x56589>.

<sup>197</sup> De Nationale Ombudsman, "Immigration Detention: penal regime or step towards deportation? About respecting human rights in immigration detention," August 7, 2012,

[https://www.nationaleombudsman.nl/uploads/report\\_2012105\\_immigration\\_detention.pdf](https://www.nationaleombudsman.nl/uploads/report_2012105_immigration_detention.pdf).

<sup>198</sup> "Wet terugkeer en vreemdelingenbewaring (34.309)," Eerste Kamer Der Staten-Generaal, n.d., [https://www.eerstekamer.nl/wetsvoorstel/34309\\_wet\\_terugkeer\\_en](https://www.eerstekamer.nl/wetsvoorstel/34309_wet_terugkeer_en).

<sup>199</sup> See Appendix IV

<sup>200</sup> Ministerie van Justitie en Veiligheid, "Wat houdt bemiddeling in het kader van 'buitenschuld' in?," *Leg Mij Nou Eens Uit. VreemdelingenVisie*, July 6, 2023, <https://www.vreemdelingenvisie.nl/vreemdelingenvisie/2023/07/buiten-schuld-vergunning>.

### **8.1.4 Residence permit to unaccompanied minors**

Similarly, in the case of UAMs whose asylum or residence permit applications are rejected, there is a gap in the implementation of the Directive because they only receive notice of a postponement of the obligation to return till they reach the age of 18. However, UAMs do not receive residence permits although the Return Directive in its Article 6(4) mentions that the MS concerned may decide to grant an autonomous residence permit or other authorisation offering a right to stay and that the issued return order shall be suspended for the duration of validity of the residence permit or other authorisation offering a right to stay (see section 4.7). The age distinction made by the Netherlands, the postponement of return instead of granting a residence permit and the CJEU ruling in T.Q,<sup>201</sup> mentioned in section 4.7 make clear that the Dutch policy concerning the UAMs does not comply with the Return Directive Article 5(a), 6(1), 4, 8(1) and 10, where Article 5(a) stipulates that when implementing return the Member state shall take the best interest of the child in account and respect the obligation of non-refoulement, and Article 10 stipulates that before issuing a return decision to the UAM, assistance should be granted by the appropriate bodies while taking into consideration the best interest of the child and that before the removal of UAM from the Member State's territory there shall be investigation concerning the reception facilities in the country of return.

### **8.1.5 The application of the Return Directive in Dublin cases**

Another element in the Dutch legal framework which causes protection gaps, is the flexibility for the immigration authorities to choose between the applying the Dublin Regulation and the Return Directive, in case of a TCN who has a pending asylum procedure in another MS. If the authorities decide not to initiate a tack back procedure under the Dublin Regulation, but instead apply the Return Directive, they issue a return decision (and entry ban) and proceed with the forced return procedure. The Dutch Council of State has ruled that in case the Dublin Regulation applies, the State Secretary of Justice and Security is not allowed to take all measures under the Return Directive.<sup>202</sup>

## **8.2 Gaps in the institutional framework**

### **8.2.1 The lack of an independent monitoring (and advocacy) body**

The Netherlands lacks an independent monitoring body. In 2013 the Regulation on the Supervision of the Return of Foreign Nationals provided that the return activities (including detention) in the Netherlands conducted are monitored by the Inspectorate of Justice and Security which is the coordinator and a part of the National Prevention Mechanism (NPM). The NMP, which has its office at the Ministry of Justice and Security, is installed as one of the obligations for signatories to the Optional Protocol to the Convention Against Torture (see Article 4 (2) OPCAT), meant to monitor, raise awareness and advocate for the implementation of the CAT. The National Ombudsman resigned as an observer to the NPM in 2014, arguing

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<sup>201</sup> CJEU 14 January 2021, C-441/19, ECLI:EU:C:2021:9 (TQ v. State Secretary of Justice and Security),

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=236422&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4249070>.

<sup>202</sup> ABRvS 29 June 2018, ECLI:NL:RVS:2018:2173, case no. 201800622/1/V3.

that the NPM is not sufficiently independent and poorly functioning.<sup>203</sup> However, this resignation did not lead to any reform in the monitoring of asylum and return activities.<sup>204</sup> In 2016, the subcommittee (SPT) of the OPCAT criticised the lack of independence of the Dutch NPM. It urged the Dutch government to change its policies, so far without result.<sup>205</sup> In 2022, a study (commissioned by the Ministry of Justice and Security) has been published for the preparation to appoint the National Institute for Human Rights as the NPM.<sup>206</sup> This Institute has been mandated with the NPM task as of 2024, for which the recruitment procedure was still pending in February 2024.<sup>207</sup>

### 8.2.2 The LVV agreement

The Ministry of Justice and Security has made an agreement with the VNG about the LVV scheme which was implemented as a pilot project from 2019 till 2022 entailing that five municipalities would provide basic provisions and that other municipalities would close their shelters. Although the high burden of proof related to the no-fault residence permit confronted by the LVVs, the scheme was successful in finding a sustainable solution to 60% of the TCNs hosted in the facilities either by obtaining a no-fault residence permit or through return. However, the agreement had a temporary nature and was not renewed which has led to a policy vacuum as this impedes the possibility to find a sustainable solution for the irregular and non-removable migrants. Moreover, it increases the vulnerabilities of this category of people due to homelessness and lack of basic provisions. In doing so, the Dutch government still refuses to fully comply with the decisions of the European Committee on Social Rights, that undocumented migrants must be offered shelter and basic needs without further conditions. Instead, the government requires that the person concerned cooperates with his/her return to be eligible for shelter.

### 8.2.3 Lack of municipal cooperation on evacuations

The evacuation order of TCNs who no longer have the right to stay demanding them to leave the reception centre is based on a national decision from the IND and DT&V, while the evacuation itself is implemented by the local police which follows the municipal authority. However, some municipalities and their local police refuse to implement evacuations, arguing it is not in compliance with their duty to take care of their inhabitants, or that the consequential homelessness may lead to public policy problems. Municipalities are thus confronted with local problems caused by implementing the national policy. This does not only prove the need

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<sup>203</sup> Press statement National Ombudsman, September 2014, <https://www.nationaleombudsman.nl/nieuws/nieuwsbericht/2014/nationale-ombudsman-trekt-zich-terug-uit-npm>.

<sup>204</sup> "Preventing Torture in Closed Institutions: Dutch NPM Needs to Become More Effective and Fully Independent," Netherlands Helsinki Committee, November 23, 2021, <https://www.nhc.nl/preventing-torture-in-closed-institutions-dutch-npm-needs-to-become-more-effective-and-fully-independent/>.

<sup>205</sup> Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Kingdom of the Netherlands, United Nations, 16 March 2016.

<sup>206</sup> Ministerie van Justitie en Veiligheid, "Meer dan de som der delen? Verkenning NPM," Rapport Berenschot, March 30, 2022. Rijksoverheid.nl, September 28, 2023, <https://www.rijksoverheid.nl/documenten/rapporten/2023/09/27/tk-bijlge-rapport-berenschot-verkenning-npm-bij-crm>.

<sup>207</sup> <https://www.mensenrechten.nl/over-ons/werken-bij-het-college/vacature-collegelid/toelichting>.

for decoupling between the national and local level where a solution for the national government is a problem for the local one, but also hinders the implementation of evacuations and return.

### 8.3 Gaps in the international cooperation framework

Although the Dutch government prioritises extending the cooperation on return and readmission with the countries of origin, there is a significant gap in this cooperation framework. This relates partly to a reluctance of some countries of origin to conclude a readmission agreement, as illustrated by the lengthy, thorny and deferred negotiations with countries like Algeria, Morocco and Turkey.<sup>208</sup> The cooperation between the Netherlands and Morocco is a good example, where Morocco has been refusing to readmit its citizens. In the so-called ‘action plan’ that the Dutch and Moroccan government signed in July 2021, they promise not to interfere any longer in internal affairs of the other country. The Netherlands also promised to inform the Morocco on its funding of NGOs of Moroccan citizens.<sup>209</sup> After a rather low return rate in 2022, Morocco readmitted around 250 Moroccans in 2023. The commitments in the action plan reveal that the Dutch government is prepared to silence itself on human rights violations in Morocco in exchange for cooperation on returns of irregular migrants. Moreover, in practice this cooperation is not necessarily directed towards returning Moroccan nationals whose application for residence has been rejected, but also those who are born and rooted in Dutch society, and whose removal is therefore highly controversial.<sup>210</sup> In addition, the cooperation on readmission with autocratic governments do not only come at the cost of human rights, but are also unsuccessful due to the political instability that hinders the achievement of policy goals. This is manifest in the case of the readmission negotiations between the Netherlands and Niger.

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<sup>208</sup> Jean-Pierre Cassarino, *Informalizing EU Readmission Policy* (Routledge eBooks, 2017), 83–98, <https://doi.org/10.4324/9781315645629-7>.

<sup>209</sup> Actieplan Nederland Marokko, 8 July 2021, <https://open.overheid.nl/documenten/ronl-061c5bb902f31a461b8b646930120c6620906a5b/pdf>.

<sup>210</sup> Samira Jadir and Reinalda Start, “Gewortelde Marokkanen uitgezet: na 43 jaar in Nederland geboeid op vliegtuig,” *NOS*, June 21, 2023, <https://nos.nl/artikel/2479780-gewortelde-marokkanen-uitgezet-na-43-jaar-in-nederland-geboeid-op-vliegtuig>.

## 9. Policy Recommendations

Based on these findings, this report proposes the following policy recommendations to the Dutch migration authorities, which also serve as points of attention for the European Commission while supervising the Netherlands' compliance with Union Law:

I- Better implementation of the Return Directive and the EU case law by adhering to the principles of necessity and proportionality, anchoring the best interest of the child, and respecting the fundamental rights of migrants.

II- Structurally practice less coercive enforcement measures instead of using detention to avoid absconding. Detention must be a measure of last resort and implemented for the shortest term possible and only if no other measures are possible. Also, migrants must have the opportunity to be heard before the decision of detention and its extension.

III- Detention must be held as an administrative measure where the restrictions and duration are reduced to the minimum while taking into consideration the needs and vulnerabilities of the migrants held in detention.

IV- The protection of the child's rights and best interest should be emphasised in the national legislation (Aliens Act, Decree and Implementation Guidelines). Clear guidelines and criteria on the assessment of the availability of adequate reception for unaccompanied minors in the countries of return must be provided and uncertainty must be avoided.

V- There must be independent bodies that monitor the return and detention practices. The recent intention to transfer the National Prevention Mechanism to the National Institute for Human Rights is to be strongly encouraged.

VI- Given the success of the LVV scheme, the government should consider renewing the agreement with the Dutch Municipalities Association (VNG) and turn it into an improved and sustainable structure.

VII- Finally, there will always be immigrants who cannot be returned: no return policy can guarantee a 100% success rate. Instead of leaving those who cannot be returned in a legal and humanitarian limbo, which is currently the case, they should be entitled to a residence permit. The current threshold for in-country applications on this ground is far too high and regularisations are rare in the Dutch context. In sum, the absence of options for legal residence renders the overall migration management policy ineffective.

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## 11. Annexes

### 11.1 Return statistics

Year	TCNs found to be illegally present	Asylum applications	TCNs refused entry at the border	Dublin returns	The categories included here are based on available Eurostat data						ALTERNATIVE		
					TCNs ordered to leave		TCNs returned following an order to leave (annual data) *	TCNs returned following an order to leave, by type of return			Related alternative national category of official (annual) data on return		
					Total ordered to leave	Return decisions issued for		assisted return	non-assisted voluntary	forced return	Independent departure <sup>211</sup>	Independent without supervision	Total
2015	3150	4497 0	2295	n/a	19015	19015	8385	n/a	n/a	1850	3320	5070	10240
2016	2760	2094 5	2700	n/a	25310	25310	1189 0	4640	6470	2220	6760	8100	17080
2017	2120	1821 0	2410	n/a	20750	20750	8195	1530	2810	3390	3400	10170	16960
2018	2790	2402 5	2555	1850	17935	17935	8830	2150	3480	2650	3610	8620	14880
2019	3565	2520 0	2900	2420	25435	25435	1105 5	3040	n/a	2760	4460	9660	16880
2020	3640	1525 5	1980	1280	21100	21100	8715	2550	n/a	1650	2630	6880	11160
2021	5010	2652 5	3745	850	17300	17300	2540	2233	n/a	1630	2100	5600	12090
2022	5510	3702 5	3070	970	15740	15740	975	2478	n/a	1850	2450	4310	8610
Data sources	Eurostat	Eurostat	Eurostat	DT&V <sup>212</sup>	Eurostat	Eurostat	Eurostat	EMN for 2016/ 2017.	EMN Factsheet	DT&V	DT&V	DT&V	

\* See appendix I for top five nationalities of return.

<sup>211</sup> Years 2015, 2016 and 2017 are retrieved from EMN reports that build on the DT&V statistics while 2018-2022 are retrieved directly from the DT&V. There are inconsistencies in the EMN reports concerning the naming of this category of returns. In 2016 it is named “voluntary departure” in 2017 “independent return” and in 2018 “assisted voluntary departure”.

## 11.2 Overview of the Legal Framework on Return Policy

The Title of the Legislation in English	The Title in the Original Language	Policy Area	Year Announced	Description of Policy	Key terms for search function	Level of Legislation	Type of Legislation or Administrative Action	Target Group	Web Links to	Web links to Source in
Aliens Act	Vreemdelingenwet	Access Stay Enforcement Departure Deportation Entry ban Remedies	2000 - today		Illegal entry Illegal stay Detention Deportation	National	Act	Regular Refugees Illegal Rejectees	<a href="https://www.asylumlawdatabase.eu/sites/">https://www.asylumlawdatabase.eu/sites/</a>	<a href="https://wetten.overheid.nl/BWBR011823/2022-10-01/">https://wetten.overheid.nl/BWBR011823/2022-10-01/</a>
Aliens Decree	Vreemdelingenbesluit	Access Stay Border Control Surveillance Freedom-restriction Departure Deportation Transfer Entry ban Undesirability Remedies	2000 - today		Asylum residence permit Border control Schengen border code Supervision Custodial measures	National	Decree	Regular Refugees Illegal Rejectees	<a href="https://wetten.overheid.nl/BWBR0011825/2023-01-01/#Hoofdstuk4">https://wetten.overheid.nl/BWBR0011825/2023-01-01/#Hoofdstuk4</a>	

<sup>212</sup> Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” Over DT&V, *Dienst Terugkeer en Vertrek*, August 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

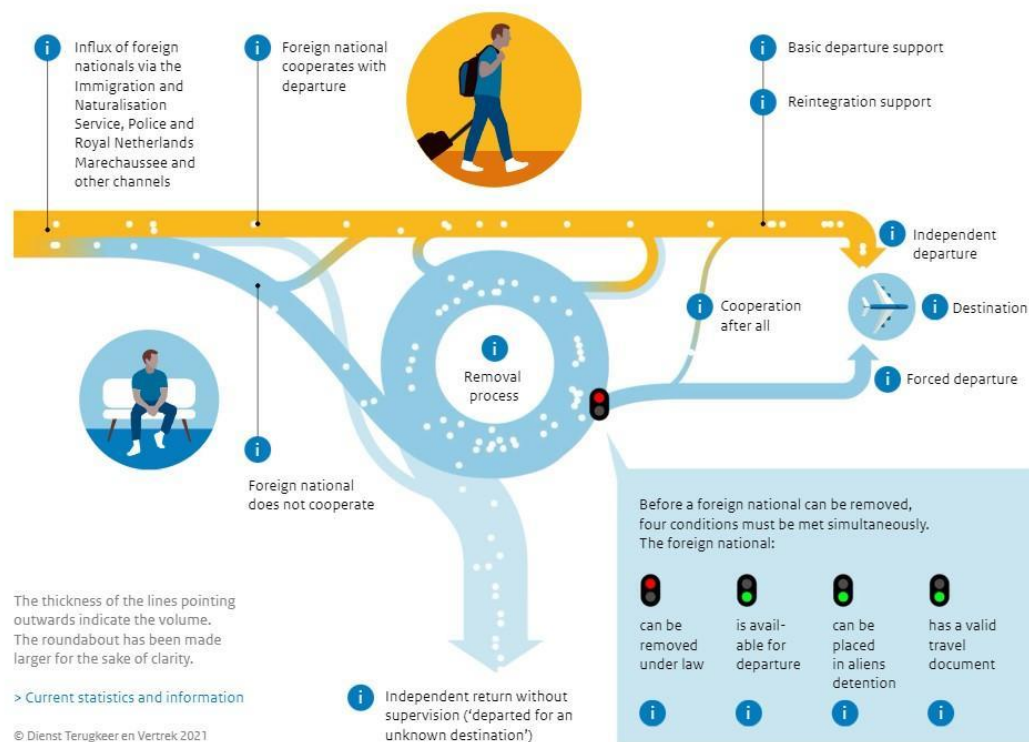
Aliens Circular A	Vreemdelin gencirculaire A	Access Supervision Departure Eviction Entry ban Undesirability Freedom-restriction Identification	2000 - 2021			National	Guidelines	Regular Refugees Illegal Rejectees	<a href="https://wetten.overheid.nl/BWBR0012287/2021-01-01">https://wetten.overheid.nl/BWBR0012287/2021-01-01</a>
Aliens Circular B	Vreemdelin gencirculaire B	Regular stay Humanitarian residence Special stay	2000 - 2021			National	Guidelines	Regular Refugees	<a href="https://wetten.overheid.nl/BWBR0012289/2021-01-01">https://wetten.overheid.nl/BWBR0012289/2021-01-01</a>
Aliens Circular C	Vreemdelin gencirculaire C	Asylum Country-specific policy Temporary asylum permit	2000 - 2021			National	Guidelines	Refugees	<a href="https://wetten.overheid.nl/BWBR0012288/2021-01-14#Circulaire.divisie3_Circulaire.divisie3">https://wetten.overheid.nl/BWBR0012288/2021-01-14#Circulaire.divisie3_Circulaire.divisie3</a>
Aliens Regulation	Voorschrift Vreemdelingen	Access Stay Surveillance Border control Freedom-restriction Departure Eviction	2000 - today		Safe countries of origin	National	Regulation		<a href="https://wetten.overheid.nl/BWBR0012002/2023-07-01">https://wetten.overheid.nl/BWBR0012002/2023-07-01</a>

Border Accommodation Regime	Reglement Regime Grenslogies	Border Control Supervision Irregular	2001 - today			National	Regulation		<a href="https://wetten.overheid.nl/BWBR0005848/2001-04-01">https://wetten.overheid.nl/BWBR0005848/2001-04-01</a>
Regulation on the Supervision of the Return of Foreign nationals			2013						
The Repatriation and Detention of Aliens Act			2018			National	Act		
Central Agency for the Reception of Asylum Seekers Act	Wet Centraal Orgaan opvang asielzoekers	Reception Refugees Asylum seeker	2020 - today		Reception Accommodation Supervision	National	Act	Refugees Asylum seekers	<a href="https://wetten.overheid.nl/BWBR0006685/2020-01-01">https://wetten.overheid.nl/BWBR0006685/2020-01-01</a>
Decree of the State Secretary for Justice and Security amending the Aliens Act Implementation Guidelines 2000	Besluit van de Staatssecretaris van Justitie en Veiligheid houdende wijziging van de Vreemdelingen-circulaire 2000	UAMs Return decision Postponement of departure Adequate reception facilities	2022 - today		Return of UAMs Postponing return TQ case	National	Decree	UAMs Asylum seekers	<a href="https://zoek.officielebekendmakingen.nl/stcrt-2022-53.html">https://zoek.officielebekendmakingen.nl/stcrt-2022-53.html</a>

### 11.3 Flowchart of the national return system

### The return process

The aim is for foreign nationals without legal stay in the Netherlands to have them demonstrably leave the country, preferably independently (voluntarily).



Source: Repatriation and Departure Service (2021). “the return process” available at: <https://english.dienstterugkeerenvertrek.nl/the-return-process>

## Appendix I

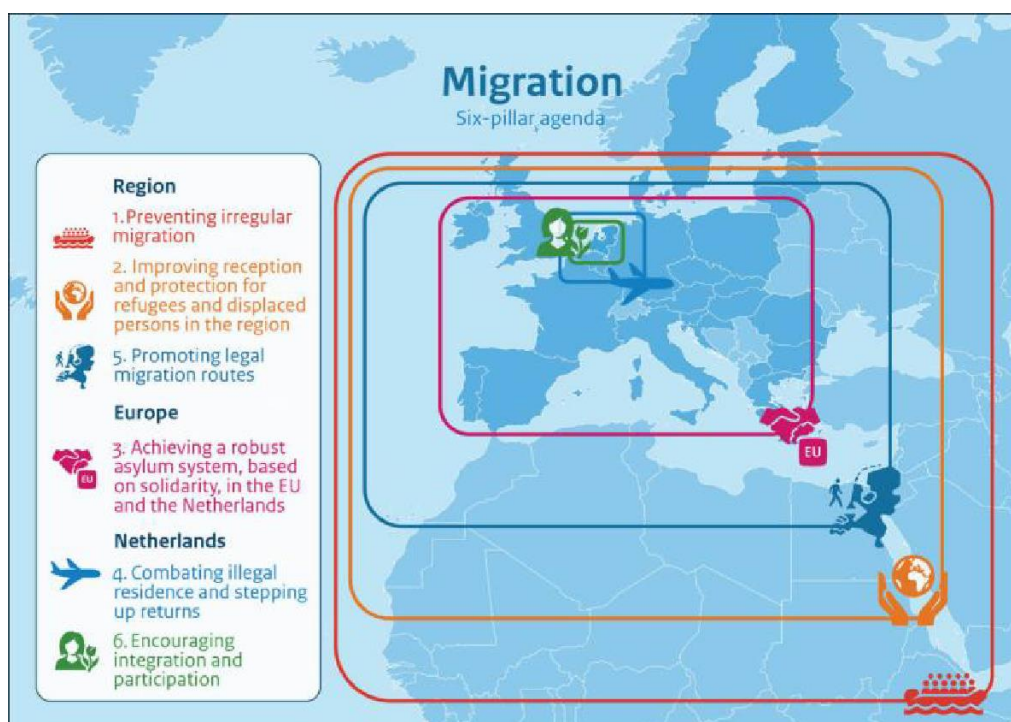
### Top nationalities return from DT&V statistics

Year	2015	2016	2017	2018	2019	2020	2021	2022
1	n/a	n/a	n/a	Albania	Morocco	Nigeria	Morocco	Morocco
2	n/a	n/a	n/a	Morocco	Nigeria	Morocco	Algeria	Algeria
3	n/a	n/a	n/a	Iraq	Moldavia	Algeria	Nigeria	Nigeria
4	n/a	n/a	n/a	Afghanistan	Algeria	Syria	Albania	Syria
5	n/a	n/a	n/a	Algeria	Iraq	Iraq	Syria	Ukraine

Source: Ministerie van Justitie en Veiligheid, “Instroom- en vertrekcijfers,” Over DT&V | Dienst Terugkeer En Vertrek, November 1, 2023, <https://www.dienstterugkeerenvertrek.nl/over-dtv/cijfers>.

## Appendix II

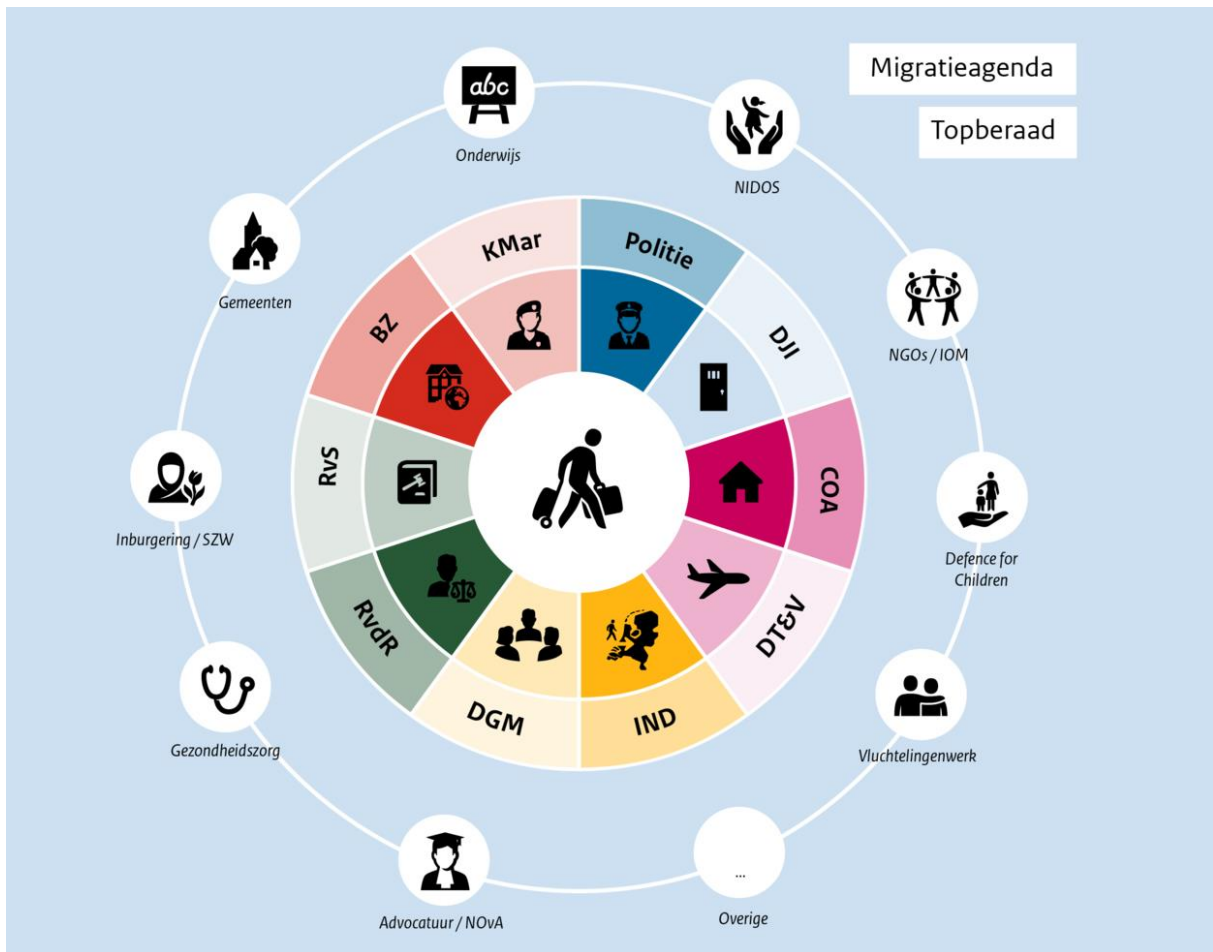
### Integrated Migration Approach



Source: Ministerie van Justitie en Veiligheid, “Kabinet presenteert integrale migratieagenda,” Nieuwsbericht | Rijksoverheid.nl, July 10, 2018, <https://www.rijksoverheid.nl/actueel/nieuws/2018/03/30/migratiebeleid-toekomstbestendig>.

## Appendix III

### Migration Chain partners



Source: Ministerie van Justitie en Veiligheid, "Samenwerking in de keten," Migratieketen, June 28, 2018, <https://magazines.rijksoverheid.nl/jenv/migratieketen/2018/01/samenwerking-in-de-keten>.

## Appendix IV

### No-fault permit statistics

	2008	2009	2010	2011	2012	2013 t/m juni
Aanvragen «buiten schuld»	460	550	470	290	240	90

Bron: IND. Afgerond op tientallen.

**Het aantal verblijfsvergunningen dat in de afgelopen jaren op grond van «buiten schuld» is verleend (in eerste aanleg en na bezwaar) wordt weergegeven in de volgende tabel:**

	2008	2009	2010	2011	2012	2013 t/m juni
Inwilligingen «buiten schuld»	70	70	60	30	40	10

Bron: IND. Afgerond op tientallen.



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