

Dealing with the consequences of article 1F of the Refugee Convention in the Netherlands: A crisis for migration policymakers and excluded asylum claimants

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The drafters of the 1951 Refugee Convention believed war criminals and other perpetrators of serious crimes are undeserving of refugee protection. Article 1F of the Convention therefore stipulates that when there are serious reasons for considering that persons committed such crimes, they are to be excluded from refugee protection. Though determining whether this exclusion clause applies is challenging in itself, developing an adequate policy on how to deal with excluded persons in the post-exclusion phase proves even more complicated. This is especially the case if excluded persons cannot be *refouled* to their countries of origin because of humanitarian concerns. They continue to live in limbo; not having access to refugee protection while simultaneously not being deportable.

In this article, we describe the post-exclusion challenges faced in the Netherlands, a country which has applied the exclusion clause rather actively over the past decade. For years the question on what to do with excluded persons who find themselves in limbo has been a topic of debate in national parliament, and for years the Government of the Netherlands has been struggling to develop a coherent post-exclusion policy. In the meantime, the excluded persons have to get by living as undocumented migrants. Based on an analysis of policy documents and interviews with excluded persons themselves and experts on the topic, this article discusses the consequences of a fundamental system error in international law.

The no safe haven policy in the Netherlands

In the European context, the Netherlands is at the forefront with regard to the application of article 1F, which is based on the idea that the country should not be a safe haven for alleged criminals applying for asylum. Between 1997 and 2011, 810 asylum claimants have been excluded. Since 2001, every official of the Dutch Immigration and Naturalization Service (IND) is expected to automatically refer cases to the “1F unit” when, during the initial interviews in the asylum procedure, indications arise that there may be serious

reasons for considering that someone was involved in war crimes, crimes against humanity, acts of terrorism or other serious crimes abroad. Such indications can be statements of the asylum applicants themselves or other sources that reveal that their activities, claimed professions or positions in a group could mean their involvement in human rights violations. Currently, the majority of the excluded individuals in the Netherlands are of Afghan nationality and approximately 190 of them are still residing in the country.² Their exclusion is often based on a report of the Ministry of Foreign Affairs on the activities of the KhAD/WAD during the communist regime between 1978 and 1992. It concludes that all sub-officers of the KhAD/WAD rotated between various departments and were therefore personally involved in the arrest, questioning, torturing and occasional execution of suspects. The report forms the basis for the categorical exclusion of former sub-officers of KhAD/WAD. The use of the specialist report has been highly criticized, among others by UNHCR. Unique to the Netherlands 1F policy is the fact that from 2006 onward, alleged 1F offenders are automatically declared undesirable aliens, or *persona non grata*. This is motivated by the presumption that their presence in the Netherlands endangers public order and/or the interest of international relations. Being present in the Netherlands while having such a status is punishable by law.

Post-exclusion measures

Consistent with international obligations, the possibilities of criminal proceedings are examined first after article 1F has been applied. Preferably, the excluded person would be prosecuted in his country of origin or a third country requesting his extradition. However, barriers such as the absence of a bilateral extradition treaty and concerns with regard to the human rights record of the country of origin frequently impede extradition. Further, it does not occur often that requests for extradition of 1F excluded persons are made. For this reason, transfers to an international criminal court such as the ad hoc International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal

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² Minister and State Secretary of Justice, *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag* (The Hague, 2008), p.32.

for Rwanda or the permanent International Criminal Court in The Hague (ICC) also rarely occur. Moreover, according to the so-called “complementarity principle” of these courts, in the absence of an indictment by an international court, the Netherlands, as host State of the alleged perpetrator, should assess if it can domestically prosecute an excluded individual. This, however, is far from easy. The “serious reasons for considering” evidentiary standard in the administrative exclusion procedures is much lower than the “beyond reasonable doubt” standard in criminal procedure. In addition, complex, time-consuming and expensive investigations in the country of origin are often indispensable to gather further evidence to prove that the excluded person has committed the alleged crimes. Therefore, despite the availability of universal jurisdiction and the close collaboration between the immigration authorities and a specialist war crimes team of the public prosecution office, the post-exclusion measure of prosecution is largely unsuccessful.

The authorities’ preferred alternative is to convince the individual and his family to voluntarily depart to their country of origin or a third country that is willing to accept them. However, voluntary return to the country of origin is often not seriously considered as an option by the excluded persons. Indeed, why voluntarily return to the country one has – often by means of paying high fees to travel agents – just fled? An additional reason for alleged 1F offenders to not consider voluntary return is that they are not eligible for financial support from the International Organization for Migration (IOM). Whereas other rejected asylum claimants may be provided with reintegration support schemes which can add up to several thousand euros, such support is not available for excluded individuals. Voluntarily departing to a third country within the European Union is often not an option either. The Dublin Regulation, signed by 26 European countries, including the Netherlands, regulates that the first country in which an individual applied for asylum will be responsible for accepting his claim. A claimant that has been excluded in the Netherlands will thus be handed over to the Netherlands when he or she applies for asylum in any of the 25 other Dublin Regulation Member States. Travelling to countries outside the European Union is also complicated since alleged 1F offenders often lack identity documents. Moreover, they may not have the financial means to obtain a visa to enter non-EU countries.

The last option available to the Netherlands Government in dealing with the excluded persons is forcible deportation. This, however, is less straightforward than it may seem. Lack of cooperation from the excluded person or grave medical concerns can, for example, complicate this process. A particularly difficult barrier to expulsion for alleged 1F offenders to overcome stems from human rights obligations under article 3 of the European Convention for the Protection of Human Rights

(ECHR) and article 3 of the Convention Against Torture which prohibit *refoulement* of individuals to torture, or inhuman or degrading treatment or punishment. The Netherlands Government is bound by article 3 of ECHR, which not only prevents forcible deportation to the country of origin but also to non-Member States of the Council of Europe, where the excluded applicants will no longer be protected against *refoulement* by article 3 of ECHR.

Living in limbo

When the public prosecution office of the Netherlands has not found sufficient starting points for a criminal investigation of an alleged 1F offender, this does not lead to a reassessment of the applicability of article 1F to his asylum claim. Nor will a failure to extradite, transfer to an international court or deport. The excluded non-prosecutable and non-deportable asylum applicants remaining in the Netherlands are not entitled to education above the age of 18, medical insurance, work, financial support and housing. Because they are generally also being declared undesirable aliens, they constantly risk being arrested and imprisoned. Prospects of an end to this limbo are grim. Currently, a minimum of 240 excluded asylum claimants still remain in the Netherlands, at least 45 per cent of whom cannot currently be deported due to article 3 of ECHR.³

The sections below present some of the practical consequences that excluded persons in limbo face. The data is based on in-depth interviews with 24 excluded individuals and eight experts that took place from 2011 to 2012. The experts are professionals who, through their work with former asylum claimants, became knowledgeable on the topic of exclusion. With the exception of one, all the interviewed alleged 1F offenders are male. Nineteen of them are Afghan, five Iraqi and three African. On average, Afghan individuals had remained 14 years in the Netherlands and non-Afghans 7. Most had therefore formed relatively strong ties to Netherlands society, especially when they lived with their children. The Afghan respondents are mostly in their 50s or 60s and live with their families, while non-Afghan respondents are generally in their 30s and left their family behind in their country of origin.

Awaiting decisions on ongoing procedures, the possibility of being arrested and detained at any time and the infinity of the duration of exclusion lead to great uncertainty. As one respondent mentioned,

³ This number, however, is fluid, since the principle of *non-refoulement* can be acknowledged and rejected over time. Kst. 19637 nr. 1547, *Het bericht dat Afghanistan wil dat Nederland onderzoek gaat doen naar oorlogsmisdadigers* (1 June 2012); Ah-tk-2011 2012 nr. 1607, *Antwoord van Minister Leers op kamervragen van Gesthuizen en Karabulut* (20 February 2012).

the consequences of the application of article 1F are perceived as administratively sanctioned prison sentences: "In my country, someone will be incarcerated 72 hours before being convicted, but... here it takes 12 years! Just because of a suspicion."

Another respondent stated: "If someone in the Netherlands kills five people, he gets maybe a 20-year prison sentence. I have been imprisoned here for almost 9 years and I never did anything wrong!"

The uncertainty impacts all areas of life: finances, housing, health and social life. Financially, the respondents claimed to have no lawful means available to earn money. They largely depend on assistance from non-governmental organizations (NGOs), friends or family members. The financial dependency on family members changes traditional roles – when when wife and children are taking care of the mostly male alleged 1F offenders, this often leads to frustration and pressure within the family. Assistance from NGOs is not guaranteed either, even when the main objective of these organizations is to assist refugee claimants. Some NGOs are unwilling to help alleged 1F offenders who lack prospects of a positive outcome of their asylum claims or they prioritize the interests of other asylum-seekers over those of allegedly criminal applicants. An alleged 1F offender's son remembered:

The first hit came from [a Dutch NGO]. They called my father when they received a letter from IND regarding his 1F status. They told my father: "You are a 1F offender, we don't deal with that type of case." ... We also asked IOM whether we could go to a third country with the entire family, but they said no.

In the Netherlands, secondary health care is not for free without medical insurance. Medical expenses can thus increase financial worries. Medical experts interviewed claim that alleged 1F offenders face many psychological problems. Being stigmatized as supposed dangerous criminals weighs heavily on the excluded. Their psychological complaints are caused primarily by their exclusion rather than by earlier traumas, which inhibits effective treatment of the latter. Moreover, respondents seem to postpone seeking medical aid. They prioritize solving problems related to work, legal procedures and social environment and only resort to medical treatment when any hope for change has disappeared. The following statement is from a man who had fallen ill during his detention:

My doctor sent me to the hospital... I was handcuffed and they put a stick in my trousers so I couldn't bend my legs. I had to walk through the crowd with police officers left and right of me... The eye drops burned in my eyes. I asked the police: "Can you loosen the cuffs, so I can rub my

eyes?" But... they wouldn't. I became aggressive. I started to scream to the people in the corridor: "Look at me, I am a criminal, a terrorist!"

Being declared persona non grata aggravates the stigma. Contrary to other undesirable aliens, the respondents have never been convicted for an offence or crime in the Netherlands and identify themselves as regular law-abiding citizens. One interviewee said: "The label... used to be for people killing, dealing drugs and I have the same sticker."

Respondents cope with the social isolation, stigma and shame by either keeping their 1F status secret or by disclosing it strategically to the media or a few confidants in Netherlands society who, they believe, can offer support. The presence of family members in the Netherlands can provide assistance but can also be a source of tension, shame and guilt. The alleged 1F offender often feels or is held responsible for the deprivation of his spouse and children. This is because in the Netherlands, relatives of an alleged 1F offender are, on principle, not entitled to refugee or subsidiary protection if they lack independent grounds for asylum. Since 30 November 2008, however, dependants can, under certain conditions, apply for a residence permit after a long-term stay in the Netherlands.⁴ Nonetheless, the feeling of guilt originating from causing the long-term exposure of spouse and children to financial, educational, medical and social problems, and the constant threat of the excluded family member being detained or deported is experienced strongly. As one female respondent stated:

The IND tries to destroy the family... "Because of you I am 1F, our kids have 1F." My children say: "Mum, why have you said you were in the military, why didn't you lie?" Because of the war I lost my brothers, parents and family. But because of the injustice here I lost my husband, kids and life.

The personal accounts of alleged 1F offenders indicate that their long-term dire situation also has a negative impact on Netherlands society as a whole. Not in the least because their 1F status, poor health and ageing inhibit them from working and contributing, through taxes to the economy. In addition, the continuous litigations initiated by both excluded asylum applicants and IND are costly government expenditures. Respondents perceive the 1F policy as incoherent and its implementation as inconsistent. A former member of Algeria's Department of Intelligence and Security said:

⁴ Decision of the State Secretary of Justice, *Wijziging van de Vreemdelingencirculaire 2000*, nr 2008/29 (18 November 2008). Available online at <https://zoek.officielebekendmakingen.nl/stcrt-2008-1080.html>.

If IND here suspects an Algerian asylum-seeker of having terrorist ties, what do you think they will do? They will go to AIVD [Netherlands secret services], which searches for data and asks my former colleagues to give information so this person can get 1F... it is Kafka-esque.

Government representatives frequently appear not to know how to deal with alleged 1F offenders who cannot be deported, resulting in mixed messages. A respondent whose refugee status was withdrawn and who was subsequently invited for another IND interview gave the following example:

[The IND representative] said: "According to us you have a refugee status, there's no problem. Go talk to the one who withdrew it." [In the asylum centre after being excluded,] he [Central Agency for the Reception of Asylum Seekers employee] said: "What are you doing here? In our computer it says you have a house and refugee status."

To sum up, the situation of excluded persons in limbo is extremely troublesome for the individuals involved. The social, psychological and financial consequences of their exclusion are severe. For this reason, NGOs, academics and politicians have over the past years criticized the 1F policy and actively lobbied to come to a solution for excluded persons who live in limbo. But what options does the government have? On the one hand the Refugee Convention obliges immigration authorities to strictly apply article 1F, while article 3 of ECHR on the other hand prohibits *refoulement*. Third countries are not willing to offer a way out by opening their borders for alleged 1F offenders. As it stands, international law and politics do not yet have an answer to this fundamental system error in international law.

Ad hoc solutions to the policy crisis

Netherlands authorities in the meantime use ad hoc tools to deal with this crisis. The minister for Immigration, Integration and Asylum, for example, has the option to use his discretionary authority in order to terminate the unlawfulness of the residence of an individual who has not been granted refugee status. This discretionary power can also be used in relation to 1F excluded persons. The condition required to apply this competence is a particularly harrowing situation in the Netherlands for the individual concerned. Although it was recently used for an Afghan man whose expulsion would leave his children behind in the Netherlands without parents, ministers have so far rarely made use of this competence.

A second alternative to end the indefinite limbo situation of an alleged 1F offender in the Netherlands is a type of post-exclusion balancing test which is specifically designed to deal with excluded persons who cannot be

deported. It is called the "durability and proportionality test" and was developed in the jurisprudence of the Administrative Jurisdiction Department of the Council of State. It allows the State to disapply article 1F when the gravity of the crime allegedly committed by the asylum-seeker is outweighed by the humanitarian concerns regarding the individual that have arisen after his exclusion from refugee protection. An excluded individual is eligible for a temporary residence permit in the Netherlands when he complies with the following cumulative requirements:⁵

1. The person could demonstrably not be expelled due to human rights concerns during many years⁶ and cannot be removed.
2. There is no prospect of change in his situation within a reasonable term.⁷
3. Departure to a third country has been impossible despite the individual's best efforts.
4. He finds himself in an exceptional situation in the Netherlands.

Based on a recommendation by the Advisory Committee for Alien Affairs, "many years" is interpreted as at least 10 years.⁸ The "exceptional situation" refers to a medical or other humanitarian emergency and a situation in which his family life is well established in the Netherlands. In practice, the post-exclusion balancing, implemented since June 2004, has been rarely applied and when it has been, it generally concerned terminal illness. In the past two years, it resulted in the granting of a residence permit to fewer than five excluded persons.⁹ It thus proves difficult to meet the demands of the durability and proportionality test.

The durability and proportionality test causes much confusion and paradoxical results. Excluded individuals are told to leave the Netherlands directly after being excluded, but an exceptional situation can only lead to a residence permit if they can demonstrate that they have "durably" remained on Netherlands territory for at least 10 years. It is a policy that is not easy to digest for some respondents: "On the one hand I am undesirable, on the other hand IND says I should stay 10 years after which they will review my procedure. I can't go back and I have to wait for 10 years... but no documents?"

⁵ Council of State, LJN: BB1436 (18 July 2007).

⁶ Council of State, LJN: AP2043 (2 June 2004).

⁷ Council of State, LJN: BB1057 (18 July 2007).

⁸ Bahtiyar, Z., Exclusion of ex-KhAD/WAD members in the Netherlands. In: *Fervet Opus Liber Amicorum Anton van Kalmthout* (M.S. Groenhuijsen et al., eds). (Maklu, Apeldoorn, 2009), p.27.

⁹ Ah-tk-2011 2012 nr. 1607. Antwoord van Minister Leers op kamervragen van Gesthuizen en Karabulut (20 February 2012).

More problems on the horizon?

The situation described above does not constitute a crisis in numbers. Yet it does represent a crisis for the individuals affected. They live in the margins of society. Despite the fact that the drafters of the Convention clearly stipulated that the application of article 1F is not intended to have a penal function, the de facto consequences are felt as such by the persons concerned. Post-exclusion measures to address this system error are therefore indispensable.

However, the policy measures currently available to end this limbo provide no adequate and coherent solution. Excluded persons are only eligible for the durability and proportionality test if they can survive as undocumented immigrants for a minimum period of 10 years. In the meantime, they have to get by without any support, rights to education, work or secondary medical care.

Meanwhile, new limbo cases appear on the horizon. The Netherlands, in particular, is likely to be faced shortly with a very delicate and problematic issue in relation to 1F due to the location of ICC on Dutch territory. Recently, the Court of Amsterdam decided that three detained Congolese defense witnesses were entitled to apply for asylum in the Netherlands. Considering their alleged involvement in crimes categorized under article 1F of the Convention, it is likely that article 1F will be applied to their asylum case.¹⁰ Article 3 of ECHR might prevent their *refoulement* to a prison in the Democratic Republic of Congo. Will these and future allegedly criminal ICC witnesses seeking asylum in the Netherlands end up in the limbo situation described above?

Next, there is a tendency of more countries setting up structures in refugee determination procedures to implement a more active no safe haven policy. UNHCR is currently in the process of updating its exclusion guidelines. In the prospect of mass influxes of asylum applicants fleeing the instabilities in the Middle East, governments and UNHCR will have to separate legitimate refugees from those there are serious reasons for considering they have been implicated in acts of torture, such as former members of the Syrian or Libyan secret services. But merely excluding such persons may create new problems if no coherent post-exclusion policy is in place to deal with persons who cannot be *refouled*.

A consistent and more uniform approach to the application of article 1F of the Convention and post-exclusion measures is needed. This article discussed some of the dilemmas faced and policies used in the Netherlands, but post-exclusion policies by other countries, when they exist, are often not publicly disclosed. A first step to come to a more coherent policy could be to examine the differences between national approaches to post-exclusion and identify their successes and failures. In addition, considering its guidance on the application of article 1F, UNHCR could take a proactive role in developing post-exclusion measures. The need for sharing information on the matter is evident, since the crisis for migration policymakers and excluded asylum claimants is far from resolved.

¹⁰ Van Wijk, J., Possible Scenarios following Asylum Applications by Four Defense Witnesses. The Trial of Germain Katanga and Mathieu Ngudjolo Chui (28 August 2012). Available online at www.katangatrial.org/2012/08/possible-scenarios-following-asylum-applications-by-four-defense-witnesses/.