



Ad-Hoc Query on the ‘ no fault’ procedure

Requested by NL EMN NCP on 21th June 2012

Compilation produced on 24 July 2012

Responses from Austria, Belgium, Bulgaria, Czech Republic, Finland, Hungary, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Spain, United Kingdom (15 in Total)

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1. Background Information

The Advisory Committee on Migration Affairs (Adviescommissie voor Vreemdelingenzaken (ACVZ)) is an independent committee that advises the Dutch Government and Parliament on immigration law and policy. The ACVZ is preparing an advisory report on the so called ‘no-fault’ procedure in the Netherlands. Below we will explain this procedure. In order to compare the Dutch procedure with similar regulations in other EU-countries, the ACVZ would like to receive information thereon.

The ‘no-fault’ procedure

Confronted with unreturnable aliens, the so-called “no-fault” procedure for obtaining a residence permit was introduced. Unreturnable aliens can be aliens whose asylum application has been rejected, but also irregular, undocumented or stateless persons. If an alien is unable to leave the Netherlands through no fault of his or her own, he can be granted a residence permit for a limited time (*een verblijfsvergunning regulier voor bepaalde tijd*) under Article 3.4(1)w in conjunction with Article 3.6(1a) of the Aliens Decree (*Vreemdelingenbesluit*). The residence permit is a so-called no-fault residence permit (*buitenschuldvergunning*), which is granted on the condition that the alien leaves the Netherlands if this becomes possible at a later stage.

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2. Responses¹

| | | Wider Dissemination? ² | <ol style="list-style-type: none"> 1. Does your country have a specific policy for aliens that can't leave the country through no fault of his or her own? 2. Do you have any knowledge about the policy on this matter in your country? 3. Are you familiar with studies on this matter and the specific regulations in your country (in French, German or English)? 4. Do you have addresses and telephone numbers of people the ACVZ could contact about these regulations? <p>Of course, the contact details received are treated confidentially. Therefore they are not for wider dissemination.</p> |
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|  | Austria | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | Belgium | Yes | <ol style="list-style-type: none"> 1. No. Unremovable aliens - whatever the reason is for this impossibility to return - fall under the (basic) common provisions of the Aliens Law (Law of 15 December 1980). They are not registered as such nor identified, except when they have been through an asylum procedure and have been excluded from an international protection status because of severe public order reasons (i.e. suspicion of terrorism, crime against humanity,...). In such cases the asylum instances take contact with the Public Prosecutor's Office to let them know the alien has been denied any international protection status. They get an ordinary order to leave the country issued. <p>If their return is to be delayed for any reason - due to risk of violation of the non refoulement principle in case of return or due to individual circumstances, amongst which the fact that they are unremovable -, the general provision of national law deriving from Art. 14 of the Return Directive is applicable to them: they get the decision notified (see Art. 74/17§§1 and 2, and al. 2).</p> <p>To get the right to stay in Belgium, 'no-fault' aliens can try to apply for a regularization on humanitarian grounds on the basis of article 9bis of the Aliens Act. This is a general provision for persons who are present in Belgium but do not possess a right of residence, and who as a result of "exceptional circumstances" cannot return to their country of origin to file an application. The decision making on such applications is discretionary. Stateless people for instance make use of this procedural path, since recognized stateless people are in Belgium not automatically granted a permit to stay. But also persons with a protracted asylum procedure or a durable local integration try to get a residence permit through the regularization procedure.</p> 2. Since the return directive has only recently been transposed into national law, there is so far no actual policy on this target group identified. |

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

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| | | | <p>3. *See EMN Belgium “EU and non EU harmonised protection statuses in Belgium », Octobre 2011 http://www.emnbelgium.be/publication/eu-and-non-eu-harmonised-protection-statuses-belgium-update *See (Work in progress) UNHCR « Mapping statelessness in Belgium » *See, Centre pour l'égalité des chances et la lutte contre le racisme, Rapport annuel 2008, “Les personnes inéloignables, statut et droits”, p. 51 available on http://www.diversite.be/?action=publicatie_detail&id=68&thema=4 *See, Centre pour l'égalité des chances et la lutte contre le racisme, Rapport annuel 2009, “Les droits des inéloignables doivent être renforcés”, p. 43, available on http://www.diversite.be/?action=publicatie_detail&id=117&thema=4 *See Common position of the European group of National Human Rights Institutions, “Stockholm Programme should strengthen the human rights of non-removable persons”, 21/10/2009, available on www.diversiteit.be/.../EG%20NHRI%20common%20position%20non-removable%20persons.pdf *See FRA « Fundamental rights of migrants in an irregular situation in the European Union”, Non removed persons, p. 29, 2011, available i.a. on http://research.icmpd.org/1417.html *Regulation: Art. 74/17 of the Aliens Law (Law of 15 December 1980)</p> |
|  | Bulgaria | Yes | <p>1. Currently no. Facing similar problems Bulgaria is in the process of preparation of legislation changes regarding this category of TCNs.</p> <p>2. The Bulgarian Parliament is elaborating amendments to the Law for the foreigners in the Republic of Bulgaria which have to come into force by the end of the year. The changes envisage allowance in certain cases and under strictly defined conditions the possibility of cancelling the implementation of a forced administrative measure. The cancellation shall be done by the body that has imposed the measure following an act of a national or international court providing prohibition of return of the TCN to a definite state /states/ where his/her life and liberty will be threatened and where he/she will be exposed to persecution, torture, inhumane or humiliating treatment. In such extraordinary cases a TCN will be allowed temporary stay on Bulgarian territory without annulation of his obligation to leave the country upon dropping the obstacles for his/her return. If his/her return to a third safe country cannot be accomplished in one year period after the cancellation of the implementation of the forced administrative measure the TCN will be allowed to access the national labour market. The changes proposed are based on comparative analysis of EU member-states legislations where a tolerance regime has been established in regard to TCNs that cannot be returned. The stances of NGOs and European Court on Human Rights have also been taken into account.</p> <p>3. N/a.</p> |
|  | Cyprus | Yes | |
|  | Czech Republic | Yes | <p>1. Yes</p> <p>2. The foreign national who is prevented from departing the Czech Republic by an obstacle beyond his/her control shall be issued long-term visa for tolerated stay in the territory (“permit leave to remain”), which is valid for 6 months. Then, if the reasons</p> |

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| | | | <p>preventing him/her from leaving the territory continue to persist, he/she shall be permitted long-term tolerated residence, which is valid for 1 year and can be renewed under the same condition of "persistence of reasons". Then, after 3 years of interrupted residence, he/she can apply for long-term residence permit.</p> <p>3. There has been no recent study on this.</p> |
|  | Denmark | Yes | |
|  | Estonia | Yes | |
|  | Finland | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | France | Yes | |
|  | Germany | Yes | |
|  | Greece | Yes | |
|  | Hungary | Yes | <p>1. We do not have a special policy for aliens, that can't leave the country through no fault of his or her own. However, there are some cases when third-country nationals can be granted a residence permit or certificate of temporary residence.</p> <p>2. A) According to the Article 2. f) of the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals 'exile' shall mean any person who is provided temporary shelter and may not be returned to the country of his/her nationality, or in the case of a stateless person to the country of domicile, for fear of facing the threat of the death penalty, torture or any other form of inhumane or humiliating treatment, and there is no safe third country offering refuge, and who is not entitled to asylum or treatment as a stateless persons, nor to any subsidiary form of protection or temporary protection. According to the Article 30 (6): Exiles shall be entitled to the rights afforded to persons with residence permits and to the rights granted to exiles in specific other legislation. The exile shall provide assistance for having his identity established, however, failure to establish his identity shall not justify refusal of a residence permit.</p> <p>B) According to the Article 30 (1) c) of the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals: A certificate of temporary residence shall be issued to any third-country national, who remained in the territory of Hungary beyond the duration of lawful residence due to humanitarian reasons or reasons in connection with his/her gainful employment, or for personal or some other unavoidable reasons beyond his/her control. (2) The validity period of a certificate of temporary residence shall be up to three months and it may be extended by maximum three additional months at a time. (4) A certificate of temporary residence may not be extended, or it shall be withdrawn if any requirement for issue is no longer</p> |

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| | | | <p>satisfied.</p> <p>C)</p> <p>According to the Article 47 (4) a) of the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals: Third-country nationals residing in the territory of Hungary may lodge their applications for a residence permit at the regional directorate of jurisdiction by reference to their place of accommodation if there are special circumstances to justify submission of the application in Hungary, such as on the grounds of family reunification or medical treatment.</p> <p>3. Not applicable</p> |
|  | Ireland | Yes | |
|  | Italy | Yes | |
|  | Latvia | Yes | <ol style="list-style-type: none"> 1. There is no specific policy developed in Latvia regarding aliens who can't leave the country through no fault of his or her own. In order to find a solution each case is reviewed by individual approach, for example the status of stateless person is determined in cases when country of origin does not admit the person as a citizen of their country and rejects issuance of a travel document, or it is possible according to the conditions of the Immigration Law to issue residence permit on the basis of humanitarian reasons. 2. See answer No 1. 3. No studies were carried out on such category of persons in Latvia and no specific regulations were made on this matter. |
|  | Lithuania | Yes | |
|  | Luxembourg | Yes | <ol style="list-style-type: none"> 1. Yes. 2. Article 125bis of the modified Law of 29 August 2008 on free movement of persons and immigration establishes that in the case the third country national justifies that he/she is in the impossibility of leaving the country for reasons that are independent to him/her, or return to his/her country of origin or any other country the Ministry can postpone the execution of the expulsion for a determinate period waiting that the expulsion can be executed. The third country national can be assigned to residence. During this waiting period the third country national benefits of humanitarian aid as foreseen in article 27 of the Law of 18 December 2009 on the organisation of welfare. Also article 125bis (3) foresees the possibility of granting the person a temporary occupation permit for the duration of the waiting period so he/she can work. 3. The article regulating this situation is article 125bis of the modified Law of 29 August 2008 on free movement of persons and immigration. |
|  | Malta | Yes | <ol style="list-style-type: none"> 1. Such a procedure is in place with respect to former applicants for international protection who could not be returned to their country of origin (through no fault of their own). The Office of the Refugee Commissioner issues a certificate for 'Temporary Humanitarian Protection- N', valid for a period of one year (renewable). The renewal of the certificate is dependent, amongst others, on efforts to integrate in Malta. |

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| | | | <ol style="list-style-type: none"> 2. The abovementioned status is accorded in line with a policy issued by the Ministry responsible for Home Affairs. A decision is taken in accordance with the criteria mentioned above as well as other relevant criteria. 3. The policy providing for Temporary Humanitarian Protection was subject to an EMN study which was compiled by the Ministry responsible and that is published on the EMN website. However, the version of the policy studied was not yet extended to also cater for third-country nationals who could not be returned through no fault of their own. |
|  | Netherlands | Yes | <ol style="list-style-type: none"> 1. Yes 2. Confronted with unreturnable aliens, the so-called “no-fault” procedure for obtaining a residence permit was introduced. Unreturnable aliens can be aliens whose asylum application has been rejected, but also irregular, undocumented or stateless persons. If an alien is unable to leave the Netherlands through no fault of his or her own, he can be granted a residence permit for a limited time (<i>een verblijfsvergunning regulier voor bepaalde tijd</i>) under Article 3.4(1)w in conjunction with Article 3.6(1a) of the Aliens Decree (<i>Vreemdelingenbesluit</i>). The residence permit is a so-called no-fault residence permit (<i>buitenschuldvergunning</i>), which is granted on the condition that the alien leaves the Netherlands if this becomes possible at a later stage. To obtain this residence permit the alien has to meet a number of cumulative requirements which are listed in paragraph B14/3.2 of the Aliens Act Implementation Guidelines (<i>Vreemdelingencirculaire</i>): <ol style="list-style-type: none"> 1. the alien must prove that he or she has independently (<i>zelfstandig</i>) tried to leave the Netherlands; 2. the International Organization for Migration must have indicated that it is not able to assist the alien in leaving due to lack of travel documents; 3. mediation by the Return and Departure Service (<i>DT&V</i>) to obtain the necessary travel documents has not been fruitful; 4. the applicant must show through objective and verifiable facts and circumstances that he or she cannot leave the Netherlands through no fault of his or her own; and 5. the alien must be residing in the Netherlands without a valid residence title and not meet the conditions for another residence permit. 3. Study: See UNHCR, <i>Mapping Statelessness in the Netherlands</i>, the Hague, november 2011, p. 44-45: http://www.unhcr.org/refworld/pdfid/4eef65da2.pdf <p>Regulations: Article 3.4(1)w in conjunction with Article 3.6(1a) of the Aliens Decree (<i>Vreemdelingenbesluit</i>); Paragraph B14/3.2 of the Aliens Act Implementation Guidelines (<i>Vreemdelingencirculaire</i>):</p> |
|  | Poland | Yes | <ol style="list-style-type: none"> 1. Yes |

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| | | | <p>2. According to Polish regulations, if expulsion of an alien is unenforceable due to reasons beyond the authority executing the decision on expulsion, or beyond this alien, he or she shall be granted the permit for “tolerated stay” on the territory of the Republic of Poland (<i>zgoda na pobyt tolerowany na terytorium Rzeczypospolitej Polskiej</i>) (art. 97 par. 1 (2) of Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (Consolidated text Journal of Laws of 2009, No 189, item 1472, as amended). The permit for tolerated stay is a special kind of residence permit and is considered as a form of protection granted to aliens in Poland. The administrative decision concerning a permit for tolerated stay is issued for indefinite period of validity, but a residence card confirming the grant of “tolerated stay” is issued for 1 year. If the period of validity of the residence card expires, an alien is obliged to apply for a new card. The permit for “tolerated stay” is granted upon the request of the authority obliged to execute the decision on expulsion, or the decision on refusing to grant the refugee status, which results in an order to leave the territory of the Republic of Poland. The permit for “tolerated stay” shall be withdrawn, if amongst others, the reason for granting the permit has ceased to exist.</p> <p>3. Study: There is no such publications. Regulation: Article 97 par. 1 (2) of Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (Consolidated text Journal of Laws of 2009, No 189, item 1472, as amended).</p> |
|  | Portugal | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | Romania | Yes | |
|  | Slovak Republic | Yes | <p>1. Yes, it is called tolerated residence.</p> <p>2. Tolerated residence is a specific type of residence whose aim is to avoid illegal stay of third-country nationals in the territory of the Slovak Republic. It is defined in Article 58 to Article 61 of the Act No. 404/2011 Coll. on Residence of Aliens (http://emn.sk/phocadownload/documents/act_on_residence_of_aliens_21_10_2011_en.pdf) and granted for a temporary period of time. If the reason for which tolerated residence was originally granted ceases to exist, the third country national is obliged to inform the Police Department of this fact within 15 days from the day he/she learned thereof. The Police Department will cancel the tolerated residence, especially when learning the fact that the reason of tolerated residence ceased to exist, or when learning new facts representing reasons for rejection of tolerated residence application. Tolerated residence may be granted to a foreign national for a maximum of 180 days and can be repeatedly extended if one of the following conditions applies:</p> <ul style="list-style-type: none"> • There is an obstacle to administrative expulsion; • The foreigner was granted temporary shelter; • The foreigner’s departure from the country is not possible and detention is inefficient; • The foreigner is a minor child found in the territory of Slovakia; • The foreigner is a victim of human trafficking and is at least 18 years old; • If it is required due to respect for his/her personal and family life and he/she does not threaten the state safety or public order; |

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| | | | <ul style="list-style-type: none"> • The foreigner was illegally employed under particularly exploitative working conditions or to an illegally employed minor person; • If a foreign national meets conditions for submitting an application for temporary residence for the purpose of family reunion or permanent residence for five years, the Police Department may grant tolerated residence due to respect of his/her personal and family life only in case he/she does not hold a valid passport and proves his/her identity in another trustworthy way. <p>The following is also considered as tolerated residence:</p> <ul style="list-style-type: none"> • assessment of application for tolerated residence; • provision of institutional care; • prison sentence execution or period of imprisonment; • duration of quarantine measures; • a maximum of 90 days from submitting a written application for assisted voluntary return until departure from the country, or until withdrawing this application; • a maximum of 90 days during which a third country national, who is a victim of human trafficking and at least 18 years old, decides whether he/she will cooperate with prosecuting authorities, when resolving this criminal act. <p>An application for the granting of tolerated residence shall be filed by a third country national in person in an official form at a police department. In certain cases the application can be filed by a prosecuting authority or family member instead of a third country national.</p> <p>3. No. You can only download the English version of the Act No. 404/2011 Coll. on Residence of Aliens (http://emn.sk/phocadownload/documents/act_on_residence_of_aliens_21_10_2011_en.pdf) which defines tolerated residence in Articles 58 to 61.</p> |
|  | Slovenia | Yes | |
|  | Spain | Yes | <ol style="list-style-type: none"> 1. Spanish law does not foresee any kind of "no fault" procedure. These migrants receive the same treatment as any other non-returnable irregular migrant, without prejudice to the possibility of their circumstances eventually making it easier to obtain a residence authorisation for exceptional circumstances. 2. Not applicable. 3. Not available. |

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|  | Sweden | Yes | |
|  | United Kingdom | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | Norway | Yes | |
