

Refugees and taxation

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Beyond the Refugee Crisis:

A reflection from different perspectives on the Dutch case



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The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM is the pivot of research, counselling, knowledge exchange and training activities with regard to cross-border mobility and cooperation.

Beyond the Refugee Crisis: a reflection from different perspectives on the Dutch case

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1. Background of the project and summary

Note by ITEM

This volume was created within the framework of ITEM, the Institute for Transnational and Euregional cross border cooperation and Mobility in Maastricht. ITEM is an interdisciplinary institute that conducts interdisciplinary research within the scope of cross-border mobility and cooperation issues. In this respect, several PhD candidates within the institute took up the initiative to write a collective volume to look beyond the ‘refugee’ crisis in Europe, with a focus on the Netherlands.

Note by contributors

This volume aims to shed light on long-term outcomes regarding refugees with a recognized status of international protection.¹ The separate papers provide reviews of laws and regulations affecting the incorporation of asylum migrants in the Netherlands. As several Member States have been confronted with a great influx of asylum seekers, the contributors believe that this descriptive contribution provides useful information for other Member States. Furthermore, it should be noted that all contributing PhD candidates have different fields of expertise, both legal and non-legal. The contributors hope that this volume will motivate other scholars/PhD researchers to collaborate on a central topic, thus venturing slightly beyond their personal expertise in order to further knowledge.

Summary

As a result of the Arab Spring and the subsequent civil uprisings and wars in – among other countries – Iraq, Libya and Syria, and numerous other violations of human rights,² thousands of people have fled their home countries and applied for asylum in the European Union in recent years. While the majority of forcibly displaced people find shelter in their region of origin,³ the number of asylum seekers crossing into Europe in 2015 vastly exceeded that of prior years. Only a portion of the asylum seekers receive protection, based on refugee status, subsidiary protection or humanitarian reasons. The highest absolute and relative numbers of persons that were granted protection status in 2015 were registered in Germany, followed by Sweden. The recognition rate for all origin groups and in all EU countries is slightly more than half of the total number of asylum requests.⁴ In the Netherlands this percentage is much higher (78%), with recognition rates of almost 100% for asylum seekers from Syria. People from countries that are considered safe countries of origin by the Netherlands (e.g. Albania, Morocco), have a very low chance of being issued a residence permit. The reflections in this volume largely apply to those who do receive a

¹ This includes asylum permits based on both refugee and subsidiary protection.

² See for example: United Nations General Assembly, ‘Report of the commission of inquiry on human rights in Eritrea’, A/HRC/32/47.

³ UNHCR, ‘Figures at a glance’. Last accessed on 30-01-2017 via <<http://www.unhcr.org/figures-at-a-glance.html>>.

⁴ Eurostat press release, ‘Asylum decisions in the EU’, 20 April 2016. Last accessed on 30-01-2017 via <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/>>.

positive answer to their asylum claim. Whereas the 'refugee crisis' was mainly about short-term aspects of dealing with asylum claims, varying from setting up emergency shelters to installing proper safety checks⁵, a related debate concerns the socio-economic inclusion of newcomers in host countries in the longer run. As the majority of people who are granted a residence permit on asylum grounds do not return to their (often unsafe) origin countries, it is of high importance to consider incorporation and social-inclusion measures. The contributions in this volume seek to describe the current situation in the Netherlands with regard to these concerns, based on debates among legal scholars, politicians or the public in general, following both directly and indirectly from the refugee crisis.

After a positive evaluation of the asylum application, asylum migrants are free to reside in the Netherlands, either temporary or permanently. There seems to be growing agreement on the importance of 'rapid integration' of these residence permit holders. The various contributions of this volume show that the asylum procedure was only a first hurdle to overcome in building up a life in the country of asylum. A broad range of obstacles and difficulties are typically faced by asylum migrants, when trying to become incorporated into the host society. A variety of legal and policy instruments and its impact on status holder incorporation are briefly touched upon in this introduction, and discussed more in detail in the separate papers in this volume. It becomes clear that the asylum status provides freedoms as well as restrictions for status holders.

Whereas, on the one hand, integration policies have loosened the conditions under which asylum seekers can do voluntary work while awaiting their asylum request, on the other hand policies have become more restrictive. The first paper of this volume reflects on the legislation concerning criminal behaviour and its impact on the residence permit. Stricter asylum laws have led to a situation where both persons who apply for and persons who have been granted a temporary residence permit on the basis of refugee or subsidiary protection status have found themselves in a precarious position. At first, if a person with a refugee status was convicted for at least 24 months of imprisonment for certain crimes, he or she would be denied or lose the granted residence permit. If a person with a subsidiary protection status was convicted for at least 18 months of imprisonment for certain crimes, he or she would be denied or lose the granted residence permit. Nowadays, a conviction for 10 or 6 months unconditionally for a particular crime is sufficient to be denied or lose one's granted residence permit.

The second paper addresses the limited freedom of choice as to where asylum seekers are allocated after having been granted asylum. The random dispersal policy regarding housing of asylum migrants in the Netherlands comprises a restriction of settlement. This may hamper the process of incorporation, as resources that asylum migrants need to rebuild their lives are not equally spread across the country. Whereas some may benefit from social networks or the

⁵ As is often the case, the influx of refugees has been associated with taking in (potential) terrorists. See for example: NOS, 'Terroristen die als vluchteling naar Europa komen, wat weten we?', 11 July 2016. Last accessed on 22-01-2017 via <<http://nos.nl/artikel/2117016-terroristen-die-als-vluchteling-naar-europa-komen-wat-weten-we.html>>.

proximity of jobs in their allocated place of settlement, other will be less fortunate in this regard and may decide to change their residence.⁶ Getting to work may prove to be a subsequent challenge for refugees having a Dutch residence permit, even if jobs are readily available in their area. Barriers faced in this respect may relate to qualifications. The third paper in this volume reflects on the difficulties regarding the recognition of professional qualifications faced by refugees when accessing the Dutch labour market. These barriers may be difficult to overcome, as they appear to not only be a practical reality but to also be rooted in both EU and national law.

A further step in the integration of refugees when accessing the Dutch labour market concerns being liable to tax. To overcome possible uncertainties and prevent issues with the Dutch authorities, it is essential to know from which point of the asylum procedure onwards refugees are expected to pay taxes in the Netherlands. In this respect, the fourth paper of this volume provides the legal framework that ultimately leads to tax liability in the Netherlands and shows in how far refugees have access to the Dutch double tax treaty network, in case they face cross-border double-taxation situations. The final paper considers access to social insurances and benefits. Refugees are entitled to social insurances and benefits, provided that they are qualified as resident of the Netherlands. For instance, the refugee needs to qualify as a resident and an insured person to be entitled to build up AOW-benefits (the Dutch basic state old-age pension). Therefore, in the fifth paper the AOW (*Algemene Ouderdomswet*) will be examined, in particular the personal scope, to explore the AOW entitlement of refugees in the Netherlands. In particular, the role of the resident permit in being subject to such entitlements will be touched upon.

Reading guide

The volume is composed of five contributions, and each one centres on a different topic related to the direct effects of the refugee crisis in the Netherlands. The contributions are drafted so that they can be read individually without extensive prior knowledge on the subject or the foregoing papers. This however leads to possible repetition of terms or explanations in the separate contributions.

⁶ This turns out to be a challenge for all Member States. E.g. Fóti, KláraFromm, Andrea, 'Approaches to the labour market integration of refugees and asylum seekers' (2016).

2. Towards stricter Dutch migration laws: The legal limitations of expulsion⁷ of refugees and persons with subsidiary protection due to criminal behaviour.

Kim Geurtjens

Introduction

As a result of the ‘refugee crisis’ of 2015, many European countries have been concerned with a significantly higher influx of asylum seekers than in previous years.⁸ According to Eurostat, the Netherlands received 44 970 asylum applications in total in 2015, among which 18 690 applications from Syrians, 7 455 from Eritreans and 3 240 from Iraqis.⁹ This influx caused a direct need for emergency shelters, which were subsequently decided upon by municipalities and built in a relatively short period of time. In some instances, this led to public outcry and action by citizens who were against the placement of an asylum shelter in their municipality. The disturbances in Geldermalsen in December 2015 – during which bottles, fireworks, stones and concrete were thrown at the police – are possibly the most extreme and most covered event by the media.¹⁰ In addition, both the national and local media have regularly reported about riots in asylum centers, fuelling the ongoing public and political debate about the obligation to shelter those who need protection on the one hand and the ‘need’ for stricter migration laws and the expulsion of ‘criminal’ asylum seekers on the other hand.¹¹ There are, however, legal limitations to the expulsion of refugees, such as the principle of non-refoulement laid down in international and European laws.¹²

⁷ The sending away of refugees when problems arise regarding the security and public safety of the receiving state.

⁸ Apart from 2014 (a total of 24 495), the annual total of asylum applications between 2008 and 2014 varied between 13 000 and 16 000 applications: Eurostat, ‘Asylum and first time asylum applicants by citizenship, age and sex. Annual aggregated data (rounded)’, Eurostat (2016). Last update 5-10-2016. Last accessed on 15-12-2016 via <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en>.

⁹ Eurostat, ‘Asylum and first time asylum applicants by citizenship, age and sex. Annual aggregated data (rounded)’, Eurostat (2016).

¹⁰ NRC, ‘Rellen bij gemeentehuis Geldermalsen om raadsvergadering azc’, 16 December 2015. Last accessed on 15-12-2016 via <<https://www.nrc.nl/nieuws/2015/12/16/rumoer-bij-gemeentehuis-geldermalsen-om-raadsvergadering-azc-a1410746>>.

¹¹ See for example: RTV Noord, ‘Massale vechtpartij bij asielzoekerscentrum Oude Pekela’, 25 August 2015. Last accessed on 15-12-2016 via <<http://www.rtvnoord.nl/nieuws/152909/Massale-vechtpartij-bij-asielzoekerscentrum-Oude-Pekela>>; NOS, ‘Preventief fouilleren na spanningen bij azc Oosterwijk’ 7 October 2015. Last accessed on 15-12-2016 via <http://nos.nl/artikel/2061821-preventief-fouilleren-na-spanningen-bij-azc-oosterwijk.html>; De Dagelijkse Standaard, ‘Grote vechtpartij breekt uit onder vluchtelingen in azc in Nijmegen’, 3 November 2015. Last accessed on 15-12-2016 via <<http://www.dagelijksestandaard.nl/2015/11/grote-vechtpartij-breekt-uit-onder-vluchtelingen-in-azc-in-nijmegen/>>; De Volkskrant, ‘Vechtpartij in asielzoekerscentrum Velp’, 13 December 2015. Last accessed on 15-12-2016 via <<http://www.volkskrant.nl/binnenland/-vechtpartij-in-asielzoekerscentrum-velp~a4206915/>>. But see also: NOS, ‘71% van de Nederlanders vindt azc in gemeente acceptabel’, 19 December 2015. Last accessed on 15-12-2016 via <<http://nos.nl/artikel/2076142-71-nederlanders-vindt-azc-in-gemeente-acceptabel.html>>; NOS, ‘Dijkhoff: niet veel conclusies uit incidenten asielzoekerscentra’, 30 January 2016. Last accessed on 15-12-2016 via <<http://nos.nl/artikel/2083801-dijkhoff-niet-veel-conclusies-uit-incidenten-asielzoekerscentra.html>>.

¹² See Article 33 of the 1951 Convention relating to the Status of Refugees (hereafter referred to as the ‘Refugee Convention’; Article 21 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011

Therefore, the central element of this contribution will be how committing a crime in either the home or host country influences the asylum application of refugees and persons with subsidiary protection.¹³ The host country in this contribution will be the Netherlands.

Firstly, it is important to note that anyone may apply for asylum and by doing so, can be considered an asylum seeker. The term asylum seeker is therefore an overarching concept, which includes anyone seeking shelter, either on political, economic or other grounds. For the purpose of this paper, however, the central focus will be on refugees and persons with subsidiary protection. Following from Article 2(d) from the Qualification Directive, a refugee is a person recognized by the 1951 Refugee Convention.¹⁴ A person with subsidiary protection is a person who has a well-founded fear of serious harm.¹⁵ In Dutch law, if a person qualifies as a refugee, he or she will be granted a residence permit on the basis of Article 29(1)(a) *Vreemdelingenwet 2000*. If a person qualifies for subsidiary protection, he or she will be granted a residence permit on the basis of Article 29(1)(b) *Vreemdelingenwet 2000*. Such a permit is proof that a person lawfully resides in the Netherlands and, as a consequence, has certain rights and duties.¹⁶ In the following part, the legal grounds for denying or revoking a residence permit due to criminal acts will be discussed, for which the legal basis is laid down in Article 32(1)(b) *Vreemdelingenwet 2000*.

A first ground for exclusion is that of the so-called '1F-status': persons who have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or an act contrary to Articles 1 and 2 of the Charter of the United Nations.¹⁷

In a concrete case, as a result of the 1F provision, 18-year old Márcia and 13-year old Gláucio were to be deported to Angola as a result of their father's 1F status, even though they had lived in the Netherlands for 15 years, had no ties to Angola and did not speak the national language. Many political parties and the children's Ombudsman spoke against the planned deportation. Defence for Children organized a protest rally at the detention center in Zeist, where the family

on standards of the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011], OJ L 337/9 (hereafter referred to as '**Qualification Directive**').

¹³ Since the Netherlands mostly provide statuses for subsidiary protection, the relevance of only highlighting the consequences for the refugee status is limited.

¹⁴ Article 2(d) of the Qualification Directive defines a refugee as "a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]"

¹⁵ Article 15 of the Qualification Directive defines serious harm as "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

¹⁶ Some basic examples are: one may request family reunification and is allowed to search for a home, a job, travel abroad, but must learn the Dutch language and children must go to school.

¹⁷ In which '1F' refers to the specific article of the Refugee Convention. See also Article 12(2)(a) and 17(1)(a) of the Qualification Directive.

had been held until they would be deported.¹⁸ This protest, however, turned into a festive gathering after the Ministry of Security and Justice announced that they would grant the mother and two children a residence permit on the exceptional basis of the Minister's discretionary powers, while the father had to be deported to Angola.¹⁹ This example demonstrates the often ambivalent attitude of Dutch citizens and politicians towards the subject of refugees.

In addition, it may be noted that courts also have to balance different interests and provisions. In a case against a Libyan asylum seeker the court found that, even though the person in question had a 1F-status due to the rape of his sister, he could not be deported to Libya, because he would most likely be detained upon arrival and would be subjected to mistreatment and torture.²⁰

The 1F-status often relates to crimes that were committed in the home country. But crimes committed in the host country may also lead to refusal or revocation of the refugee or subsidiary protection status, namely on grounds of national security and public order. To illustrate, in the case of a person applying for refugee status, there must be (a) reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present; (b) he or she, having been convicted by a final judgment of a **particularly serious crime**,²¹ constitutes a danger to the community of that Member State.²²

In the case of subsidiary protection status, there must be serious reasons for considering that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a **serious crime**;²³ (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.²⁴

Note that for refusing or revoking a status on the basis of a crime, the definition of this crime is different for either a refugee (a particularly serious crime) or person with subsidiary protection (a serious crime), though no further explanation on the definitions is provided in the Qualification Directive. Moreover, it is clear from Articles 14(4) and 19(3) of the Qualification Directive that in the case of a refugee status, the Member State may choose to revoke or refuse a status, but with

¹⁸ NOS, 'Protest tegen uitzetting Glaucio (13) en Marcia (18)', 29 August 2015. Last accessed on 27-10-2016 via <<http://nos.nl/artikel/2054741-protest-tegen-uitzetting-glaucio-13-en-marcia-18.html>>.

¹⁹ NRC, 'Met uitzetting bedreigde tieners Glaucio en Marcia mogen blijven', 31 August 2015. Last accessed on 27-10-2016 via <<https://www.nrc.nl/nieuws/2015/08/31/met-uitzetting-bedreigde-tieners-glaucio-en-marcia-mogen-blijven-a1413529>>.

²⁰ **As was decided in judgment ECLI:NL:RVS:2015:238 of 27 January 2015. The more than reasonable chance of being subjected to mistreatment and torture (Article 3 ECHR) subsequently triggers the non-refoulement principle.**

²¹ Examples of a particularly serious crime will be provided in the next paragraph.

²² Qualification Directive, Articles 12 and 14(4).

²³ Examples of a serious crime will be provided in the next paragraph.

²⁴ Qualification Directive, Articles 17 and 19.

the subsidiary protection status, the Member State has no choice and must revoke or refuse said status.²⁵ These provisions have been adopted and further elaborated into Dutch law.

Since February 2016, Dutch migration laws have become stricter after the Dutch Secretary of State regarding Asylum proposed several changes, as a result of questions posed by representatives.²⁶ On the basis of Articles 30b(1)(j) and 32(1)(b) *Vreemdelingenwet 2000* and Articles 3.105c-f *Vreemdelingenbesluit 2000*, a residence permit can be denied or an already granted permit can be revoked or not extended in case the person concerned poses a threat to the public order or national security. Definitions of a threat to the public order or national security are further laid down in section C2/7.10.1 and section B1/4.4 of the *Vreemdelingencirculaire 2000*.

A refugee who has been convicted of a ‘particularly serious crime’, who poses a threat to the community and on whom imprisonment or a detention order has been imposed for at least ten months unconditionally,²⁷ can lose the right to a permit. Such ‘particularly serious crimes’ would consist of distributing, offering, publicly exhibiting, importing, transiting or exporting child pornography; making a profession or habit of the possession of child pornography; intentional infliction of very serious physical harm, using a weapon other than a firearm; a ram raid (organized and with significant damage), involving recidivism; and the selling, delivering or providing user quantities of hard drugs from a building or on the street for six to twelve months with some regularity.²⁸ A threat to the community may be assumed in cases of drug-, sex-, and violent offences; arson; human trafficking; illicit trafficking in weapons, munitions and explosives and illicit trade in human organs and tissues. Moreover, a threat may also be assumed in case of actions abroad that shocked the public order, or if the person has carried out acts that are considered as serious crimes in the Netherlands.²⁹ The threat to the community will be assessed individually and on the basis of all relevant factual and legal information, encompassing at least the nature of the crime and the sentence, but also on the arguments brought forward by the person concerned on why there would not be a threat to the community (section C2/7.10.1 of the *Vreemdelingencirculaire 2000*).

A person with subsidiary protection can lose his or her permit in the case of a ‘serious crime’. This means that the person has been unconditionally sentenced to at least six months of

²⁵ Compare Articles 14(4) and 19(3) of the Qualification Directive: “Member States **may** revoke, end or refuse to renew the status granted to a refugee” versus “Member States **shall** revoke, end or refuse to renew the subsidiary protection status”. See also: Adviescommissie voor Vreemdelingenzaken, ‘Brief over wijziging van de Vreemdelingencirculaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asiolvergunning na ernstig misdrijf’, 10 March 2016. Last accessed on 11-12-2016 via <<https://acvz.org/wp-content/uploads/2016/03/ADV-007-Advies-aanscherping-openbare-orde-beleid.pdf>>.

²⁶ *Kamerstukken II 2015/16*, 19 637, nr. 2078.

²⁷ This used to be at least 24 months unconditionally.

²⁸ *Kamerstukken II 2015/16*, 19 637, nr. 2078.

²⁹ In this regard, issues may arise concerning the international recognition of convictions, or even concerning formally proving the seriousness of a crime committed in a foreign country.

imprisonment or a detention order for crimes,³⁰ of which at least one of the sentences relates to a crime that in its nature represents a danger to the community. A ‘serious crime’ would entail for example overt violence with grievous bodily harm as a result; intentional infliction of grievous bodily harm; snatching with a single push/pull, involving frequent recidivism, intrusions into a dwelling, involving frequent recidivism; and the selling, delivering or providing user quantities of hard drugs from a building or on the street for more than a month but less than three months with some regularity.³¹

The Advisory Committee for Immigration Affairs³² expressed its concerns about the adjustment of the law in a letter to the Ministry of Security and Justice, in which they focused on a few key issues. Firstly, they draw attention to the distinction between refusing a status or a residence permit. Articles 21 and 24 of the Qualification Directive provide an opportunity to refuse a residence permit instead of an international protection status, when compelling reasons of national security or public order so require, or when the person constitutes a danger to the community because he or she has been convicted of a particularly serious crime by a final judgement. However, at the time the predecessor of the Qualification Directive (2004/83/EC)³³ was implemented into Dutch law, no distinction was made between a status (recognition of international protection of a third-country national or stateless person) and a residence permit (the authorization which allows a third-country national or stateless person to reside on the territory of the Member State), assuming that any person who qualifies for international protection, will also be granted a residence permit. Hence, if the person does not qualify for, or loses his residence permit on the basis of Dutch law, he or she also loses the status of international protection.³⁴ This is not the case in other European Member States, where persons can lose their residence permit on the grounds laid down in the Qualification Directive and national law, but still hold their international protection status. Therefore, the Advisory Committee is uncertain whether the stricter Dutch asylum laws are still in line with EU and human rights law. In particular, because the European Court of Justice emphasizes the importance of all relevant circumstances of the case, in the light of proportionality, the interests of the person concerned and fundamental rights. A hard rule, such as the proposed stricter ‘ten or six months of imprisonment’ for refugees and persons with subsidiary protection respectively, should therefore not be the vantage point for a decision; rather, the individual’s “personal conduct, the length and residence on the territory of the Member State, the nature and gravity of the offence committed

³⁰ This used to be at least 18 months unconditionally.

³¹ *Kamerstukken II* 2015/16, 19 637, nr. 2078.

³² Adviescommissie voor Vreemdelingenzaken, ‘Brief over wijziging van de Vreemdelingen-circulaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asiolvergunning na ernstig misdrijf’, 10 March 2016.

³³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12.

³⁴ Adviescommissie voor Vreemdelingenzaken, ‘Brief over wijziging van de Vreemdelingen-circulaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asiolvergunning na ernstig misdrijf’, 10 March 2016. *Kamerstukken II* 2006/07, 30 925, nr. 3, and *Staatsblad*. 2008, 116, p. 8.

and the extent to which the person concerned is currently a danger to society [...]” should be taken into account.³⁵

More importantly, the Advisory Committee draws attention to another recurring issue, namely the oftentimes impossibility of sending people back to their country of origin when they do not qualify for international protection, regardless of whether they have committed crimes in the host country. This leads to a situation where the concerned person does not have a status of international protection and therefore is not able to claim any facilities in the Netherlands.³⁶ In turn, this may cause additional risks for public security as these persons have no social safety net, minimal opportunities and a highly uncertain future.

Lastly, the Advisory Committee notes that, in the letter by the Secretary of State regarding Asylum, the usefulness of stricter asylum law is not addressed and no figures are provided, so that the necessity of these stricter laws is also unclear. This leaves only the call for stricter laws by other representatives as direct cause for the adjustments.³⁷

Conclusion

To conclude, it is clear from the foregoing discussion that the riots in asylum centers, which are regularly covered by the media, oftentimes do not amount to (particularly) serious crimes and therefore cannot necessarily lead to revocation of the residence permit and, subsequently, in Dutch context, the loss of an international protection status. However, refugees or persons with subsidiary protection in the Netherlands have found themselves in an even more precarious situation than before,³⁸ as asylum law has become stricter because of symbolic politics on the part of the Dutch Ministry of Security and Justice. There has yet to be a solid justification in the form of facts or figures that the Netherlands indeed do have a problem with criminal refugees or persons with subsidiary protection. Regardless of any facts or figures, it appears that the current (legal) situation does not always lead to a satisfactory result for the involved parties, let alone for divided society as a whole, as can be seen from the examples provided.

³⁵ Case C-165/14 Alfredo Rendon Marin v Administracion del Estado, ECLI:EU:C:2016:675, para. 84-86.

³⁶ Adviescommissie voor Vreemdelingenzaken, ‘Brief over wijziging van de Vreemdelingencirculaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asiolvergunning na ernstig misdrijf’, 10 March 2016.

³⁷ Adviescommissie voor Vreemdelingenzaken, ‘Brief over wijziging van de Vreemdelingencirculaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asiolvergunning na ernstig misdrijf’, 10 March 2016.

³⁸ When the ‘(particularly) serious crime’ element involved an unconditional sentence for refugees and persons with subsidiary protection of 24 months and 18 months respectively.

3. Dispersal and residential mobility of asylum migrants in the Netherlands

Marloes de Hoon

Introduction

Significant influxes of refugees crossing into Europe in 2015 have led to increasing concerns regarding refugee reception in European countries. Various controversial policy plans have been proposed in recent times, with the aim of 'spreading the burden' of asylum seekers across European countries (e.g. relocation plans, quotas).³⁹ Comparable policies have been implemented at the national, city and neighbourhood level to reduce pressure on local housing markets and to facilitate refugee integration. Whereas these policies cover both residence permit holders and asylum seekers without a permission to stay, this contribution focuses on the former group. The residential location of status holders is controlled by local authorities, who have a responsibility to provide housing for refugees. Although settlement policies may be effective in the short run, the question remains to what extent refugee migrants remain in the location of initial settlement or make onward moves instead. The latter option is most likely to occur, as research shows high residential mobility rates of immigrants within the national borders of the host country.⁴⁰ This contribution will explore the residential mobility of refugee migrants in the Netherlands. Based on literature review, covering both theoretical and empirical contributions, expectations regarding initial and subsequent choices of new refugee groups in the Netherlands are outlined.

The destination setting of migrants within a particular country is not random. Research on location decisions of immigrants in the US and European countries has shown that metropolitan areas or large cities have a 'magnetic effect' on new immigrants. Various studies have revealed the role of contextual factors in location decisions of immigrants, including labour demand, welfare provisions and access to public housing.^{41,42} This can be understood by means of the human capital model, where migration is considered a costly event (both monetary and non-monetary) that is compensated for by resources that are mostly concentrated in large cities. Moreover, the existence of family or other social ties may attract migrants to specific regions and or deter them from leaving. This hypothesis was supported for various western countries.⁴³

³⁹ European commission press release, 'Enhancing legal channels: Commission proposes to create common EU resettlement framework' (2016): <http://europa.eu/rapid/press-release_IP-16-2434_en.htm IP/16/2424>, last accessed on 30-01-2017.

⁴⁰ See for example D. S. Massey, A. B. Gross, and K. Shibuya. "Migration, segregation, and the geographic concentration of poverty." *American Sociological Review* (1994), pp. 425-445.

⁴¹ See for the importance of regional labour markets: G. J. Borjas, 'Does immigration grease the wheels of the labor market?,' *Brookings papers on economic activity* 1 (2001) pp. 69-133.

⁴² See for the importance of welfare provisions: G.J. Borjas, (1999) 'Immigration and welfare magnets,' *17 Journal of labor economics* 4 (1999), pp. 607-637.

⁴³ See for the Dutch case: S. Musterd, & R. Van Kempen "Segregation and housing of minority ethnic groups in Western European cities," *100 Tijdschrift voor economische en sociale geografie* 4 (2009), pp. 559-566.

Immigrants most often do not stick to their initial settlement choices or the assigned location. They may decide to relocate across borders or move to other areas within national borders. Belanger and Rogers show that immigrants migrate internally because of changing regional factors (e.g. labour market opportunities) or individual characteristics (e.g. social mobility or changing preferences).⁴⁴ In the Netherlands, spatial mobility of immigrants turns out to be substantial in the first years following arrival, particularly among immigrants from non-western countries.⁴⁵ Whereas relocation of immigrants seems to be resulting in higher levels of ethnic concentration, in the longer run immigrants can, from an assimilationist perspective, be expected to move in an opposite direction. From this theoretical angle, an increased length of stay in a host country is expected to lead immigrants to leave immigrant concentration areas in cities for more suburban or even more rural areas.⁴⁶ It is important to note that most of these studies consider all immigrants, regardless of origin and migration motives. There are various reasons to assume that refugee migrants, both within and outside the Netherlands, show different residential mobility trajectories than other migrants. The following paragraphs elaborate more on the particular circumstances of this group.

During their asylum procedure, asylum migrants are not free to choose their residence in the Netherlands. The reception of asylum seekers in the Netherlands is organised by the *Centraal Orgaan Opvang Asielzoekers* (COA), the Ministry of Justice's Asylum Seekers' Reception Service), which operates at the national level. After having obtained a residence permit, refugee migrants in the Netherlands receive an offer for social housing in a given municipality.^{47,48} Both asylum migrants and municipalities have only a very limited say in this allocation procedure. Although residence permit holders may look for accommodation themselves, only a limited number of these so-called 'status holders' (officially recognized asylum seekers) succeed at this.⁴⁹ Each municipality is obliged to accommodate a certain number of status holders. The minimum housing quota is based on the population size of each municipality. Although in recent times municipalities are facing difficulties to comply with this requirement, the policy seems to be effective in dispersing refugee migrants, at least on the short term. This is illustrated by the figure

⁴⁴ A. Belanger & A. Rogers, 'The internal migration and spatial redistribution of the foreign-born population in the United States: 1965-70 and 1975-80,' *International Migration Review* (1992), p. 1342-1369.

⁴⁵ A. Zorlu & C. H. Mulder, 'Initial and subsequent location choices of immigrants to the Netherlands,' *42 Regional Studies* 2 (2008), p. 245-264.

⁴⁶ D. T. Lichter & K. M. Johnson, 'Emerging rural settlement patterns and the geographic redistribution of America's new immigrants'. *71 Rural Sociology* 1 (2006), pp. 109-131.; Funkhouser, Edward. Changes in the geographic concentration and location of residence of immigrants. *International Migration Review* (2002), pp. 489-510.

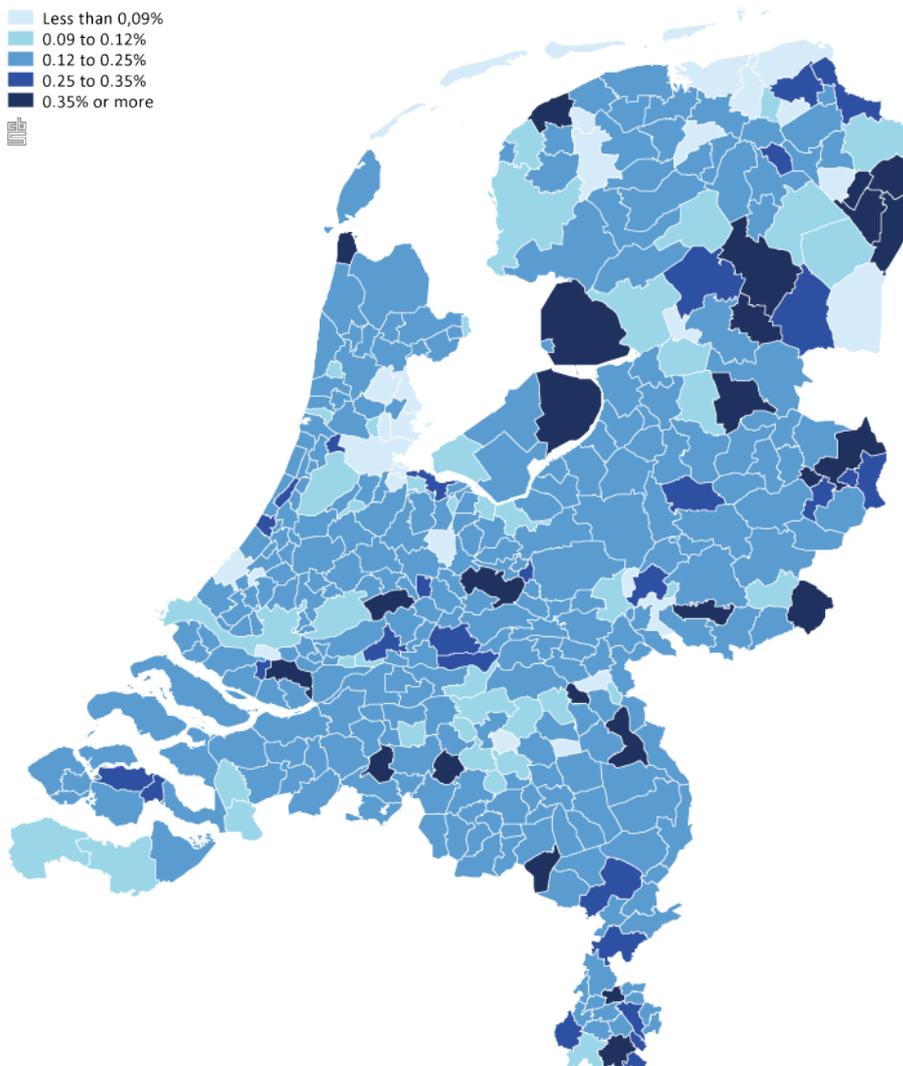
⁴⁷ Website Government of the Netherlands, asylum policy: <<https://www.government.nl/topics/asylum-policy/contents/housing-for-residence-permit-holders>>, last accessed on 30-01-2017.

⁴⁸ M. Arnoldus, T. Dukes, and S. Musterd, 'Dispersal policies in the Netherlands.' (2003): 25-64. provide a detailed description of dispersal policies in the Netherlands - including a comparison with the Swedish and British case.

⁴⁹ J. F. I. Klaver & I. van der Welle, 'Vluchtelingenwerk integratiebarometer 2009: een onderzoek naar de integratie van vluchtelingen in Nederland. Vluchtelingenwerk Nederland' (2009). pp 21-31. <<https://www.vluchtelingenwerk.nl/sites/public/Vluchtelingenwerk/migrate/pdf-bibliotheek/Vluchtelingenwerk%20IntegratieBarometer%20Rapport%202009.pdf?phpMyAdmin=7w5ZyEx7eG8GI5V6d7lLiau64Ca&phpMyAdmin=d103b040daaa28b558cce86d2a2af0e5>>, last accessed on 30-01-2017.

below, which shows the number of Syrian immigrants who arrived in the different Dutch municipalities from 2014 onwards. This group from Syria forms the largest group of recently arrived refugees in the Netherlands. In relative terms, the share of recent Syrian migrants varies only modestly across municipalities, from a little over 0% to 1.6% of the total population. Higher concentrations are found in Flevoland and the border regions of the country, including the eastern part of Friesland, Overijssel and Gelderland and the province of Limburg. It should, however, be noted that approximately 15-20% of these Syrian refugees are residing in a reception centre and are thus not (yet) free to resettle elsewhere.

Share of registered Syrian immigrants in 2014 and 2015 by municipality, 1 January 2016



Source: CBS.nl 'Syrian immigrants often live in a family setting' (2016)

After having received refugee status, asylum migrants are in principle free to move to another dwelling in the country. In the majority of the cases, migrants will take the social housing offer as mentioned in the previous section, as financial means to rent private accommodation are often

lacking. This is consistent with the finding that, in most European countries, immigrants are generally overrepresented in public housing.⁵⁰ The share of asylum migrants is expected to be even higher in social housing, especially as their initial location. Moreover, the French case has demonstrated that the share of non-European immigrants living in public housing does not decrease much over time.⁵¹ This suggests that there is a significant risk of immigrants in public housing becoming 'trapped' in their initial housing locations. A strong correlation between the distribution of social housing and the distribution of the refugee population in Denmark seems to support this line of reasoning.⁵² On the other hand, the elimination of restrictions on settlement during the asylum procedure should be taken into account, which is expected to result in high levels of relocation within the Netherlands.⁵³

A small number of studies have focused on the residential migration of asylum migrants in particular. For the Swedish case, research has shown that the presence of people from one's birth country is important in the choice of initial location, the decision to leave it, and in choosing a new one.⁵⁴ A large overall immigrant population also appears to be attractive when choosing an initial location and even more so when choosing a second location. Likewise, results for Denmark suggest that the probability of refugees' relocating is lower if the region of initial assignment has a higher percentage of co-nationals.⁵⁵ Comparable empirical findings exist for the Netherlands, where asylum migrants show the strongest tendency of all migrant groups to move to more ethnically segregated neighbourhoods.⁵⁶ From these studies we can conclude that local ethnic networks often serve as a pull factor for specific municipalities or regions, and, at the same time, the absence of these networks could be regarded a push factor.

The differences between origin groups in residential mobility patterns should not remain unnoticed. The region of origin turns out to be an important determinant of internal migration propensities in the Swedish case, with the highest mobility existing among African migrants and people from the Middle East and lower mobility for asylum migrants from Asia and South

⁵⁰ S. Musterd & R. Deurloo, 'Ethnic segregation and the role of public housing in Amsterdam,' 88 *Tijdschrift voor economische en sociale geografie* 2 (1997), pp. 158-168.

⁵¹ G. Verdugo, 'Public housing magnets: public housing supply and immigrants' location choices,' 16 *Journal of Economic Geography* 1 (2016), pp. 237-265.

⁵² K. Wren, 'Refugee dispersal in Denmark: from macro-to micro-scale analysis,' 9 *International Journal of Population Geography* 1 (2003), pp. 63.

⁵³ M. Van Huis, M & H. Nicolaas, 'Binnenlands verhuisgedrag van allochtonen,' 48 *Maandstatistiek van de Bevolking* 3 (2000) pp. 36-45. show that over 60 percent of all asylum seekers who migrated to the Netherlands in 1995 or 1996 moved once or more within the Netherlands in the three following years.

⁵⁴ O. Åslund, 'Now and forever? Initial and subsequent location choices of immigrants,' 35 *Regional Science and Urban Economics* 2 (2005), pp.141-165.

⁵⁵ A. P. Damm, 'Determinants of recent immigrants' location choices: quasi-experimental evidence', 22 *Journal of Population Economics* 1 (2009), pp. 145-174.

⁵⁶ A. Zorlu & C. H. Mulder, 'Initial and subsequent location choices of immigrants to the Netherlands,' 2 *Regional Studies* (2008), pp. 245-264.

America.⁵⁷ A somewhat similar picture can be drawn for the Netherlands, with relatively high rates of residential moves across municipalities for migrants from Somalia, Iraq and Afghanistan.⁵⁸ In general, asylum seekers in the Netherlands leave rural areas and move to bigger cities⁵⁹. This is particularly the case for migrants from Afghanistan and Iraq. Migrants from Iran and former Yugoslavia seem to live more dispersed across the country. As the latter two groups seem to have the highest levels of human capital (based on a rough classification of educational and occupational level), they may base their residential location more on (regional) labour-market perspectives.

Conclusion

As migration flows nowadays tend to be more decisive for population developments, both on a country and regional level, the settlement and relocation decisions of migrants form a topic that deserves the attention of researchers, policy makers and the wider public. Although the Netherlands is sometimes referred to as an 'urban field', there are significant differences between regions, in terms of inter alia shrinkage, population density, age distribution and labour-market characteristics. Asylum migrants form an interesting group of newcomers in the Netherlands, first of all because they do not generally have existing links within the receiving society, which makes (internal) relocation more likely as they gain access to information and other sources. Secondly, as their freedom of choice in their (initial) residential location is restricted by policies, asylum migrants may react to this by moving out of the assigned dwellings.

This contribution partly underlines the finding of Zorlu and Mulder that government settlement policies designed to regulate initial settlement locations only have a limited impact and can hardly realize (long-term) diffusion of immigrants over the country.⁶⁰ Whereas some migrants or migrant families will remain in the municipality or region of initial allocation, others will join the already present community of (co-ethnic) migrants elsewhere or move to find employment or location specific resources. Accordingly, most relocation movements are towards cities the *Randstad*: a megalopolis in the central-western part of the country. Moreover, cities across the country with a regional function, e.g. Enschede, Arnhem, Maastricht and Tilburg, have experienced the largest absolute and relative influxes of asylum migrants⁶¹. This leads to the conclusion that the dispersal

⁵⁷ O. Åslund, 'Now and forever? Initial and subsequent location choices of immigrants,' 35 *Regional Science and Urban Economics* 2 (2005), pp.141-165.

⁵⁸ M. Van Huis & H. Nicolaas, 'Binnenlands verhuisgedrag van allochtonen,' 48 *Maandstatistiek van de Bevolking* 3 (2000) pp. 36-45.

⁵⁹ J. Klaver & I. van der Welle, 'Vluchtelingenwerk integratiebarometer 2009: een onderzoek naar de integratie van vluchtelingen in Nederland. Vluchtelingenwerk Nederland' (2009). pp 21-31.

⁶⁰ A. Zorlu & C. H. Mulder 'Initial and subsequent location choices of immigrants to the Netherlands,' 42 *Regional Studies* 2 (2008) 2, pp. 45-264.

⁶¹ J. Klaver & I. van der Welle, 'Vluchtelingenwerk integratiebarometer 2009: een onderzoek naar de integratie van vluchtelingen in Nederland. Vluchtelingenwerk Nederland' (2009). pp 21-31.

policy as implemented at the national level has determined the regional dispersal of refugees throughout the country, while dispersal within countries is determined by other factors.

Bigger cities may offer many different resources to newcomers, of which a social network is only one aspect. Besides, regional labour markets play an important role in relocations. Migrants who live in a region where the labour market situation is favourable are less likely to move out than those who live in a region that offers poor labour-market perspectives.⁶² This finding suggests that people are actively seeking for places where their economic needs can be met. However, moving out is almost without exceptions a costly undertaking. One factor that appears to play a major role in the costs and constraints of moving is the housing stock in different municipalities of the country, particularly the availability of social housing. As the supply of social housing is generally bigger in cities, this might partly explain the attractiveness of urban municipalities. At the same time, it might be a retaining factor, under the assumption that social-housing dependency can also lead to geographical immobility, i.e. people being 'trapped', when they lack the means to move to a private dwelling elsewhere.

Finally, although it is often believed that refugee migrants intend to stay permanently in the country that has granted them asylum, about a third of permitted asylum migrants is expected to leave the country within a period of ten years.⁶³ People may return to their countries of origin when the fear of persecution is over or move to a third country elsewhere in the world. Recent studies into onward mobility of former asylum seekers in Europe suggested that the absence of a co-ethnic network in the region to which they were allocated was one of the reasons to leave the asylum country for another European country.⁶⁴ In particular, a substantial number of migrants from Somalia make onward moves to the UK after having lived in the Netherlands for some time. In conclusion, it is important to consider the initial settlement of refugee migrants in the Netherlands a temporary stage that is most likely to be followed by onward moves, depending on their life trajectories and changing circumstances both in the Netherlands and in different corners of the world.

⁶² G. J. Borjas, 'Does immigration grease the wheels of the labor market?', *Brookings papers on economic activity* (2001) 1, pp. 69-133.

⁶³ This estimation is based on the share of migrants from five different countries (Afghanistan, Iraq, Iran, former Yugoslavia and Somalia) who arrived in the Netherlands in 1999 and who were no longer in the registers 10 years after immigration (2009), CBS Statline publication:

<<http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=83002NED&D1=0&D2=9,22-23,26,32&D3=a&D4=a&D5=0&HDR=T,G2&STB=G1,G3,G4&VW=T>>, last accessed on 26-01-2017.

⁶⁴ I. Van Liempt, "'And then one day they all moved to Leicester': the relocation of Somalis from the Netherlands to the UK explained." *17 Population, Space and Place* (2011) 3, p. 254-266.

4. A refugee's access to the Dutch labour market: Recognising the professional qualifications of refugees

Lavinia Kortese

Introduction

Refugees in possession of a Dutch residence permit face difficulties in accessing the labour market.⁶⁵ When it comes to qualifications, language requirements and profession-specific demands are some of the most prevalent factors complicating their labour market participation.⁶⁶ The non-recognition of foreign diplomas is an additional important factor inhibiting labour market participation, as is the fact that pursuing education and training is a time-consuming exercise causing the initial labour market participation of refugees to be low in the Netherlands.⁶⁷

In the long run, it may be most beneficial for refugees to acquire a qualification in the Netherlands. Studies have shown that, in particular, home country higher education qualifications do not necessarily pay off and that education followed by refugees in the Netherlands positively influences employment opportunities.⁶⁸ This raises questions regarding the causes of non-recognition and what options refugees with a Dutch residence permit have if they want to work in the Netherlands while using the qualifications obtained abroad.

In the EU, the four fundamental freedoms ensure that EU citizens have ample possibilities to move across borders.⁶⁹ However, even with all the mobility rights EU citizens have, access to other Member States' labour markets is not always easily achieved. When it comes to exercising a profession in another Member State, a distinction is made between regulated and non-regulated professions. A regulated profession is one for which certain standards and requirements regarding qualifications are laid down *by law*, meaning the fulfilment of those criteria is an absolute precondition to accessing the labour market. In order to ensure access to a second Member State's labour market, Directive 2005/36/EC sets out the procedures and, for some professions, conditions to be fulfilled for the exercise of a regulated profession. However, migrating EU

⁶⁵ This contribution exclusively focuses on refugees who have been recognised under Directive 2011/95/EU and who have consequently been granted a residence permit in the Netherlands, so-called *statushouders* (status holders).

⁶⁶ Randstad, '61% vergunninghouders in pilot COA en Randstad aan het werk: Pilot COA en Randstad geeft inzicht in problematiek', <<https://www.randstad.nl/over-randstad/pers/persberichten/2016/07/61-procent-vergunninghouders-in-pilot-coa-en-randstad-aan-het-werk>> last accessed on 22-01-2017.

⁶⁷ G. Engbersen et al., 'Geen tijd verliezen: van opvang naar integratie van asielmigranten', *WRR-Policy Brief 4* (2015), <http://www.wrr.nl/fileadmin/en/publicaties/PDF-WRR-Policy_Briefs/WRR_Policy_Brief_WEB_-_Geen_tijd_verliezen_04.pdf>, last accessed on 22-01-2017.

⁶⁸ J. Hartog and A. Zorlu, 'How important is homeland education for refugees' economic position in the Netherlands?', *22 Journal of Population Economics* (2009), p. 243; T. de Vroome and F. van Tubergen, 'The Employment Experience of Refugees in the Netherlands', *44 International Migration Review* 2 (2010), p. 389.

⁶⁹ The freedom of movement of goods, persons, services and capital make up the four fundamental freedoms on which the EU Internal Market is based.

professionals wanting to exercise a non-regulated profession in another Member State do not need specific qualifications nor recognition. They can exercise their profession freely as a consequence of the free movement rights enshrined in the Treaties.

Although Directive 2005/36/EC lays down specific rules for the recognition of EU citizens' professional qualifications, there is no such EU framework for third-country nationals and refugees in particular.⁷⁰ How do refugees obtain labour market access through the recognition of their professional qualifications?

Recognizing professional qualifications and gaining labour market access as a refugee

EU law – When does it apply?

To be considered a refugee under the current EU legislation on professional recognition, one has to fulfil the conditions laid down in Directive 2011/95/EU.⁷¹ According to article 2(d) of that Directive a refugee is:

'A third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;'

Article 12 lists several exclusion grounds, meaning persons falling under that article do not qualify as refugees under Directive 2011/95/EU. It is only after the refugee status of an individual has been confirmed that he or she may fall within the scope of the relevant EU legislation regarding the recognition of professional qualifications. Refugees are one of the few categories of third-country nationals that may fall within the scope of application of Directive 2005/36/EC.⁷² They

⁷⁰ K. Eisele, 'Falling Through the Cracks: Third-Country Nationals and the Recognition of Qualifications in the EU', in S. Carrera et al. (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond* (CEPS, 2014), p. 55.

⁷¹ Directive 2011/95/EU has recast the previous directive for the qualification of persons as refugees (Directive 2004/83/EC). The new directive aims at realising simplification of decision-making procedures, streamlining of procedures for granting rights and realising coherence with the case law of the ECJ and ECtHR; European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, p. 3-4.

⁷² Only a limited number of third-country nationals may fall within the scope of application of Directive 2005/36/EC. The following directives contain equal treatment clauses as regards recognition of qualifications: Directive 2004/38/EC (third-country nationals who are family members of EU citizens), Directive 2003/109/EC (long-term residents), Directive

acquire a right to equal treatment which is identical to that of EU citizens when it comes to ‘the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications’.⁷³

The Group of Coordinators for the recognition of professional qualifications has clarified that this right to equal treatment is to be understood as follows:

‘when a third country national has obtained the statute of refugee in a Member State he/she must, in this Member State, be treated on equal footing with nationals. As far as recognition of qualifications is concerned, it means that if a refugee holds a qualification obtained in another Member State of the European Union, the Member State which has granted him/her the statute of refugee must recognise this qualification in accordance with Directive 2005/36/EC.’⁷⁴

It follows from this rather ambiguous clarification that refugees have two possibilities to obtain equal treatment as regards the recognition of their professional qualifications. First of all, imagine a Syrian refugee having previously followed education and training in the EU to become a doctor, meaning he or she has a diploma in medicine issued by a EU Member State. It follows from the quote above that he or she benefits from the provisions of Directive 2005/36/EC. This because the directive is based on the “nationality of the qualification”, as opposed to the nationality of the qualification *holder*. It is not relevant for the application of Directive 2005/36/EC whether a refugee is applying for recognition, as long as the qualification was obtained in a Member State other than the one in which refugee status was sought. This means that, if the Syrian refugee wants to work as a doctor in the Netherlands, he or she must have a diploma obtained in any other Member State but the Netherlands to fall under Directive 2005/36/EC.

However, many refugees may arrive in the EU for the first time. Now imagine a Syrian refugee who is trained as a doctor in Syria. He or she also obtains the same treatment as EU citizens. Since the application of Directive 2005/36/EC is based on the origin of the qualification at hand, both EU citizens and third-country nationals who have a qualification from a non-EU country, largely fall outside the scope of application of the directive.

Article 2(2) of Directive 2005/36/EC clarifies how Member States should treat EU citizens with non-EU qualifications. A Member State may treat these qualifications ‘in accordance with its rules’, meaning recognition of non-EU qualifications is regulated by national law. Nevertheless, EU

2011/95/EU (refugees), Directive 2009/50/EC (Blue Card holders), Directive 2011/98/EU (Single-permit directive) and Directive 2005/71/EC (researchers).

⁷³ Article 28(1) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

⁷⁴ European Commission, Group of Coordinators for the Recognition of Professional Qualifications – Frequently Asked Questions, MARKT D/3418/6/2006-EN, p. 14-15.

citizens with third-country qualifications do not fall outside the scope of application of the directive entirely as they have to fulfil the minimum training conditions of Title III, Chapter III of Directive 2005/36/EC.⁷⁵ The situation is the same for refugees: Member States have the liberty to recognise third-country nationals' qualifications '*in accordance with their rules*' as well.⁷⁶ Member States also have to take into account 'minimum training conditions for certain professions'. Although not specified, these can also be taken to be the minimum training conditions laid down in Title III, Chapter III of the directive.

Minimum training conditions are the lowest common denominator as regards the required qualifications in certain professions. Directive 2005/36/EC lays down such conditions for seven professions.⁷⁷ This means that non-EU qualifications are assessed on the basis of procedures laid down in national law, while taking these requirements into account. Therefore, both the Dutch doctor with a United States diploma, for example, *and* the Syrian doctor with a Syrian diploma will obtain recognition according to procedures set by national law. However, because the profession of doctor is one for which minimum training conditions are laid down in Directive 2005/36/EC, they must fulfil these EU-wide standards to work as a doctor in the Netherlands.

In conclusion of this section, it can be said that the right to equal treatment as regards recognition procedures for those whose refugee status has been confirmed under Directive 2011/95/EU comprises two possible scenarios: (1) they have a EU qualification, meaning the procedures of Directive 2005/36/EC apply or (2) they have a qualification from a third country, in which case they have to obtain recognition in accordance with national law. This leads to follow-up questions related to the way recognition is organised at the national level: what is this national law under which a refugee's situation is regulated?

Falling outside the scope of EU law – Which legislation applies?

Considering that the recognition of third-country qualifications is susceptible to national law and that Member States have the liberty to designate the rules on how to recognise such qualifications, the procedures for the recognition of such qualifications may vary considerably per Member State. How do holders of third-country qualifications obtain recognition in the Netherlands? More generally, how do refugees gain access to the Dutch labour market?

In the Netherlands, the position of a refugee seeking employment is governed by the *Wet arbeid vreemdelingen*. This piece of legislation revolves around the concept of *vreemdeling*: this is someone who does not possess the Dutch nationality and who is not treated as a Dutch citizen on

⁷⁵ Article 2(2) Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L 255/22.

⁷⁶ Preamble para. 10 Directive 2005/36/EC.

⁷⁷ Minimum training conditions are set for the professions of doctors of medicine, general care nurses, dentists, veterinarians, midwives, pharmacists and architects.

the basis of any legal provision.⁷⁸ In this contribution, the focus is placed on recognised refugees, so-called status holders (*statushouders*). In the Netherlands, this means that a refugee has been granted a residence permit on asylum grounds.⁷⁹

In general, before a status holder is able to access the Dutch labour market, he or she will need a so-called *tewerkstellingsvergunning* in line with article 2(1) of the *Wet arbeid vreemdelingen*. However, this requirement does not apply to those who have been granted a residence permit.⁸⁰ Refugees who possess such a permit derive a right to work in the Netherlands from it. From a legal point of view, the residence permit grants a refugee unlimited access to the Dutch labour market.⁸¹ Therefore, when it comes to non-regulated professions status holders are in the same position as Dutch citizens as regards remuneration and working conditions.⁸²

The search for work in a non-regulated profession can be facilitated by a credential evaluation (*diplomawaardering*). This is a written statement indicating the value of a foreign diploma or study programme in the Netherlands that is the result of a comparison between the foreign diploma or study programme to the Dutch educational system.⁸³ In the end, access to a non-regulated profession strongly depends on the decision of the employer. A credential evaluation may help a Dutch employer gain insight into what a status holder has learnt and can facilitate his or her labour market access in a non-regulated profession. Nevertheless, finding employment may be difficult for a status holder new to the Dutch labour market. There are multiple initiatives in the Netherlands aimed at facilitating labour market access and matching up refugee employees with Dutch employers.⁸⁴

Nevertheless, this does not clarify how the recognition of professional qualifications of status holders is regulated in the Netherlands. The recognition of EU qualifications is regulated by the *Algemene wet erkenning EU-beroepskwalificaties*. This piece of legislation transposes the main body of Directive 2005/36/EC into Dutch law. Depending on the profession, migrating EU professionals may also fall under sectoral legislation laying down procedures and conditions for specific professions, e.g. medical professions.

⁷⁸ Article 1 Vreemdelingenwet 2000.

⁷⁹ T. de Lange, 'De toegang tot de arbeidsmarkt voor asielzoekers, asielstatushouders en uitgeprocedeerden', 3 *Nederlands Juristenblad* (2016), p. 180.

⁸⁰ Article 1c Besluit uitvoering Wet arbeid vreemdelingen.

⁸¹ T. de Lange, 3 *Nederlands Juristenblad* (2016), p. 180.

⁸² Rijksoverheid, 'Factsheet Vluchtelingen en werk: Wat mag wel en wat mag niet', <<https://www.rijksoverheid.nl/documenten/publicaties/2015/11/11/asielzoekers-en-werk>>, last accessed on 22-01-2017, p. 6.

⁸³ Idw.nl, 'What is a credential evaluation?', <<https://idw.nl/international-credential-evaluation.html>>, last accessed on 22-01-2017.

⁸⁴ See for example G. Engbersen et al., 'Geen tijd verliezen: van opvang naar integratie van asielmigranten', *WRR-Policy Brief 4* (2015), <http://www.wrr.nl/fileadmin/en/publicaties/PDF-WRR-Policy_Briefs/WRR_Policy_Brief_WEB_-_Geen_tijd_verliezen_04.pdf>, last accessed on 22-01-2017, p. 33; UAF, UAF Jaarverslag 2015, <https://www.uaf.nl/Portals/13/Jaarverslag/2015/UAF_Jaarverslag2015.pdf>, last accessed on 22-01-2017, p. 27-28.

The *Algemene wet* does not immediately appear to extend to status holders. The only third-country nationals explicitly considered migrating professionals under that law are those with a long-term residence permit under Directive 2003/109/EC or third-country family members of EU citizens who have a right of residence on the basis of Directive 2004/38/EC.⁸⁵

Where does this leave status holders? As stated above, refugees that have been recognised in the context of Directive 2011/95/EU receive equal treatment to EU citizens as to recognition procedures. From a EU law perspective, the full application of Directive 2005/36/EC depends on whether they have a qualification obtained in another EU Member State or one acquired outside the EU. Extending this reasoning to Dutch law, refugees with a qualification obtained in another EU Member State fall within the scope of the *Algemene wet* entirely, whereas refugees with a non-EU qualification must follow a separate procedure for recognition.

However, none of this appears to be explicitly laid down in the *Algemene wet*. The explanatory memorandum to the *Algemene wet erkenning EG-beroepskwalificaties* (the first version of the law before the 2013 modernisation) shows that the extension of the scope of application to status holders may not have been considered at all. According to that document, third-country nationals cannot rely on the directive, with the exception of long-term residents and third-country family members of EU citizens.⁸⁶ There appear to have been no updates on this topic. This leaves questions as to the practical application of the current *Algemene wet erkenning EU-beroepskwalificaties* to those status holders who have a professional qualification obtained in a EU Member State.

The same can be said for status holders with a third-country qualification. It follows from EU law that this position is governed by national law. The only mention of third-country qualifications in the *Algemene wet* states that a qualification, issued by a competent authority in a third country, can be considered as evidence of formal qualifications if the migrating professional has three years of experience exercising a profession in a EU Member State (i.e. the intra-EU or cross-border mobility of third-country qualifications).⁸⁷ However, it should be noted that third-country nationals may be subject to specific rules governing their intra-EU mobility that may differ considerably from those of EU citizens.

The *Algemene wet erkenning EU-beroepskwalificaties* of course relates only to EU qualifications. It is, therefore, somewhat logical that the recognition of refugee qualifications originating from third countries would not be regulated there. However, there does not seem to be any general piece of legislation regulating this particular situation, meaning that the recognition of third-country qualifications will largely take place via sectoral legislation.

⁸⁵ Article 1 *Algemene wet erkenning EU-beroepskwalificaties*.

⁸⁶ *Kamerstukken II 2006/07*, 31059, 3, p. 14.

⁸⁷ Article 1 – Opleidingstitel para. 2 *Algemene wet erkenning beroepskwalificaties*.

An example of this can be seen for medical professionals. The non-Dutch qualifications of doctors of medicine are assessed by an expert committee advising whether or not a foreign qualification is sufficient for the holder to gain access to the profession in the Netherlands.⁸⁸ In order for the committee to issue advice on a third-country qualification, the holder may be required to take knowledge and skills tests.⁸⁹ A status holder may be required to take such tests, for which he or she pays a fee,⁹⁰ only for the committee to give its opinion. In its advice to the Minister concerned, the committee will recommend whether additional education and training will be necessary.⁹¹ Space precludes the analysis of other sectoral legislation. Suffice it to say that the recognition of the third-country qualifications of status holders under Dutch law is likely to include tests and possibly retraining.

Conclusion

The beginning of this contribution briefly touched upon some of the difficulties refugees face when accessing the Dutch labour market. Following EU law, a Syrian refugee whose status is recognised under Directive 2011/95/EU and who has a diploma issued by a EU Member State should have the possibility to obtain recognition under Directive 2005/36/EC. Nevertheless, this does not appear to be the case in the Netherlands, leaving questions as to how these individuals obtain recognition in practice. At the same time, recognised refugees with third-country qualifications are likely subject to profession-specific sectoral legislation requiring tests and possibly retraining.

Whereas retraining, and therefore delayed labour market access, may be inevitable for a Syrian refugee with a Syrian diploma coming to the Netherlands for the first time, the situation of his fellow citizen who has been to the EU before and has completed education and training in a Member State is not apparent in Dutch law. The difficulties status holders have in gaining access to the Dutch labour market therefore not only appear to be an unfortunate practical reality but also to have their foundation in law. Barriers regarding the recognition of refugee professional qualifications may thus prove to be particularly arduous. Considering the urgency of the issue, some reconsideration and specification may be desirable in this area.

⁸⁸ Article 3 Besluit buitenslands gediplomeerden volksgezondheid.

⁸⁹ Article 3a(1) Besluit buitenslands gediplomeerden volksgezondheid.

⁹⁰ Article 3a(2)(3) Besluit buitenslands gediplomeerden volksgezondheid.

⁹¹ Artikel 11 Reglement Kennis- en vaardighedentoetsen voor artsen.

5. Refugees and taxation

Kilian Heller

Introduction

The vast influx of refugees to Europe and in the European Union (EU) over the past years has become the subject of widespread discussions throughout politics and in the public. To a greater or lesser degree, all the Member States are involved and have hosted and accommodated a certain number of refugees. Just by browsing the internet and reading some of the comments on the arrival of the refugees over the last year, it becomes evident that many issues related to the treatment of refugees are unclear, both to specialists and to the public at large.⁹² One of the issues that may cause expert confusion is the taxation of refugees domestically and internationally once they have been granted a residence permit. This contribution describes the legal process a refugee goes through to become economically active and taxable in a Member State and investigates the following question:

How can refugees residing in the Netherlands enter the Dutch labour market, and can they access the protection from double tax conventions? What are the conditions to be considered a tax resident?

The focus is on only one Member State: the Netherlands. Small sections will highlight international, European and domestic aspects in relation to refugees, ultimately illustrating from which point onwards refugees can work in the Netherlands and can become taxable persons in respect of their income. In addition, the access to double tax treaties modelled after the OECD Model Tax Convention (OECD MC) is shortly elaborated on.

General international and EU treatment of refugees

Two legal spheres must be considered when dealing asylum seekers in the EU. On the one hand, there is the sphere of the Council of Europe, expressed in the 1951 Geneva Convention, which contains a clause of non-refoulement in Article 33. On the other hand, there is the sphere of EU law, more specifically, the EU Charter of fundamental rights. The legal value of the Geneva Convention becomes evident in Article 78 TFEU, which introduces the Common European System for Asylum that follows the principles laid down in the Geneva Convention. Moreover, the article

⁹² Omroep Brabant, Wat kost de opvang van asielzoekers in Brabant?, 06-10-2016, last accessed on: 10-01-2017, <<http://www.omroepbrabant.nl/?news/237146892/Wat+kost+de+opvang+van+asielzoekers+in+Brabant.aspx>>; Klokwerk, Welk bedrag geeft de staat uit per asielzoeker?, 16-04-2017, last accessed on: 10-01-2017, <<http://sargasso.nl/welk-bedrag-geeft-de-staat-uit-per-asielzoeker/>>; Omroep Zeeland, Negen vragen over het leven van asielzoekers, 20-08-2015, last accessed on: 10-01-2017, <<http://www.omroepzeeland.nl/nieuws/2015-08-20/907228/negen-vragen-over-leven-van-asielzoekers#.WHTwebGX9Z0>>.

binds EU Member States to comply with the principles in the Geneva Convention. The EU Charter of fundamental rights has been legally binding since the Lisbon Treaty was concluded in 2009 and grants refugees the right to asylum under Article 18. Furthermore, similar to the Geneva Convention, Article 19 prohibits refoulement, i.e. the refusal to consider an application for asylum of refugees arriving in one's territory. Apart from the EU Charter of fundamental rights, there is secondary legislation that influences to a certain degree the arrival and admission procedure of asylum-seeking refugees. Among others, the most important directives for the granting of asylum are Directive 2005/85/EC concerning asylum procedures, Directive 2011/95/EU, which deals with the qualification of refugees, and the Single Permit Directive 2011/98/EU, allowing refugees to solely be granted access to one Member State. The following paragraphs briefly outline the most important articles, relevant for the exercise of the right to asylum.

Article 3 of Directive 2005/85/EC delineates the scope of the Directive. It encompasses "all claims made in the territory of EU Member States" and shall ensure minimum standards as to the granting of refugee status (Article 1). Some guidance and options for the procedures which may be adopted in domestic legislation are provided in Article 6. Those include aspects such as where to start the application, who may file an application, regulation regarding minors applying for asylum or access to the competent authorities. As will become apparent at a later stage, Article 7 is particularly important for the pursuit of economic activity. It gives refugees the right to remain in a particular Member State until a decision has been made concerning their status. The rest of the Directive, Articles 8-22, mainly deal with guarantees and obligations that must be followed by the Member States and the applicant for refuge.

As an addition to Directive 2005/85/EC, Directive 2011/95/EU lays down specific requirements that must be fulfilled to be eligible for refugee status and the minimum rights that have to be granted once the refugee status or subsidiary protection has been granted. Especially Articles 24 (residence permits) and 26 (access to employment) are relevant to the subject of this contribution. Article 24(1) sets out that those who acquire refugee status must be issued a residence permit valid for 3 years with the possibility of renewal. Refugees who obtain subsidiary protection only must be issued such a permit for a minimum of one year with an option for renewal (Article 24(2)). This means that, once the refugee application has been successful, the refugee receives a permit that makes him a resident of that Member State for the time being, not to be confused with acquiring the nationality. Being a resident includes having access to education, employment, travel documents and social assistance as stipulated by domestic law. Voting rights and the rights of free movement are not automatically granted to a person with a residence permit. Holding the status of a resident as provided by Article 24 entitles refugees to enter into an employment relationship. This is explicitly mentioned in Article 26, granting refugees access to the labour market under the "rules generally applicable to the profession...". The EU rules on asylum thus already require that persons who hold the status of refugee receive a

residence permit and have the right to seek employment. As with all EU directives, those requirements must be transposed into domestic law, which is also the case in the Netherlands.

The third important directive concerning economic activities of refugees is the Single Permit Directive 2011/98/EU. The purpose of this directive is to establish a single application procedure that grants third-country nationals a single work permit within the territory of a Member State as well as to stipulate a common set of rights for those holding such a permit (Article 1). The reasons for initial admission to the territory are now irrelevant. Once the permit has been issued, the refugee enjoys the right of treatment equal to that of the nationals in terms of employment. This also includes tax benefits, insofar as the refugee is considered a resident for tax purposes (Article 12(1)(f)). Those rights to tax benefits, however, may be limited if benefits are claimed for family members that have their registered or usual place of residence in the Member State concerned. Again, the EU directive requires equal treatment in terms of taxation when the person is deemed to be a taxable person under domestic law.

Apart from the directives mentioned above, there are various other directives relevant for the acceptance of an asylum seeker, which include Directive 2003/9/EC on the reception conditions for refugees, Directive 2003/109/EC on long-term residency, Directive 2000/43/EC on racial equality and access to social security. Treating each of them in detail, however, would be beyond the scope of this contribution. They will be mentioned in later sections, however, insofar as they are relevant.

The Netherlands and the domestic treatment of refugees

After having outlined the international and European framework within which the EU Member States must manoeuvre their asylum regulations, the more important aspects on the way to economic activity of refugees can be found in the specific domestic legal rules. Hereby, each Member State is free to adopt their own asylum regulation system as long as it is compliant with EU legislation. For EU directives, which constitute a form of minimum harmonization, this means that the Netherlands must transpose the rules laid down there into national law. The way in which this is done however, is left to each Member State.

When it comes to the permission to take up economic activity in the Netherlands, the Dutch legal system generally differentiates between three types of refugees: (1) foreigners who have not yet filed an application for asylum (*Vreemdelingen*), (2) Applicants, i.e. refugees who started the asylum application procedure (*Asielzoekers*), and (3) Status holders, i.e. refugees who have been granted asylum (*Statushouders*). The consequences for the first category, the foreigners (*vreemdelingen*), are clear: they are not allowed to work in the Netherlands before they have filed an application for asylum with the Dutch immigration authority *Immigratie- en Naturalisatiedienst (IND)*.

For the second category, the asylum seekers (*asielzoekers*), different rules apply. Asylum seekers whose application has been filed but still have not been issued a residence permit after six months can work up to 24 out of 52 weeks.⁹³ For them to be able to work, the employer is required to ask for a work permit. In principle, *asielzoekers* who start to work are liable to income tax⁹⁴, if they are considered taxable residents in accordance with Article 4 *Algemene wet inzake rijksbelastingen* (AWR).⁹⁵ The low amount of earnings and the weak link to the Netherlands may, however, lead to either a tax exemption or a non-consideration as tax resident. Additionally, the deduction regulation to compensate for expenses made by the *Centraal Orgaan opvang asielzoekers* (COA) must be taken into account.⁹⁶ The provisions in Articles 1-5 stipulate that *asielzoekers* with savings or an income have to pay a compensation of the economic support granted to them, to a maximum of € 393,43 per month. This amount can be deducted from the salary or the savings of the *asielzoeker* on a monthly basis. Only 25% or a maximum of € 183 of the salary earned are exempt from these payments. This repayment for the living expenses in the Netherlands cannot be regarded as tax payment as it has a mere compensational function for the services rendered.

The third category, the status holders, (*statushouders*) consists of those who have the right to access the Dutch labour market in its entirety without a temporal limit, but only once they have received a temporary residence permit.⁹⁷ These refugees may of course only work for as long as their residence permit is valid. *Statushouders* are not only allowed to enter into an employment relationship but may also start their own business. Thus, having acquired the residence permit and therewith having been granted asylum, they have full access to the Dutch labour market. If they find a job or earn any form of income, they will be governed by the same Dutch laws as any other Dutch national. Once refugees earn an income, Dutch tax rules apply to them, including, for instance, wage tax, etc. The question then remains, whether the refugee is a tax resident in the Netherlands or not. To determine Dutch residency for taxation, the circumstances must be assessed. These are laid down in domestic law⁹⁸, and the conditions can be derived from well-established Dutch case law⁹⁹:

- Place where the person has his home;
- Place where his family (partner) resides;
- Duration of his stay in the Netherlands
- Other personal ties with the Netherlands, such as (club) memberships, bank accounts, etc.

⁹³ Article 29, *Regeling Uitvoering Wet Arbeid Vreemdelingen* (2014); for further information see: https://www.werk.nl/werk_nl/werkgever/wervingsadvies/werkvergunning/wanneer-nodig/uitzonderingen, last accessed on: 10-01-2017.

⁹⁴ Article 5(5), *Regeling eigen bijdrage asielzoekers met inkomen en vermogen* (2008).

⁹⁵ Article 4, *Algemene wet inzake rijksbelastingen* (1959).

⁹⁶ Articles 1-8, *Regeling eigen bijdrage asielzoekers met inkomen en vermogen* (2008).

⁹⁷ Article 1(c), *Besluit Uitvoering Wet Arbeid Vreemdelingen*.

⁹⁸ Article 4, *Algemene wet inzake rijksbelastingen* (1959).

⁹⁹ Gerechtshof in Den Haag (d.d. 25 juni 2014, ECLI:NL:GHDHA:2014:2182; Article 4, paragraph 1 AWR (*Algemene wet inzake rijksbelastingen*)).

Thus, using the Dutch conditions for a taxable person, it can be concluded that *statushouders* can be qualified as residents for tax purposes and are therefore generally liable to Dutch taxes. *Vreemdelingen* and *asielzoekers*, on the other hand, are less likely to be considered residents for tax purposes since their ties to the Netherlands are not as strong, due to the lack of a regular home and strong personal ties.

However, they may also be taxable residents in their respective home countries, which could result in double taxation in certain rare situations. To solve double-taxation problems, states conclude double tax treaties or may have unilateral double taxation relief mechanisms in the absence of such treaties.¹⁰⁰ The next section very briefly outlines the requirements for tax treaty entitlement as stipulated by the OECD MC. Subsequently, it will be concluded whether or not refugees working in the Netherlands generally have access to the Dutch Double Tax Treaty Network.

OECD requirements for tax treaty entitlement

Article 1 of the OECD MC sets out the scope of tax treaties is laid down, stating that these are applicable to “persons”. The Commentary on Article 1 in paragraph one further stipulates that the treaty is applicable to residents. This is further defined in Article 4 of the OECD Model, which incorporates the residence requirements and defines a taxable resident as “any person who, under the laws of the State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature...”. Thus, those who are considered residents for tax purposes under the domestic laws of a state are, in principle, entitled to tax treaty benefits. Applying this rationale to refugees and the Dutch domestic requirements, it can be concluded that, in theory, if the situation requires it and if a DTC has been concluded with the other country involved, refugees have the right to enjoy the benefits of the tax treaty concluded.¹⁰¹

Conclusion

With a Dutch residence permit, refugees acquire the right to work within the territory of the Netherlands. Moreover, based on EU law and Dutch domestic law, *statushouders* are treated like Dutch nationals. After having received a residence permit, refugees can rent a domicile. In addition, a valid bank account and registration with the municipality are required. Furthermore,

¹⁰⁰ For instance, the Dutch *Besluit voorkoming dubbele belasting (2001)*.

¹⁰¹ The tax treaty network does not encompass the predominant ‘refugee origin countries’ such as Syria, Iran, Iraq and Eritrea; For further information see:
<http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/priv/internationaal/verdragen/overzicht_verdragslanden/overzicht_verdragslanden_ingezetenen, last accessed on: 10-01-2017>;
<http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/brochures_en_publicaties/verdragsstaten_ib_niet_ingezetenen, last accessed on: 10-01-2017>.

refugees are regarded as Dutch residents for tax purposes and are also granted access to Dutch double tax conventions, if the situation requires it (in accordance with Article 1 and Article 4 of the OECD MC). The DTC may become relevant for the income earned in the Netherlands by refugees who are still residents of their home country.

This, of course, depends on whether or not the Netherlands has concluded a double tax treaty with the home country of the refugee. Since the refugees are not nationals of any EU Member State, they do not enjoy the free movement rights granted by the EU to all EU nationals, including the free movement of workers. To be allowed to work in another EU Member State, refugees would have to both follow asylum law procedures and apply for a work permit in the other country. Another manner to acquire the four freedoms is for refugees to reside in a Member State, such as the Netherlands, for more than five years. In this case, they would fall under the Long-Term Residents Directive, which provides entitlement to enhanced 'long-term residence' status to third-country nationals who have resided in an EU Member State legally and continuously for more than five years.

6. Refugees and social security: the personal scope of the National Old Age Pensions Act (AOW) in the Netherlands

Bastiaan Didden & Sander Kramer

Introduction

Social security can be considered a ‘hot topic’. In the Dutch political debate on refugees¹⁰², it is also an emerging topic and still growing in importance.¹⁰³ Within social security, basic state pensions are also receiving broad public attention, amongst others in the framework of the current pension-reform process in several European Member States. To be entitled to the benefits of a basic state pension, several conditions have to be fulfilled. A relevant question in the context of the central theme of this joint work volume is whether and to what extent refugees are entitled to a basic state pension.¹⁰⁴

In this contribution, a primarily descriptive elaboration, the Dutch basic state old-age pension (AOW, *Algemene Ouderdomswet*) will be examined, more in particular the personal scope of the AOW entitlement of refugees. Since basic state pensions can be considered ‘social security’ within the meaning of European legislation, attention should (also) be paid to Regulation (EC) No 883/2004 on the coordination of social security systems.¹⁰⁵

The European and international perspective

“Regulations (EC) No 883/2004 and No 987/2009 do not replace national legislation but coordinate the different national social protection systems so that persons who wish to avail themselves of their right to free movement are not penalised by comparison with persons who have always resided and worked in the same country.”¹⁰⁶ This quote clarifies that non-

¹⁰² In the framework of this contribution the term ‘refugee’ refers both to ‘recognised refugees’, the so-called ‘status holders’, i.e. refugees whose requests have been granted and who have received a legal residency status and ‘non-recognised refugees’, refugees who have submitted a request for legal residency status but whose request has not been granted yet.

¹⁰³ A relevant Dutch publication on this matter: M. den Heijer, ‘Kan de asielopvang niet wat soberder?’, *Nederlands Juristenblad* 2015/1951.

¹⁰⁴ For a recent article concerning (in general) AOW entitlements of persons with a migration background, see: CBS, ‘AOW-opbouw bij mensen met migratieachtergrond omhoog’, 13-01-2017, last accessed on: 23-01-2017, <<https://www.cbs.nl/nl-nl/nieuws/2017/02/aow-opbouw-bij-mensen-met-migratieachtergrond-omhoog>>.

¹⁰⁵ Regulation (EC) No 883/2004 contains a list of branches (the so-called ‘material scope’) which can be considered as social security. One of the branches mentioned is ‘old-age benefits’, see Article 3 (1) (d). Also relevant is Regulation (EC) No 987/2009, laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Implementing Regulation).

¹⁰⁶ K. Distler & G. Essers, *Guide for Mobile European Workers*, Brussels: European Trade Union Confederation (ETUC) 2011, p. 15. See also Consideration 1 preamble Regulation (EC) No 883/2004: “The rules for coordination of national social security systems fall within the framework of free movement of persons...” Regulation (EC) No 883/2004 can be considered as an elaboration of Article 46 *Treaty on the Functioning of the European Union (TFEU)*.

discrimination is one of the underlying principles of the coordination of social security in the European Union. Furthermore, following on this quote, the question arises how the term 'persons' should be interpreted. Article 2 Regulation (EC) No 883/2004 concerning the persons covered, provides some clarity on this matter. According to this article, the Regulation is also applicable to refugees who are *"residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors."* Thus, refugees too can rely on the coordination rules of the Regulation, provided that there is a cross-border situation between two Member States.¹⁰⁷

For an answer to the question who can be considered a 'refugee', Article 1 (g) of the Regulation should be taken into account, which refers to the definition used in the Geneva Convention relating to the Status of Refugees: *"'refugee' shall have the meaning assigned to it in Article 1 of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951."* Based on this article, in general, it can be stated that a person who is in *"fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"* can be considered a refugee.

The Convention of the United Nations High Commissioner for Refugees (UNHCR), signed by 144 states, can be seen as an international human rights instrument which contains rights of refugees, such as the main principles of non-refoulement and non-discrimination.¹⁰⁸ Concerning the right of non-discrimination, the Convention also contains an article, Article 24 (1)(b), which states that in respect of social security, among others legal provisions regarding old-age, the contracting states shall give a refugee who is *"lawfully staying in their territory the same treatment as is accorded to nationals"*.¹⁰⁹ Hence, being a legal resident is a key condition for being eligible for the non-discrimination clause in the field of social security. The next paragraph demonstrates the importance of this requirement in the Netherlands, in particular concerning the AOW.

The Dutch perspective: Algemene Ouderdomswet (AOW)

The previous section illustrated the interaction of international law and European law regarding the reliance of refugees on European social security coordination rules. How does the Netherlands handle this? Under which conditions is a refugee entitled to one of the main areas of Dutch social security, i.e. the AOW? According to Article 6 (1) AOW, a person is insured in

¹⁰⁷ ECJ of 11 October 2001, case C-95/99 (*Khalil*), considerations 63 and 72.

¹⁰⁸ Introductory Note by the Office of the United Nations High Commissioner for Refugees to the 1951 Convention Relating to the Status of Refugees, p. 3 and UNHCR, 'The 1951 Refugee Convention', last accessed on: 14-12-2016, <<http://www.unhcr.org/1951-refugee-convention.html>>.

¹⁰⁹ For the application of the Convention at European level, see Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted. Article 29 on social welfare of this Directive can be considered as a similar article.

accordance with the legislation if he or she¹¹⁰ has not reached the pensionable age and, according to subparagraph a, is a resident (see also Article 2 AOW) or, according to sub b, is not a resident but is subject to Dutch wage taxes in respect of an employment relationship performing work in the Netherlands or on the continental shelf. The two relevant terms in the context of the personal scope of the AOW are underlined. Both terms are discussed in the following subsections.

Residence

Pursuant to Article 6 (1) (a) AOW, a resident is, in principle, insured mandatorily for the AOW. Individuals can be qualified as residents if they reside in the Netherlands, according to Article 2 AOW. The place where someone resides is assessed based on the circumstances, pursuant to Article 3 AOW. There is long-established case-law regarding the assessment of someone's residence.¹¹¹ An elaboration on this case-law is not within the purpose and scope of this contribution. It should however be stressed that an individual is deemed to reside in the Netherlands if a durable link of personal nature exists between the individual concerned and the Netherlands.¹¹² The presence of such a durable link of personal nature is assessed based on all eligible facts and circumstances of the situation.¹¹³ These facts and circumstances encompass objective and subjective factors. Objective factors comprise, among others, the residential and working environment, the place where the family resides and the registration in the population register.¹¹⁴ When determining the place of residence, the subjective intention of the person is only taken into account if this intention can be determined objectively. Therefore, the sole intention to settle in the Netherlands is, in itself, not sufficient to establish residence.¹¹⁵ According to the policy rules of the *Sociale Verzekeringsbank* (SVB), "the organization that implements national insurance schemes in the Netherlands"¹¹⁶, the following facts and circumstances can furthermore be relevant in determining residence: the place of private and family life, the school of the children, political and cultural activities, education aimed at integration or participation in the employment market, the presence of a relative who has already worked or lived in the Netherlands for a considerable time, indications that the person concerned will leave the Netherlands in the foreseeable future and having a permanent home at one's disposal.¹¹⁷

¹¹⁰ In the interest of the readability of this text, the combination of the pronouns he/she and his/her and their various other forms has been avoided and largely replaced with plural or, incidentally, masculine pronouns, i.e. they/their/them or he/his/him, although the person referred to might just as easily be a woman. Nowhere do we intend to suggest that only males are concerned.

¹¹¹ See for instance: CRvB 29 June 2006, *LJN AY4787* and CRvB 10 May 2007, *LJN BA5082*. The CRvB is the highest Dutch administrative court in the field of social administrative law, civil service law and some parts of pension law.

¹¹² See also: SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2>.

¹¹³ Derived from HR 21 January 2011, *BNB 2011/98* and HR 4 March 2011, *BNB 2011/127*.

¹¹⁴ Derived from SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2>.

¹¹⁵ Derived from HR 17 januari 1996, *BNB 1996/161*.

¹¹⁶ SVB, 'English Website SVB', last accessed on: 13-12-2016, <<https://www.svb.nl/int/en/>>.

¹¹⁷ Derived from SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P1> and

Dutch case-law also acknowledges the possibility of dual residence, i.e. pursuant to the criteria of the applicable provisions of the AOW, an individual is deemed to reside in both the Netherlands and in another state.¹¹⁸ Refugees can find themselves in such situations in case they request residence permits in multiple countries. However, in the *Wencel*-case, the European Court of Justice (ECJ) ruled that the possibility of dual residence does not arise when EU-law is applied.¹¹⁹ In this respect, the ECJ ruled that, when individuals can be qualified as residents of multiple states, the term 'resident state' refers to the state where they have their habitual residence and where their habitual centre of interest is located. The policy rule on residence of the SVB serves as an example of the influence of European legislation on Dutch practice: when applying EU-law, the SVB fully applies the case-law of the ECJ and the derived criteria for determining residence as laid down in Article 11 (1) Regulation No 987/2009.¹²⁰

Thus, a durable link of personal nature between a refugee and the Netherlands may therefore lead to the qualification as insured person. This durable link can partially be derived from the right of residence under the *Vreemdelingenwet 2000* (Aliens Act 2000)¹²¹ and is more prominent as the certainty of continued residence in the Netherlands increases. In turn, this certainty depends on the residual title the refugee has acquired for The Netherlands. In order to establish a durable link of personal interest, the SVB considers it important that the individual has a residual title for a certain period of time (Articles 14 through 28 *Vreemdelingenwet 2000*) or for an indefinite period (Articles 20 through 33 *Vreemdelingenwet 2000*).¹²² It is common SVB policy that the SVB generally assumes residence for refugees with a residence permit for indefinite time. In principle, they thus receive the qualification of 'insured person' (see the section below) and consequently, in principle, the entitlement to build up AOW pension. If, on the contrary, refugees have a permit for a certain period of time, this can contribute to the assessment, weighing all relevant facts and circumstances, that their residence is in the Netherlands. This also means that individuals who do not have a residence permit generally have no certainty regarding their continued residence in the Netherlands. However, the SVB considers an actually realised residence of three years as an indication to assume residence.¹²³

SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P2>.

¹¹⁸ Derived from HR 12 April 2013, *NTFR* 2013/903.

¹¹⁹ ECJ 16 May 2013, C-589/10, ECLI:EU:C:2013:303 (*Wencel*).

¹²⁰ Regulation No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 on the coordination of social security systems.

¹²¹ Description derived from SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P3>.

¹²² Derived from SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P3>.

¹²³ Derived from SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,

<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P3>.

In the aforementioned cases, the prerequisite was that the refugees legally reside in the Netherlands after having their residence permit granted.¹²⁴ Note, however, that insurance on the basis of residence is effective from the moment when refugees legally reside in the Netherlands.¹²⁵ If a residence permit is granted retrospectively, the SVB will accept retrospective insurance to the time when the residence permit became effective, though not prior to that date. Refugees do not build up any AOW rights in the period prior to the granting of the residence permit, even though they already resided in the Netherlands.

Insured person

The qualification of 'insured person' under the AOW is surrounded by a large number of provisions of secondary legislation. However, the qualification of refugees as insured persons and the related issues have not been touched upon during the parliamentary process of the implementation of the AOW.¹²⁶ In chapter 2 of the AOW, insured persons are listed.¹²⁷ These insured persons are entitled to the pension benefits paid out in the decumulation phase.

Article 6 (1) AOW does not apply to a recognised refugee nor to a non-recognised refugee. However, it is explicitly mentioned in Article 6, paragraph 2 AOW that the foreign national (i.e. alien) who does not lawfully reside in the Netherlands within the meaning of Article 8, paragraph a through e and i Vreemdelingenwet 2000, is not insured. In summary, the paragraphs mentioned in Article 8 Vreemdelingenwet 2000 all cover situations in which the refugee is granted a residence permit, is a community citizen or derives a right of residence from Association Decision 1/80 of the Association Council EC/Turkey. In such cases, the recognised refugee – since he or she was granted a residence permit or is otherwise qualified as a recognised refugee - is in principle insured under the Dutch Algemene Ouderdomswet.

Article 6 (3) AOW states that, pursuant to a general administrative regulation, by way of derogation of paragraph 1 and 2 of Article 6, the category of insured persons can be expanded or limited. This expansion and limitation is laid down in *Besluit uitbreiding en beperking verzekeren volksverzekeringen 1999 (Decree on the expansion and limitation of the categories of insured persons 1999)*. However, it should be pointed out that, pursuant to Article 9a Vreemdelingenwet 2000, aliens who legally reside in the Netherlands, in the sense of Article 8, subparagraph c Vreemdelingenwet 2000 – referring to the residence permit for a certain period – regardless of

¹²⁴ The SVB considers itself not authorised to independently verify the legitimacy of the residence of the refugee in the Netherlands, except for cases in which EU-law applies. See:

SVB, 'SVB Beleidsregels', last accessed on: 13-12-2016,
<https://www.svb.nl/int/nl/over_de_svb/actueel_kennis/beleidsregels/beleidsregels/index.jsp?id=D1_H2_S2_P5>.

¹²⁵ Derived from G. Kaptein van Lize, 'AOW en Pensioenen', p. 6, last accessed on: 13-12-2016,

<<http://www.netwerknoom.nl/media/AOWenPensioenennovember2013.pdf>>.

¹²⁶ See i.a. the explanatory memorandum, *Kamerstukken II 1954/55, 4009, nr. 3 (MvT)*, par. 3 Kring der verzekeren, p. 28 d. Niet-ingezetenen. The *Algemene Ouderdomswet* was cited as *Algemene Ouderdomsverzekering*.

¹²⁷ These insured persons are liable to pay the insurance premiums pursuant to Article 6, paragraph 1 *Wet financiering sociale verzekeringen* (Social Insurance Funding Act).

whether they can be considered residents, are insured only from the day, on which their request for a residence permit was granted. This means that refugees are qualified as residents and therefore, in principle, are entitled to AOW benefits from the moment that certainty has been obtained regarding their continued residence in the Netherlands.¹²⁸ In theory, this is the day on which the residence permit is granted. Note, however, that this is a later point in time than the day on which the refugees entered the Netherlands. It can therefore be concluded that, in the framework of all relevant facts and circumstances that together constitute the legal link, the economic link and the social link of the refugee with the Netherlands, the legal link, i.e. the residence permit, plays a dominant role.¹²⁹

Observation

As touched upon in the introduction, several conditions have to be fulfilled by refugees to be entitled to the benefits of a basic state old-age pension (AOW). However, the definition of the term 'refugee' is set in several ways at the various levels of legislation, i.e. the international level, the European level and the national level. This definition also illustrates the interaction between these different levels, since the legislative levels directly refer to each other.¹³⁰ Also at the Dutch national level, the interaction and interdependency between the different layers of legislation is considerable. Firstly, to be entitled to build up AOW benefits, a refugee has to qualify as a 'resident' of the Netherlands, after which it should be assessed whether this refugee subsequently can be considered an 'insured person'.¹³¹ Whether a refugee qualifies as a 'resident' and subsequently as an 'insured person' largely depends on the facts and circumstances. However, the qualification as such is predominantly conditional on the legal residence title of the refugee, i.e., in theory, whether a(n) (in)definite residence permit is granted. From the moment this residence permit is granted, the refugee starts to build up AOW rights. This legal resident title seems essential for the entitlement to social security benefits. A further distinction can be identified when assessing the entitlement to AOW benefits: receiving the entitlement seems more certain with a residence permit of an indefinite nature than with a permit of temporary nature.

Although Article 1 of Regulation (EC) No 883/2004 does not, as such, require a legal residence title, Article 24 (1)(b) – assigning refugees the same treatment in the field of social security as is accorded to nationals - requires that the refugee is lawfully residing in the territory.

¹²⁸ Derived from G. Kaptein van Lize, 'AOW en Pensioenen', p. 6, last accessed on: 13-12-2016, <<http://www.netwerknoom.nl/media/AOWenPensioenenovember2013.pdf>>.

¹²⁹ Since the implementation of the so-called *Koppelingswet 1998* (Benefit Entitlement (Residence Status) Act), the absence of legal residence leads to no insurance under the AOW. Before the implementation of this act, the prerequisite of the legal residence was less strict.

¹³⁰ For instance: for the definition of refugee, Article 1 (g) Regulation (EC) No 883/2004 refers to Article 1 of the Geneva Convention relating to the Status of Refugees.

¹³¹ For the relevance of residence for tax purposes, see the contribution in this volume entitled 'Refugees and Taxation'.

Consequently, these refugees should be granted a residence permit.¹³² On the basis of the foregoing, it can be concluded that, pursuant to relevant International and European legislation on social security, a residence permit is not, in principle, an explicit prerequisite for refugees, but it can be considered a precondition to the entitlement to national AOW benefits on the basis of Dutch national legislation.

¹³² The considerable relevance of a legal residential title is also illustrated by Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Pursuant to this Directive, third-country nationals who obtained an indefinite residence permit after residing in a state for five years are entitled to the freedoms of movement of the European Union. On the grounds of Article 11, first paragraph of this Directive, long-term residents shall enjoy equal treatment with nationals as regards social security, social assistance and social protection as defined by national law.

7. ITEM PhD Research

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