Informal translation: letter dated 9 June 2008, sent by the Ministry of Justice of the Netherlands to the Dutch Parliament on the application of article 1F Refugee Convention.

Introduction

On June 5 and 7 2007, we had a general discussion with your Parliament concerning the subject of war crime suspects. During those consultations, we came to the following concessions:

1. To send the Parliament an overview of the number of asylum seekers currently residing in the Netherlands to whom the Article 1F Refugee Convention restriction applies and who cannot be expelled either;
2. To research the developments in the cases of those with an Article 1F Refugee Convention restriction, including the possibility of a legal trial'
3. To send the Parliament an aggregated report in answer to the SCIFA questionnaires;
4. To send the Parliament a detailed analysis of how Article 1F has been applied, integrating the filled-out questionnaires.

By means of this letter and accompanying report, we offer the Parliament, also on behalf of the Minister of Foreign Affairs, the promised information. The report includes an elaborate version and explanation of the in this letter mentioned conclusions as well. Furthermore, it responds to the request of the Parliament's Commission for Justice of August 13, 2007 to send our answers to the questionnaires concerning the application of Article 1F Refugee Convention. The report also comments on the Advisory Committee on Aliens Affairs (ACVZ) advising report "Article 1F Refugee Convention in Dutch Refugee Policy" of May 21, 2008. In the appendix to the report, you will also find a reaction to the letters of the UN High Commissioner for Refugees and the Dutch Section of the International Commission of Jurists of respectively November 14, 2007 and January 24, 2008. Your Parliament received a copy of those letters earlier.

Analysis of the Application of Article 1F Refugees Convention

Article 1F of the 1951 United Nations Convention relating to the Status of Refugees (the Refugee Convention) is an important provision. The restriction in the Refugee Convention wants to protect those who have been the victim of treatment violating their personal dignity and not those who commit such treatment. Article 1F Refugee Convention states that those in the last-mentioned category do not deserve protection.
It is our conviction that Holland should not serve as a safe haven for those individuals. It is in the interest of Dutch society and of the international legal system to not distribute residence permits to them. The position of their victims, those who have found protection in our country, is at stake here. We also do not want these people to evade the (international) legal consequences of their actions. That is why we aim to give free course to the law to deal with those to whom Article 1F Refugee Convention applies ('1F aliens'). In all of this, Article 3 of the European Convention protecting human rights and fundamental freedoms (ECHR) of course remains in force.

After the policy framework in question was determined in 1997, your Parliament discussed it several times. All these debates resulted in the decision that there was no reason or necessity to change it.

From recent discussions with your Parliament we inferred that the impression exists that a large number of the asylum seekers we denied on the basis of Article 1F Refugee Convention as well as their family members now reside in the Netherlands unlawfully for long periods of time, while Article 3 ECHR prevents them from being returned to their country of origin. Some also seem to believe that the restriction has not been applied with sufficient attention to individual cases, especially in the cases of those designated by the so-called "categorical application" of Article 1F.

In preparation of this letter and accompanying report, all the numbers and procedures concerning the application of Article 1F Refugee Convention have been checked, and we have reevaluated current policy. From this research we have reached the conclusion that neither numbers nor content justify above-mentioned perceptions.

Knowledge of the general legal framework is crucial to gain clear insight into the matter (Chapter 1 of the report). We deny a residence permit to those asylum seekers who have given us serious reason to suspect that they are guilty of the practices mentioned in Article 1F Refugee Convention (RC). The same counts when an asylum seeker has made it plausible that he runs the risk of violation of Article 3 ECHR in the case of return to the country of origin. In principle that scenario merely leads to a prohibition of forced expulsion to the country of origin, not to a right of residence.

The numbers (Chapter 2 of the report) show among other things clearly that according to the consulted systems (INDIS coupled with municipal databases), about 350 asylum seekers with the Article 1F Refugee Convention objection reside in the Netherlands. Of this group about 250 individuals reside here unlawfully. About forty of them cannot be extradited because of Article 3 ECHR. In another thirty cases the relevance of Article 3 ECHR is still being assessed.

<table>
<tr><td rowspan="3">About 350 1F persons reside in the Netherlands</td><td rowspan="3">About 350 1F aliens reside in the Netherlands</td><td>About 40 persons with the Article 3 ECHR barrier to expulsion</td><td>Most significant nationality:

Afghan 25
Iranian <5
Iraqi <5</td></tr>
<tr><td>About 180 persons without the Article 3 ECHR barrier to expulsion</td><td>Afghan 125
Iraqi <10
Angolese <10</td></tr>
<tr><td>About 30 persons without an Article 3, ECHR consideration</td><td>Afghan 20
Iraqi <5</td></tr>
</table>

	About 100 persons in process of being assessed, currently residing unlawfully

Above-mentioned numbers concern the asylum seekers against whom the Article 1F Refugee Convention has been raised, with the exception of their family members. This number differs from the number of people that did not qualify for a residence permit through the General Pardon on the basis of Article 1F RC. The following explains this. Unlike in the table accompanying this text, the statistics used in the application of the Pardon include the family members. The numbers are also different, because in the Pardon procedures only those asylum seekers with the 1F objection that applied for legal residence before April 1, 2001 are included. Lastly, a procedure related to the Pardon was only started if, based on the national intelligence database, the asylum seeker against which the Article 1F RC was raised was still residing in the Netherlands, something which did not always turn out to be the case.

The statistics also give insight in the number of family members of the approximately 250 unlawfully residing '1F aliens.' The number of family members of the group of circa 40 '1F aliens' in whose case Article 3 ECHR prevents expulsion amounts to about 80 persons. About 70 of these family members have been naturalized or are in the possession of a residence permit (asylum permit on the basis of their own asylum application or a regular residence permit) and about 10 family members will have to return to the country of origin—if necessary without the asylum seeker to whom Article 1F RC applies.

In the application of Article 1F Refugee Convention in Dutch refugee policy (Chapter 3 of the report) the individual examination of all Article 1F-related matters always comes first. The Secretary of State has to demonstrate—but not "prove" in the legal sense—that there is "serious reason" to suspect that the person in question falls under the criteria covered by Article 1F. If the asylum seeker knowingly participated in the actions in question and if he in any way personally participated in them, Article 1F Refugee Convention can be raised against that person. It can be argued that this "knowing and personal participation" can under certain circumstances be assumed, based on the general information we have about persons at work with a certain function at a specific organization, partly because of the structure and objectives of that organization. This reasoning does not abandon the individual nature of the assessment but uses a prima facie reversed partition of the burden to demonstrate the facts.

After the Article 1F RC objection has been determined, two things are of importance: legal prosecution and departure from the Netherlands.

The testing framework for a legal procedure is not identical to the testing framework in alien-related legislation. For this reason we do not think it desirable to only (continue to) raise the Article 1F objection after legal judgment has taken place.

As mentioned in the above, we believe that individuals for whom serious cause exists to suspect they have made themselves guilty of the in Article 1F mentioned conduct do not deserve a safe haven. This is why we make effort to bring those persons to court, in accordance to the universal legislation for war crime and crimes against humanity. Up to now, the Public Prosecution Services (OM) could only start legal proceedings against a few of the cases related to the crimes specified in Article 1F. In even fewer cases this has resulted in a legal indictment. [1]

In Chapter 5 of the report, we will further explain what we have learned about the specific problems in determining and prosecuting international crimes committed by the people represented by this category. The problems we experienced are partially of a legal nature (for example the lack of jurisdiction) and partially technical (for example relating to gathering evidence). The capacity for detecting and prosecuting international crimes is also part of this. As announced, we will inform your Parliament about tracing and prosecuting international crime in general at a later time.[2]

Legal prosecution of 1F aliens is a crucial element of our policy and shall therefore be intensified. Problems in the taking of evidence shall be addressed by systematically searching for asylum seekers and refugees willing to serve as witnesses. We will also start to investigate whether or not a suspect could receive a trial elsewhere. Lastly, the capacity of the Team for International Crime will be tested and if necessary adjusted. Our motivation for these measures is as follows.

The fact that cases concerning finding and prosecuting 1F suspects often heavily rely on the hearing of witnesses and that these interrogations often have to take place outside the country under hard, often unsafe circumstances is an important difficulty. It is expected that the availability of witnesses in Holland and in neighboring countries will decrease the necessity of witness interrogations outside the country, a possibly positive development for the taking of evidence. For this reason relevant Dutch agencies are currently meeting to work out a strategy to systematically map the willingness of asylum seekers and refugees to witness in a legal case. Besides a trial in the Netherlands, it is possible to let suspects be judged in their country of origin or in the country of the crime. If the circumstances in that country allow for it, this method has our preference. Furthermore, we attach great importance to the complementary authority of the International Criminal Court and the other international tribunals. In Chapter 5 of the report we will further discuss the possibility of extradition.

With regard to the departure from the Netherlands of those with the Article 1F RC objection (Chapter 6 of the report), we would first like to point out the legal obligation to depart that applies to every alien of whom it has been legally determined that he or she does not qualify for a residence permit. Then the Return & Departure Service has made personnel available to accommodate the departure of aliens against which the Article 1F Refugee Convention objection

[1] For the overview of all cases that started in the year 2007, see TK 2007-2008, 31 200 VI, no. 132.

[2] TK 2007-2008, 31 200 VI, no. 32, p.2.

stands, and to by doing so actively monitor the progression of the departure process. The Immigration and Naturalization Service is also reassessing the files of those who cannot return to the country of origin (or to a third country) on the basis of Article 3 ECHR if Ministry of Foreign Affairs reports give proof of relevant altered circumstances. This reassessment takes place to shorten the stay of these aliens here as much as possible, or—if individual circumstances leave no other way—to accept their stay.

Within our current policy, the passing of time and related (long-term) residence can still lead to a residence permit. In Chapter 7 of the report describes how this can happen. In cases in which it has been determined that Article 3 ECHR blocks return to the country of origin, the sustainability and proportionality tests that have to take place because of the current policy and case law of the Section Administrative Jurisdiction of the Council of State[3] will be maintained. These tests serve to detect such rare situations that give reason to proceed to the (legal) acceptance of residence. In the report we further elaborate on this testing and the concept of sustainability. We are of the opinion that, considering the utmost seriousness of the application of Article 1F RC, it is reasonable to take the "large number of years" mentioned in the Section Jurisdiction to refer to a time period of at least ten years. We think this test does justice to the circumstance that the passing of time in an individual case can lead to a change in the evaluation of the facts. This test, done on request, sufficiently guarantees that a 1F alien (or in whose case a different kind of public order contraindication prevents the granting of a residence permit) and who cannot be expelled because of Article 3 ECHR will not end up in an exceptional humanitarian situation.

For the family members of asylum seekers with the Article 1F RC restriction counts that they will either receive a permit on the basis of personal grounds as intended in Article 1, section 1a, b and c, of the Asylum Act 2000 or that they (in principle) will return to their country of origin (Chapter 8). Usually these family members have received an asylum permit on the basis of Article 3 ECHR or are in a position to return to their country of origin. In the cases in which it has been made plausible that the ties between the family member and the alien with the Article 1F Refugee Convention objection have been broken (for example in the case of divorce or of an independently living child), the ex-family member can under certain conditions be granted legal residence. This means that in the case of children who have reached the age of majority that if they move out of their parental home at the age of 18 to start an independent life, they will lose all connection to the contra-indication 1F RC of their parent and that they can qualify for a residence permit if they meet all the standing requirements. An important condition is, however, that the 1F parent will not make use of any of the services accompanying such a permit.

We also have a solution for the children and family members of aliens against whom 1F Refugee Convention has been raised and who have stayed in Netherlands for an uninterrupted long period of time. With regard to the family members we conclude that after a certain period of long-time residence in the Netherlands without a residence permit the intended goal of the currently applied policy for those family members apparently could not be reached. In such cases we do not consider it useful to continue to use these instruments anymore and will, in accordance with the judicial review of interests the Convention for the Rights of the Child (CRC) and established

[3] Section for Administrative Jurisdiction of the Council of State, June 2, 2004, 200308845/1, JV 2004/279 en Section for Administrative Jurisdiction of the Council of State July 18, 2007, 200701663/1, LJN: BB1436

case law prescribe, assume that the interests of children and family members outweigh the importance of public order. From that moment on the fact that they are relations of an individual with the Article 1F Refugee Convention objection will no longer be used against them in a possible procedure.

For family members we start taking the amount of time into consideration after at least ten years. This term starts to count on the date of the first asylum request of the family. After this term, an eventual application for residence will be tested ex nunc on the requirements of the desired residence permit. The attitude of the family members towards their own departure process will also be taken into account. With this measure, we trust to have done justice to both the general interest of the public order as well as to the individual interests of the family members of the so-called 1F aliens.

From the SCIFA questionnaire it can be concluded that in the European context the Netherlands is a forerunner in the field of applying Article 1F Refugee Convention and detecting and prosecuting war crimes (Chapter 9). We consider maintaining Holland's lead a matter of great importance.

Finally Chapter 10 discusses the recommendations from the ACVZ advising report of May 21, 2008. In that chapter we discuss everything related to the recommendations that could not be placed under the separate sections of the report in detail.

From the presented statistics and the reevaluation of our current policy, we believe we can conclude that we have applied Article 1F Refugee Convention with all the necessary caution, also where it concerns the categories with a reversed burden of proof. We therefore see no cause to change our policy on this point. On the contrary, we are working towards an intensified continuation of the current policy as the ACVZ advised us. Still, we agree with the ACVZ that those cases in which children and other family members as well as the aliens against which Article 1F RC is raised end up in a situation of (very) long unlawful residence under certain circumstances require a different kind of policy. This should, however, never result in a situation in which aliens with the Article 1F RC objection or their family members are favored above asylum seekers without the objection. The numbers also demonstrate that the group of people against which Article 1F Refugee Convention is raised and who cannot be returned to their country of origin because of Article 3 ECHR, as well as the group of their family members is relatively small. We therefore remain of the opinion that our policy—of which we plan to continue a slightly adapted version—meets all needs of care and purpose.

Report on the application of Article 1F Refugee Convention

8. The position of family members

Currently, the family members of an alien to who Article 1F RC applies can receive a residence permit if their personal circumstances form a legal basis for such a permit according to the individual application guidelines of Article 29, first paragraph under a,b, or c, RC 2000.

In the evaluation of applications for asylum of those family members we therefore also investigate whether their return to the country of origin is in conflict with Article 3 ECHR. If this

has been made plausible, the persons in question will be granted a residence permit on the basis of Article 29, paragraph 1b, RC 2000. If this has not been made plausible, this means that there are no obstacles relating to Article 3 ECHR to their expulsion.

It is important to emphasize that, considering above-mentioned policy framework, none of the family members will be in a position to refrain from returning to the country of origin because of fear for persecution or inhuman treatment. If this would have been the case, they would have been granted a residence permit on individual grounds. So after an asylum request has been denied there is no objective reason for these family members not to return to the country of origin.

In those cases in which has been determined that Article 1F RC applies to an alien, it is in the general interest (and more specifically in the interest of public order) that this person leaves the Netherlands. If the family members of this alien receive a residence permit, the individual in question will be much less motivated to leave the country. This especially because for these family members the residence permit brings along rights and services that in practice could also be of service to the alien with the Article 1F RC objection. When this happens, Article 1F RC loses its practical excluding purpose.

Because of the general interest of the public order, a consideration of the individual interests of the family members resulted in the decision that these family members will not receive a residence permit asylum based on Article 29, first paragraph d, e and f (Asylum Act 2000).[4] In coming to this decision we also carefully weighed the interests of the child in accordance with the Convention for the Rights of the Child.[5] These family members will also not be allowed asylum on regular grounds, because of the public order policy as it was laid out in Article 3.77, first paragraph, a (**Vb 2000**). Because of the exceptional character of the conduct described in Article 1F RC the interest of the Dutch public order weighs heavier in these cases. [6]

In practice we admit that the denial of a residence permit for ex-family members (for example after a divorce) can result in unreasonable treatment. The same counts for children who have become of age and lead an independent life outside the parental home. In such cases, where the ex-family member or child of age in question makes the case that the family ties have been broken and that the alien with the Article 1F RC objection does not (and will not) live with the ex-family member or adult child, the ex-family member or child of age can be granted legal residence on the condition that the alien with the Article 1F RC objection will not make use of the services that come with the permit of the ex-family member/child. The ex-family member/child of age can also be granted residence on other grounds than Article 29, first paragraph, heading and under a,b, and c, AA 2000 if the conditions current policy prescribes

[4] See also TK 1997-1998, 19 637, no. 295.

[5] Article 3 Convention on the Rights of the Child (CRC): 1. In all actions concerning children … the best interests of the child shall be a primary consideration." In her verdict of February 15, 2007 (JV 2007, 144) the Section has interpreted phrase "primary consideration" to mean that the interest of the child is a primary consideration, but that other interests might weigh heavier.

[6] The tension between the interests of the public order and the individual alien has been reported to your Parliament at an earlier time (Ibidem, en TK 2006-2007, 30800, no.116).

have been met. After they have broken the family ties, some ex-family members/children of age, for example, qualify for a permit because of a categorical protection policy for their country of origin, others receive a permit of the (now invalid) three-year policy and we know of cases in which ex-family members/children of age received a permit through the General Pardon. However, if it later turns out that the family ties have in fact not been broken, the permit can be cancelled.

We note that with regard to the country-specific asylum policy for Afghanistan, a special policy is pursued for single women. In the cases in which an Afghan man with the Article 1F RC objection cannot return to Afghanistan because of Article 3 ECHR, his domestic partner (and children) can call upon this policy. If all conditions for this special policy can be met, it can result in a residence permit on individual grounds.

In reality a number of family members of aliens with the Article 1F RC objection who have been denied a residence permit have not left the Netherlands. After some time, this can result in a turning point in the weighing of interests between public order and the individual interests of the family members.

If the alien to who Article 1F RC applies and his family members have not been able to leave the Netherlands after a certain long period of (uninterrupted) stay, we are of the opinion that the goal of current policy for these people apparently cannot be reached this way. In that case it is not useful to continue this instrument. In line with the Convention on the Rights of the Child and the legally prescribed consideration of interests, the interests of children and family members then start to outweigh the importance of public order. From that moment on, the fact that they are family of an alien with an Article 1F RC objection will not be used against them.

For family members we start taking the amount of time into consideration after at least ten years. This term starts to count on the date of the first asylum request of the family. After this term, an eventual application for residence will be tested ex nunc on the requirements of the desired residence permit. The attitude of the family members towards their own departure process will also be taken into account. This should, however, never result in a situation in which aliens with the Article 1F RC objection or their family members are favored above asylum seekers without the objection. With this measure, we trust to have done justice to both the general interest of the public order as well as to the individual interests of the family members of the so-called 1F aliens.

We consider the above to do justice to all parties involved and do therefore not adopt recommendation no.19 of the ACVZ.

(Separate) Departure

It can happen that the person with the Article 1F RC objection cannot return to the country of origin together with the family members because of Article 3 ECHR. The family members can then choose to return by themselves or to find a third country where they can live together with the person to who Article 1F RC applies. The legal obligation to depart is foremost at all times. If the asylum seekers neglect this obligation, non-voluntary expulsion might have to be the next step. Although we always try to avoid separating families in our departure policies, separate

departure could be necessary when there are contra-indications concerning the public order or when one or more family members prevent the joint departure. This means that in occurring cases the family members can be expelled separate from the person with the Article 1F RC objection. We communicated this rule to your Parliament in the letter of October 5, 2006,[7] and we see no reason to change it. Apart from that, the numbers show that it only concerns a very small group. We will therefore not adopt recommendation no. 17 of the ACVZ. In response to recommendation no. 18 in the ACVZ advising report we will closely follow the developments in jurisdiction.

Article 8 ECHR

As the above made clear, under certain circumstances it is possible for family members of a 1F alien to be granted a residence permit. This might raise the question whether the 1F alien might be able to claim residence with those family members with the use of Article 8 ECHR. This is not the case. Article 8 ECHR requires an individual consideration of interests, weighing all relevant sides. We could conclude from the case law of the ECHR that in some cases the interest of the public order outweighs the alien's right to exercise family life (see for example ECHR October 18, 2006 *Üner tegen Nederland*,
appl. no. 46410/99). In the case of a 1F alien, the interest of the public order certainly outweighs that of family life. The consideration of interests will therefore not lead to lawful residence for 1F aliens.

[7] TK 2006-2007, 29 344, no. 58.