

Part I (Entry, Visa regime and border control)

1.1 What national authorities are competent to deal with visa applications? (Schengen visa and long term visa) Are there any procedures to avoid duplication or successive visa applications at different EU- consulates? On what substantive criteria other than the Schengen minimum requirements are visa granted or refused? How many visa have been issued or refused?

Competent to issue short term Schengen visa and long term visa is the Minister of Foreign Affairs. The agency which processes visa applications is the *Visadienst*, which de fact is a part of the *Immigratie en Naturalisatiedienst*. Usually, information concerning applications for Schengen visa is exchanged between the consulates of Schengen countries in the country where the application is submitted. The most frequent ground for refusing a Schengen visa, apart from the criteria mentioned in Article 5 SIA, is the risk that the applicant will remain in the country after expiry of the validity of the visa. Data about long term visa are publicly available.¹ 57% of all applications are granted.

1.2 Is there a visa tracking procedure in order to find out visa overstayers? What data are collected from visa-applicants (finger prints)? Admissibility of visa data to alien and police authorities?

There is no systematic visa tracking procedure to detect overstayers. The use of biometrical data to identify incoming travellers is under investigation in The Netherlands.

1.3 Have courts ever decided on the refusal of Schengen visa based upon Schengen blacklisting of other Member States?

Case law about Schengen visa is scarce. The following decisions could be found.

Rechtbank 's-Gravenhage zp Amsterdam 19 May 1998, *Jurisprudentie Vreemdelingenrecht* 1998/151

Article 5 par. 1 sub c SIA only empowers the administration to ask for documents as meant in that provision if concrete circumstances justify doubt as to whether the alien's statements about the aim of his travel and the circumstances under which he will reside are credible or sufficiently concrete. Entry cannot be refused on the sole ground that the alien cannot indicate in detail what he intends to do and does not have documents which show that he has decided beforehand about his travels and residence.

President Rechtbank 's-Gravenhage zp Haarlem 16 April 1999, *Jurisprudentie Vreemdelingenrecht* 1999/S157

¹ Tweede Kamer 2003-2004, 19 637, nr. 787.

The alien's passport containing a valid Schengen visa contains falsified in and out stamps of Benin and Nigeria. The passport, however, has not lost its probative power as a result. Entry cannot be refused.

There is case law about aliens seeking to be removed from the Schengen Information System, which is predominantly procedural in nature.

1.4 What measures have been undertaken in implementation of the action programme for administrative cooperation in the field of external borders, visa, asylum and immigration following the Council Decision of June 13 2002?

I have not been able to trace implementation measures following this action programme, which suggests that they have not been taken under that rubric.

1.5 What measures have been undertaken to implement the Directive 2001/51 EC supplementing the Schengen rules concerning carrier sanctions? How often have carrier sanctions been used?

A bill in order to implement Directive 2001/51 has been introduced in Parliament.² No reasons for the transgression of the term for implementation was given. The bill proposes minor changes in the Dutch Aliens Act in order to delete minor differences between Dutch law as it is and the standard proposed by the Directive.³

Part II (Admission and residence of third country nationals)

2.1 What are the basic principals in your country concerning

- admission of third country nationals for labour purpose or self-employed activities
- admission of third country nationals for study and vocational training
- legal status of third country nationals in possession of a long term residence of another Member State
- to what extent do these principles differ from the European Commission's proposals?

Third country nationals (hereafter TCNs) can be admitted as labour migrants if they fulfill the following basic requirements, laid down in Article 3.31 Aliens Decree 2000 (Vb 2000):

- a work permit should have been granted, which in practice normally means that there is no labour supply for the vacancy concerned on the national labour market;
- the applicant must have been granted a long term visa, except if s/he belongs to a category of aliens excepted from this requirement;
- the applicant must be in possession of a valid travel document;
- the applicant must earn a wage at least equal to the social minimum
- the applicant must be willing to co-operate with a health test
- the applicant must not be a danger to public order or national security.

² Tweede Kamer 2002-2003, 29 016, nrs. 1-2, 28 August 2003.

³ See in more detail K.M. Zwaan: Implementation of Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187/45 of 10 July 2001) in The Netherlands, to be published in the Yearbook on European Immigration and Asylum Law (ed Philippe De Bruycker).

TCNs can be admitted for purposes of self-employed activities migrants if they fulfill the following basic requirements, laid down in Article 3.30 Vb 2000:

- the self-employed labour must be in the national interest in the opinion of the Minister of Immigration
- the applicant must earn a permanent and sufficient independent income with these activities
- the applicant must fulfill the requirements for engaging in the particular economic activity (possession of relevant permits etc.)
- the requirements of possession of a long term visa, a valid travel document, co-operation with a health test, and public order/national security are not made explicit in Article 3.30 Vb 2000, but do apply on the basis of general provisions.

Despite the legalisation of prostitution, no residence permit can be granted to a TCN for (self-employed) labour as a prostitute (Article 3.32 Vb 2000).

TCNs can be admitted for purposes of study or vocational training if they fulfill the following basic requirements (Article 3.41 Vb 2000):

- the applicant studies full time at a Dutch university or polytechnic; or s/he studies full time at a Dutch institute for vocational training, provided The Netherlands is the most obvious country for doing so and the Minister of Immigration is of the opinion that the alien in this way will make a positive contribution to the development of the country of origin
- the university or school has given a written statement to the effect that the applicant does a full time study there
- the Minister of Immigration is of the opinion that the applicant's departure is reasonably guaranteed.
- the applicant must have sufficient income (specified in Article 3.42 Vb 2000)

TCN's can be admitted for a *stage* (i.e. traineeship in the framework of a study) if a working permit (which is always required for this) has been granted (Article 3.39 Vb 2000). When a working permit will be granted is stipulated in par. 24 of the *Uitvoeringsregels Wet Arbeid Vreemdelingen* (Implementation Rules Act Labour Foreigners). A working permit will be granted provided that this is an ordinary and necessary part of the studies the alien is pursuing. The *stage* should not take longer than one year. If the applicant is studying abroad, it is required that s/he has already had sufficient training to qualify for this vocational training. There should not more than 10% of trainees at one employer, and no less than 2. If the applicant is studying at a Dutch institution and has a residence permit for the purpose of this, the maximum 10%, minimum of 2-rule does not apply.

There are no provisions privileging TCN's in possession of long term residence permits of another Member State. They are treated in the same way as other TCN's. This is a marked difference from the Commission's proposals on the subject.

2.2 What are the legal requirements and procedures for obtaining a residence permit for third country nationals for the purpose of employment? Which procedures are used in maintaining the preferred access of EU-Citizens and Turkish nationals (association agreement) to the labour market? Do special programs exist for highly qualified

professionals facilitating access to the labour market? To what extent are trade unions and employers involved in such programs? Is there a procedure to calculate the demand for foreign labour? How is the EU-enlargement taken into consideration? To what extent has the recent economic recession and unemployment influenced the concepts on admission of third country nationals?

The main legal requirements for obtaining a residence permit for TCN's for the purpose of employment have been laid out above. A complication arises because, on the one hand, Article 3.31 par. 1 Vb 2000 states that a residence permit can only be granted if a working permit has been granted. However, Article 8 par. 1 sub c under 1 of the Act on Labour of Foreigners (*Wav*) stipulates that a working permit can only be granted if a residence permit has been granted, or has been applied for, or a long term visa has been applied for. In practice, the procedure is as follows. The applicant first applies for a long term visa, thus fulfilling the requirement of Article 8 par. 1 sub c under 1 of the Act on Labour of Foreigners. S/he then applies for a working permit. If a working permit has been granted, the long term visa can be granted. Once the visa has been granted, the applicant can travel to The Netherlands, and apply for (and normally: be granted) a residence permit.

In order to ensure that preferred labour supply of nationals and EU citizens is used to fill vacancies, it is required that the employer reports a vacancy to the Labour Office at least five weeks before applying for a working permit for that vacancy. If the Labour Office has not been able to refer the employer to unemployed who qualify for the job within five weeks, an employer can apply and will have prospects of success.

For employees at the top of the labour market, there are not general special substantive rules. However, there is a fast track procedure for getting them visa and working permits.

2.3 To what extent do existing laws and practices differ substantially from the approach taken in the Commission's Proposal on admission for the purpose of paid employment and self-employed activities relating to

- admission of third country nationals for study and vocational training
- on legal status of third country nationals in possession of a long term residence of another Member State
- to what extent do these principles differ from the European Commission's proposals?

Present Dutch practice would not have to be altered dramatically if the Commission's proposal for a Directive on admission for study etc. would be adopted.

2.4 What measures have been taken to implement the Directive of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78 EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation? Have legislative changes been undertaken? To what extent is 'affirmative action' considered as necessary to promote equal chances for migrant workers from third countries?

In order to implement Directive 2000/43/EC and 2000/78/EC, the government submitted a bill proposing amendments to, mainly, the General Act on equal treatment.⁴ The bill, which at present is pending in the First Chamber of parliament and which will be adopted soon, contains a number of detailed refinements of present anti discrimination legislation. Two relatively major changes are the introduction of a prohibition of discrimination in membership of employers' and trade unions, and introduction of a prohibition on account of race in social security.

Affirmative action is allowed under Dutch law (it is excepted from the prohibition of discrimination), but it is not mandatory. An act inspired on the Canadian Employment Equity Act, requiring employers to register their employees as to ethnicity and to develop an action plan for equal opportunities, has had limited effect.⁵

2.5 Concerning the proposal of a directive on the right to family reunion agreed upon by Council in February 2003

- Do you consider the proposed standards below the principles of family reunification valid in your country?
- Will the implementation of the Directive once it is adopted lead to changes in the national law on family reunification downgrading the standard of protection? If so, what changes are envisaged?

The family reunification directive seems to be below standards set by Dutch law, of which international law is a full part in as far as it is directly applicable, at some points. First, Article 5 par. 5 of the Directive stipulates that *due regard* shall be had to the best interests of minor children. This seems to be a formulation falling short of the formulation of Article 3 ICRC, which provides that the interests of the child shall be a *primary consideration*. Second, the combination of Article 8 (waiting period of two or three years), with Article 4 last subparagraph (integration requirement for children over 12) and/or Article 4 par. 6 (apply before the child is 15) may lead to a situation in which an immigrant first has to wait for two or three years; than a child is over 12 years and has to pass an integration test; then may have turned 15 and be too old to apply. These measures may lead to a prolonged, and sometimes permanent separation of families, which may well fall short of obligations under Article 8 ECHR. At present, Dutch law does have a provision requiring aliens who themselves entered as family members to reside three years before they can be a sponsor (Article 3.15 par. 2 Vb 2000). A proposal to introduce integration requirements in Dutch immigration law is pending, in time to meet the date of implementation deadline of Article 4 par. 1, last subparagraph. Dutch immigration law does not limit the reunification with older children as envisaged in Article 4 par. 6.

One would expect the Dutch government to introduce legislation in order to make integration a requirement for children over 12, and possibly to exclude the possibility of children over 14 to apply for family reunification.

⁴ TK 2002-2003, 28 770.

⁵ P. Jonkers: *Diskwalificatie van wetgeving. De totstandkoming en uitvoering van de Wet bevordering evenredige arbeidsdeelname allochtonen*, Aksant, Amsterdam 2003.

- 2.6 The proposal for a directive on the rights of long-term third country nationals as agreed upon by the Council on June 5, 2003 provides for a number of rights approximating the standards of long-term residents to the status of EU-citizens. Will the implementation of the Directive involve major legal and policy changes in your country? What are major points of concern if any, concerning the approximation concept of the directive relating to
- non-discrimination in social rights
 - the concept of 'civic citizenship' (see also extended impact assessment on the Communication on Integration of June 11, 2003)
 - family reunification and access of family members to the labour market
 - security of stay

The Directive on long-term third country nationals will not lead to major changes in Dutch immigration law. Long-term TNCs have equal access to social security and other social rights. They have voting rights in local elections. They are treated equal to Dutch nationals in matters of family reunification, and their family members have free access to the labour market. The permanent residence permit long-term TCNs are entitled to can only be withdrawn if they move their domicile to outside The Netherlands; if the submitted false information leading to the grant of the permanent residence permit; if they are a danger to national security; or on grounds of public order. The public order ground can be applied when the alien has been sentenced for a criminal offence for which a prison term of three years or more is possible. This ground will be used according to criteria relating the length of the legal residence to the unconditional part of the prison term imposed in the alien's case.⁶ The table looks as follows:

Residence permit may be withdrawn

if the legal residence lasted	and the unconditional prison term imposed was equal to or more than
less than 1 year	1 month
1-2 years	3 months
2-3 years	6 months
3-4 years	9 months
4-5 years	12 months
5-6 years	24 months
6-7 years	30 months
7-8 years	36 months
8-9 years	45 months
9-10 years	54 months
10-15 years	60 months
15-20 years	96 months

There are more detailed rules for the second generation, and for aliens whose legal residence has lasted longer than 10 or 15 years.

The Directive will not require major amendments of the position of long-term TCN's.

Part III (Asylum and refugee law)

⁶ Article 3.98 jo. 3.86 Vb 2000

3.1 Have the Dublin Rules worked satisfactorily and what is expected from the Dublin II Regulation No. 343, 2003 of February 18, 2003?

The Dublin rules have not led to an equitable distribution of asylum applicants over the Member States. It does assist in preventing multiple applications. It has led to an extensive pre-procedure, in which the issue is which country is responsible for the examination of an asylum application. After the responsible country has been identified - which can take months and even more than one year - a substantive asylum procedure has to be undertaken, in which it is not assured however that the asylum claim itself will be addressed. It is possible that the substantive asylum procedure will lead to removal to a third country for status determination. The extensiveness and complicated nature of the pre-procedure, combined with the absence of a guarantee that the responsible Member State will examine the claim to asylum itself, is a considerable drawback of the Dublin system, and does not fit with the preamble of the Dublin Convention and the Dublin Regulation.

3.2 Has the Eurodac Regulation No. 2725/2000 of 11th December 2000 concerning the establishment of Eurodac for the comparison of fingerprints for an effective application of the Dublin Convention, operative since January 15, 2003 resulted in an increase of Dublin cases? Has Eurodac become effective in your country or is it expected to become eventually effective?

Eurodac has become effective early in 2003. Data are available until 1 July 2003. These do not indicate a clear increase of the number of Dublin claims.⁷ Even if one would see an in- or decrease, of course a question would be whether there is a causal relationship between Eurodac and the change.

3.3 What major changes, if any, will the implementation of the amended proposal of a directive on minimum standards on procedures in Member States for granting and withdrawing refugee status on which the Council has reached political agreement on most points in June 2003 bring

for the legislation and practice in your country in particular relating to

- rights of applicants in the procedure
- administrative and judicial appeal procedure
- the use of safe third country and safe country of origin concepts
- detainment of asylum seekers
- airport and border procedures?

The proposal on minimum standards for asylum procedures at this moment is in such state of flux that it is hard to draw any clear conclusions as to the consequences it will have for Dutch legal practice. In general, it does not seem to imply standards which are above the present level of legal protection of asylum applicants in The Netherlands. Of course, it is conceivable that the Dutch level of legal protection will be adapted downwards in order to reach the lowest possible level according to the directive, but this is speculative at this moment.

⁷ Tweede Kamer 2003-2004, 19 637, nr. 787, p. 31.

The one point on which Dutch legislation would have to be adapted is on the point of the accelerated procedure. At present, Dutch law does not contain any criteria specifying in which cases the accelerated procedure can be used.

Article 23 par. 4 as it stands (I have relied on ASILE 66, 4 December 2003) seems to provide that the accelerated procedure may only be used in the cases specified in that provision. This would require that Member States do specify in which cases they can use the accelerated procedure; presently, Dutch law does not do so. However, an extra provision in the Aliens Act implementing Article 23 par. 4 would not lead to substantive changes in Dutch legal practice, as the grounds on which the accelerated procedure can be used are defined so broadly in the Draft Directive that they would hardly exclude cases in which it is being used in present day Dutch legal practice.

3.4 What measures have been undertaken to implement the directive 2003/9 of January 27, 2003 on reception of asylum seekers in your country?

- relating to the flexibility clauses in the directive
- restriction of free movement
- access to the labour market
- rights of migrant workers under Article 11 § 2 of the Directive

As yet, no implementation measures have been undertaken following Directive 2003/9 on the reception of asylum seekers. Implementation has been announced. One of the issues to be addressed is the fact that presently, asylum applicants submitting a second application are excluded from reception facilities without an individual examination of their circumstances, even if they belong to vulnerable groups. This does not fit well with Article 16 par 4 of the Directive.

3.5 What steps have been undertaken to implement the Directive on temporary protection, COM 2001, 55 in national law? Are there any procedures for burden sharing arrangements? Is there a legal basis for admission of refugees receiving temporary protection in a mass-movement situation?

In order to implement Directive 2001/55 on temporary protection, a bill has been introduced.⁸ It is proposed to adopt a new Article 43a Aliens Act 2000. The proposed article provides that, if the Council decides to grant temporary protection to a group of persons, a decision on the asylum application has to be taken within six months after temporary protection ends. Normally, a decision has to be taken within 6 months after the application is submitted. Temporary protected persons will be treated as asylum applicants. No burden sharing arrangements have been adopted.

3.6 The Council has reached political agreement on the principles for a directive on minimum standards for the qualification and status of third country nationals as refugees or persons who otherwise need international protection, COM 2001, 510 final (see Council documents of June 2003). What measures are envisaged to implement the Directive, once it is adopted, in your country relating to

- the definition of refugee

⁸ Tweede Kamer 2002-2003, 29 031, nrs. 1-2, 8 September 2003.

- the definition of persons entitled to subsidiary protection
- status of persons entitled to subsidiary protection
- the issue of internal flight alternative as defined by the Directive
- exclusion clauses, particularly issues of terrorism?

To what extent are the refugee policies as reflected in the law and jurisprudence of your country in accordance with the proposal of the directive?

As the Directive on qualification has not yet been adopted, no public debate has taken place about its implementation, let alone that concrete implementation measures are envisaged. The present version would not require changes in Dutch legal practice.

3.7 In the Commission's Communication of November 22, 2000, COM 2000,755 (see also 2nd Commission Report COM 2003, 152 final) the Commission's concept of a common European asylum procedure and a uniform status for those who are granted asylum valid throughout the Union is set out. Do you consider that the concept is generally in line with your country's asylum policy? Are concerns of refugee organizations, such as Amnesty International and other organizations, of an undermining of the international regime for the protection of refugees shared in political circles of your country responsible for decision-making?

The concept of a common European asylum procedure is not in line with the Dutch asylum procedure, because a common European asylum procedure does not yet exist. In Dutch law, there is only one single asylum status, with identical secondary rights regardless of the ground on which it has been granted. The grounds on which the single status may be granted are

- the alien is a Convention refugee;
- expulsion of the alien would be contrary to article 3 ECHR or article 3 CAT;
- in the opinion of the Minister of Aliens affairs, it cannot be reasonably required that the alien returns to the country of origin on account of compelling reasons of a humanitarian nature which are related to the reasons for which the alien left that country;
- in the opinion of the Minister of Aliens affairs, expulsion would be unduly harsh on account of the general situation in the country of origin.

There have been concerns about undermining the Convention regime.

However, because case law now focuses to a great extent on procedural issues, it is hard to evaluate the single status system on this point.

3.8 The open coordination-mechanism as suggested by the Commission provided for a first stage and a second stage legislation in which the flexibility provisions in some of the directives on migration and asylum are to be replaced by a full harmonization. Is this concept discussed in your country and what are the perceptions relating to the gradual establishment of a European asylum policy which eventually might replace national procedures and national decision-making?

There are no policy papers giving clear indications about the perspective of the Dutch government on the second phase of harmonisation. The Advisory on

Aliens Affairs a couple of days ago released an advice on the future of European migration law.⁹

3.9 The Communication of June , 2003 towards a more accessible, equitable and managed asylum system – in reaction to the UK paper – develops some ideas on new approaches to pursue an orderly and managed arrival of persons in need of international protection. What is the political reaction in your country as to the concept of an outside accessed asylum procedure, distribution of refugees and responsibility-sharing and other new concepts and ideas in coping with mass refugee movements?

The Dutch government participates in the group of Member States co-operating in the further elaboration of the UK proposals. The political reactions were mixed, but the coalition parties fully consented in further co-operation.

Part IV (Termination of illegal residence, return and repatriation)

4.1 How many third country nationals without a valid residence permit are presently according to estimates staying in your country? How many deportations have actually been made in previous years? Is the whole enforcement process considered as acceptable?

One of the few serious studies on the number of illegal aliens in The Netherlands finds that their estimated number is between 112.000 and 163.000.¹⁰ In 2002, 2276 rejected asylum applicants have been actually removed, as well as 9739 other illegal aliens.¹¹ The general notion is that expulsion is the least developed part of immigration policy. Recently, the Minister of Aliens affairs has announced new, ambitious plans, envisaging to deport 26.000 rejected asylum applicants who are still in The Netherlands.

4.2 What has been undertaken to implement the Directive of November 28, 2002 dealing with the facilitation of unauthorized entry, transit and residence?

4.4 What efforts have been undertaken in your country concerning the Budapest June 2003 recommendations concerning the harmonization of penalty scales with regard to the crime of smuggling of migrants and trafficking of persons in line with Council Directive 2002/90 of 28th November 2002? Did your country sign the relevant UN protocols on smuggling of migrants?

In order to implement this Directive and the UN protocols, which were signed by The Netherlands, a bill has been introduced envisaging amendments to the Criminal Code on the point of trafficking and illegal entry.¹² The proposed changes are rather technical and detailed.

4.3 How many illegal applicants have been apprehended at or near the border? How many criminal procedures for human trafficking have been instituted in the last year?

No data are available on the number of persons apprehended at or near the border. On prosecution for trafficking, the most recent data concern 2001. In that year, the public prosecutor was involved in 132 cases. In 63% of these

⁹ Adviescommissie voor Vreemdelingenzaken: *Voorbij de horizon van 'Amsterdam'*, The Hague, February 2004.

¹⁰ G. Engbersen et al: *Illegale vreemdelingen in Nederland*, Risbo, Rotterdam 2002.

¹¹ Tweede Kamer 2003-2004, 19 637, nr. 787, p. 41-42.

¹² Tweede Kamer 2003-2004, 29m 291, nrs. 1-2, 12 November 2003.

cases, actual prosecution followed. In 2001, 86 cases were judged by the courts. In 87% of these cases, the suspect was found guilty.¹³

4.5 What measures have been taken to implement the Council Directive of 28th May 2001 on the mutual recognition of decisions on the expulsion of third country nationals? What, if any shortcomings or gaps of the Directive should be corrected in a further directive on cooperation on expulsion or deportation of third country nationals?

The Minister of Aliens affairs has published a notification stating that Directive 2001/40 does not need implementation because Dutch legislation is fully in line with it.¹⁴

4.6 Do readmission agreements or other international treaties or arrangements with the aim of controlling and curbing illegal immigration and facilitating return exist in your country? Have they functioned satisfactorily?

Readmission agreements exist between The Netherlands (sometimes as part of the Benelux) and Belgium/Luxemburg (in the framework of the Benelux), Bulgaria, Germany, Estonia, France, Hungary, Croatia, Latvia, Lithuania, Austria, Poland, Rumania, Slovakia, Slovenia, Switzerland, and Yugoslavia. No data are published about their actual use.

4.7 To what extent have EU-standards and recommendations influenced your country's return policy? Have efforts been undertaken to cooperate with other EU Member States in enforcing return decisions by common deportation actions, exchange of information, facilitation of air and land transit, common principles on flight security, etc.?

Return policy does not seem to have been influenced to a great extent by EU standards. There has been co-operation on the point of mass expulsions (common charter flights and the like), but this seems to have been done at an ad hoc basis.

4.8 Do you consider a need to elaborate a common legal regime for air deportations (legal status of armed guards on board of the aircrafts, rights of the aircraft commander, legal rules in case of transit stops, applicability of national police law on board of aircraft on flight, etc.)?

I doubt whether an elaborate common legal regime would contribute much to return policy in terms of efficiency and/or human dignity. The problems Member States are facing seem to be not of a primarily legal, but of a practical nature.

¹³ A.G. Korvinus: *Mensenhandel. Aanvullende kwantitatieve gegevens*, Bureau Nationaal Rapporteur Mensenhandel, The Hague 2003, p. 89.

¹⁴ *Staatscourant* 25 October 2002, nr. 206, p. 10.