SUMMARY

Reunited after flight

Advisory report on the implementation of migration policy on family members of persons who have been granted an asylum residence permit

Background and reasons for report

Since 2007 the policy on family members of third-country nationals who have been granted an asylum residence permit has been amended several times. After signals had been received of possible abuse of the procedure, the policy was initially tightened up. Subsequently it was liberalised again for specific categories of family members. In June 2013 the Children's Ombudsman published a critical report on the implementation of the policy. According to him, the rights of family members wishing to join an asylum residence permit-holder had been seriously violated as a result of the focus on fraud and abuse, and the interests of the children involved had been disregarded. The Children's Ombudsman took the view that all applications submitted by family members of permit-holders between 2008 and 2013 needed to be reassessed. Partly in response to the report of the Children's Ombudsman, the State Secretary for Security and Justice asked the Advisory Committee on Migration Affairs (ACVZ) to examine the relationship between (the implementation of) Dutch policy on family members of asylum residence permit-holders, and international and European law.

Migration policy on family members of asylum residence permit-holders

To be eligible for family reunification with the permit-holder, family members must have already belonged to that person's family before entry to the Netherlands and family ties may not have been severed. Family members who were not mentioned by the permit-holder during his asylum procedure are not eligible. Family members include the spouse and minor children, but also a partner or adult children who are dependent on the permit-holder to a substantial degree. The category 'minor or adult children' also includes children of one of the spouses or partners from a previous marriage or relationship and adopted or foster children who belong to the family. In the case of these children, if one of the parents remains behind, he or she must agree in writing to their departure for the Netherlands.

The family members must enter the Netherlands at the same time as the permit-holder or within three months of that person's asylum permit being granted. Or they must have applied for family reunification within this time frame. If they have failed to do so, their application was lodged out of time and will be rejected.

The burden of proof with regard to establishing the existence of de facto family ties rests on the permit-holder and his family members. In principle, the identity of the family members and the family-law relationship between them must be demonstrated on the basis of official, original documents. If that is impossible, they must be plausibly established in some other way. DNA testing is used to establish the relationship between parents and their biological children. If there is no blood relationship (in the case of foster children, for example) the family members have to make convincing statements regarding their alleged family ties.

If the conditions have been fulfilled, an asylum residence permit dependent on the status of the permit-holder will be granted to the family member.

Changes to (the implementation of) policy since 2007

In the course of 2007 it was decided to carry out DNA testing as a standard measure in the case of applications from members of a biologically related nuclear family who lacked documentary evidence of their relationship. The number of applications to join a permit-holder made by foster children (primarily Somalis) subsequently increased. This led the Immigration and Naturalisation Service (IND) to believe that entry to the Netherlands was being applied for by aliens who in fact did not belong to the permit-holder's family. This in turn led to suspicions of fraud and abuse and a number of measures were taken to tighten up procedures.

In 2008 it was decided to pose supplementary questions during the asylum procedure about the possible existence of foster children and to ask family members applying for family reunification additional questions for the purposes of identification.

In 2009 it was announced that henceforth family members who were not mentioned by the permit-holder during his asylum procedure would no longer be eligible for family reunification, the burden of proof would become greater and alleged family ties would be less easily accepted.

Following these measures, halfway through 2012 the implementation of policy was liberalised. Applicants from biologically related nuclear families who lacked documentary evidence of their relationship were no longer subjected as a standard procedure to an interview for the purposes of identification. The statements made by the permit-holder during his asylum procedure in combination with the results of DNA testing sufficed. The interview to identify the person was maintained for family members who were not biologically related to the permit-holder.

In May 2013 it was decided to assess de facto family ties in these cases in the same way as under regular family reunification policy. This meant a liberalisation of the rules for minor children. Only in exceptional circumstances were their de facto family ties deemed to be severed. For adult children, however, it represented a tightening up of the rules. In their case, de facto family ties were only assumed to exist if the child was more than normally (emotionally) dependent on the permit-holder. On the basis of case law, it was also decided that foster children should henceforth be treated in the same way as biological children in the assessment of the existence and possible severing of de facto family ties. Since 2013, foster children's family ties are also only deemed to have been severed in exceptional circumstances.

Since 1 January 2014 the requirements that family members must have the same nationality and that family ties must already have been formed in the country of origin no longer apply. On 12 November 2013 Tineke Strik, a member of the Dutch Senate, introduced a motion with the aim of ensuring that in cases where an earlier application lodged before 1 January 2014 had been denied solely on one of these two grounds, assessments of new applications would be based on the age of the family member at the time of the earlier application. Debate on the motion was adjourned pending the publication of this advisory report.

International and European law

The Final Act of the Refugee Convention, the UNCHR Handbook on Procedures and Criteria for Determining Refugee Status and the Directive on the right to family reunification ('Family Reunification Directive') all require special attention to be paid to the situation of asylum residence permit-holders and their family members, on account of the reasons which obliged them to flee their country and which prevent them from exercising their right to family life there. Furthermore, article 23 of the Qualification Directive embodies a best-efforts obligation to maintain the unity of the family of asylum residence permit-holders. The more favourable conditions for family reunification in their case set out in Chapter V of the Family Reunification Directive mean that such reunification may not be impeded if it has been established that the family members belonged to the permit-holder's family and that family unity was not disrupted for any other reason than the permit-holder's flight. If these more favourable conditions are not met, a residence permit will not in principle be granted on the basis of article 8 ECHR, since the existence of family ties is also a precondition for invocation of that article. However, the established case law on article 8 ECHR is relevant to the questions of whether family ties can be deemed to have been severed and whether an adult child is more than normally (emotionally) dependent on the permit-holder.

The changes in relation to international and European law

The study carried out by the ACVZ produced no concrete evidence of fraud or abuse of the procedure. The Committee cannot therefore confirm that the measures tightening up policy were necessary to combat such fraud, especially since the term 'fraud' was used in connection with cases in which the IND doubted whether there were de facto family ties, yet two-thirds of the applications in which this was initially the suspicion were nevertheless ultimately granted.

Dutch migration policy on family members of asylum residence permit-holders has a broader target group than the Family Reunification Directive because it includes foster children. It follows from this Directive that the requirement of de facto family ties may be imposed and that evidence of these ties may be requested, provided account is taken of the possibility of inability to produce such evidence. In such cases, the Directive allows for interviews and other necessary investigations (including DNA testing) to be carried out. Although the need for tighter measures in order to combat fraud has not been demonstrated, in themselves such measures fall within the parameters of the Directive. Assessment in light of the requirement of a more than normal (emotional) dependence on the permit-holder for adult children derives from established case law of the European Court of Human Rights regarding article 8 ECHR and is in accordance with the provision on adult children in the Family Reunification Directive. Nevertheless, the practical implementation of any such measure must be in accordance with the aim envisaged by the favourable regime laid down in the Family Reunification Directive, i.e. to facilitate and not impede family reunification for holders of an asylum residence permit.

Harmonising the position of foster children with that of biological children with regard to the assessment of the existence and possible severing of de facto family ties was necessary in order to end a situation that was incompatible with the desire to preserve family unity laid down in the statutory rules on family members of permit-holders. According to the ACVZ, abolishing the requirement for family members to have the same nationality and for the family ties to have already been established in the country of origin was necessary to end a situation that was incompatible with the Family Reunification Directive.

Current policy and its implementation in relation to international and European law

The Committee sees two problems in connection with current legislation. The first is that it is impossible to deviate from the statutory three-month period in unforeseen and exceptional circumstances. The second is the absence of procedural safeguards to ensure child-friendly interviewing.

With regard to implementation, problems no longer arise in connection with the way the burden of proof is handled in relation to biological children. If they are unable to provide documentary evidence, it is standard procedure to offer DNA testing, after which their application is usually granted. The IND is also alert to inability to provide evidence in the case of foster children: for them it is standard procedure to offer an interview for identification purposes. This modus operandi is in line with the applicable provisions of the Family Reunification Directive.

With regard to decision-making, two-thirds of applications in the 200 IND files examined by the Committee were at some point granted. In view of this, and taking account of the way in which subsequent applications in procedures regarding family members of permit-holders were and still are being handled, the Committee no longer sees any grounds for reassessing all applications that have been denied since 2008. It does, however, note that in recent years the administrative rules have not always been applied consistently in all cases. In addition, de facto family ties were not initially investigated with the necessary care in 5.5% of the files examined. And finally, in the files examined, none of the decisions denying an application clearly substantiated the grounds for attributing decisive importance to statements made in the identification interviews which were considered to be inconsistent. Nor was it made clear how much importance was attached to statements made by the persons in question which were indeed consistent, or how those statements related to the inconsistent statements. This practice, in the Committee's view, is incompatible with the requirement for authorities to give reasons for their decisions laid down in article 41 of the Charter of Fundamental Rights and/or sections 3:46 and 3:47 of the General Administrative Law Act.

Recommendations

On the basis of its study, the ACVZ would make the following recommendations. For further details, please see the advisory report.

1. Implement the Strik motion. Apply the method of assessment proposed in the motion not only to new applications. Reassess applications which have not yet been finally denied but which were previously rejected purely on the grounds of the nationality requirement and/or the requirement that family ties must have already been established in the country of origin on the basis of the age of the family members at the time the application was submitted.

2. Make it standard procedure to explicitly ask every asylum seeker in the initial interview in his asylum procedure whether he would wish to be reunited with the family members he has mentioned should his asylum application be granted, and have this confirmed in writing. So that this is absolutely clear, always repeat this process in the second interview.

3. Maintain the three-month period laid down in section 29, subsection 2 of the Aliens Act 2000, but expand the exception relating to subsection 2 contained in subsection

4 of this section so that paragraph 4 reads: 'The temporary residence permit referred to in section 28 may also be granted to a family member as referred to in subsection 2 who did not enter the Netherlands within three months of the date on which the third-country national referred to in subsection 1 was granted a residence permit as referred to in section 28, if within the three-month period an authorisation for temporary stay is applied for by or on behalf of that family member, or *if it has been plausibly established that there were well-founded reasons not to apply for such authorisation within this period.*' Examples of well-founded reasons for exceeding the deadline could then be listed in the Aliens Act Implementation Guidelines 2000.

4. Incorporate in the Aliens Act Implementation Guidelines 2000 a reference to the recommendations on interviewing children made by the UN Committee on the Rights of the Child. Indicate which aspects of these recommendations are relevant to the interviewing of children during procedures relating to the entry of family members of asylum permit-holders. Take as a basis paragraphs 41-47 of the recommendations, in which the UN Committee describes the steps it regards as necessary to effective implementation of article 12 of the Convention on the Rights of the Child. These relate to 1) an assessment of the child's capacity of forming her or his own views 2) preparation for the interview 3) the conduct of the interview and 4) the provision of information about the outcome of the procedure and an explanation of how account was taken of the child's statements.

5. a) Limit the application of the age assessment in this context to the cases in which external features and/or statements made by the person in question make it obvious that he/she is an adult. Observe the policy on age determination in asylum procedures as laid down in paragraph C1/2.2 of the Aliens Act Implementation Guidelines 2000 and include an appropriate reference in the administrative rules concerning the entry of family members of asylum residence permit-holders.
   b) Make a note to the effect that in such cases, the decision will include a clear description of which statements, external features and behaviour constituted grounds for concluding that the person was obviously an adult.

6. a) Ensure that the permit-holder is given the opportunity, not only at the objections stage but also in those cases where doubt regarding the existence of de facto family ties arises at the primary decision-making stage, to give a further explanation of the application to an official hearing committee.
   b) In cases where insufficient substantiation of the primary decision is noted at the objections stage, ensure that the person who drafted the decision is informed.

7. State in a new passage on establishing the facts in the administrative rules that the decision must clearly explain the grounds on which decisive importance was attributed to statements considered to be inconsistent, what importance was attributed to statements that were consistent and how the latter statements refer to the former.

8. Assign priority to applications from family members of asylum residence permit-holders and from now on process them speedily.