Wezenlijk Nederlands belang en economische migratie : nationaal toelatingsbeleid ten aanzien van buitenlandse werknemers en zelfstandigen
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The main question of this study is two-fold. First, which factors regulate the entry of foreign workers, self-employed persons and international companies in the Netherlands? Second, what is the significance of the national interest (also known as public interest) in article 11, sub 5 of the Aliens Act of 1965 and 2000? For both the policy maker and the judiciary, the national interest forms the criterion for assessing the balance between the nation’s best interests and those of the individual foreigner. In my search for an answer to the second question, I explore the definition and scope of the national interest as applied by legislators, administration, and the courts. The records of parliamentary debate on the Aliens Acts of 1849, 1965, and 2000 form the basis for this exploration. In addition, several laws concerning the entrance of foreign workers and national interest provided insight. This leads to the following subsidiary questions. First, what are the main reasons for the existence of a restrictive immigration policy and second, under which circumstances will the national interest justify the entrance of foreigners despite restrictive immigration policy?

Part one of this study discusses economic migration in general. Part two examines profiles of foreign workers and the national criteria as determined by law, policy and case law. Part three examines policy and case law regarding self-employed workers and international companies. Part four concludes the study with a formulation of the different aspects of national interest.

For self-employed persons and international companies detailed criteria have been drawn up by the administrative authorities. The Immigration and Naturalisation Department (IND of the Ministry of Justice) is used to obtain expert advice from the Ministry of Economic Affairs, and in some cases also from the Ministry of Agriculture. The abundancy of foreigners who wants to start a restaurant, public bar, bakery, islamic butcher’s shop or a small firm in miscellaneous goods in the Netherlands has caused a constant stream of advisory statements from the Ministry of Economic Affairs. Since 1982 the Secretary of Economic Affairs pointed out that in these cases no national interest is served and that individual advice on this matter is not required anymore. The content of that national or general interest still remains unclear. In cases of self-employed artists and sportsmen additional advice is required of the Ministry of Education and Science and the Ministry of Welfare, Health and Cultural Affairs.

Every foreigner who wants to stay longer than three months must meet certain criteria to attain a temporary residence permit. In case the foreigner starts working in the Netherlands a work permit (tewerkstellingsvergunning) is required as dictated by the Law on Foreign Labour. The main goal is to give workers of member-states of the EC and EEA a preferred status above nationals of third states. National corporations are obliged to recruite from this EC and EEA pool of labour. In some cases, national interest determines the entrance of workers of third states. The national interest of article 11, sub 5 of the Aliens Act can be used to justify the refusal of work permits not only to prostitutes, but also to unskilled workers in agriculture. Foreign workers of third countries need a residence permit and their employer needs a work permit. The connection between those two titles is difficult. The residence permit is issued only when the work permit has been assigned to the employer. In case the employer already has a work permit, the residence of the foreigner can be refused, for instance because the foreigner is considered a persona non grata.
Since the Oil Crisis of 1973, the Dutch government considered the country as a non-immigration country. Restrictive immigration policy was introduced due to increasing migration from the former Dutch colony Surinam, labour and chain migration (family reunion) from recruitment countries like Turkey, Morocco and the Mediterranean region, and the downward economic trend and unemployment. In the nineties, the economic situation in the Netherlands changed in a way that a shortage of labour emerged, not only in high-skilled professions like air-traffic controllers, physicians, and teachers but also in low-skilled professions in the shipping industry, agriculture, nursing and catering. A considerate number of lawsuits concerning the refusal of work-permits has been a consequence of a restrictive immigration policy on the one hand and the changing economic situation on the other. Moreover, the administrative chambers of the courts have treated the refusal of work permits as invalid because the old policy does not fit the new economic situation.

In defiance of severe administrative practises, various methods are applied to regulate foreign workers. An example is the 'convenant', which is an agreement among one or more Ministry department(s), employers-organisations, labour-unions and other institutions to assign quotas to foreign workers. Such convenants have proved to be successful instruments in healthcare and agriculture. More than once the status of these convenants has proved to be legally binding.

In search for the meaning of the general interest of article 11, sub 5 of the Aliens Act 1965 three aspects can be learned from the parliamentary history of the Aliens Act of 1849, 1965 and 2000 and the Law on Foreign Labour and former laws (of 1934, 1964 and 1979) regulating work permits, policy and case law. Table 1 shows the criteria for justifying the restrictive immigration policy. Table 2 examines the different parties concerned with the entrance of foreign workers, and table 3 contains basic necessities for the existence of the national interest in article 11, sub 5, needed for the balance of interests by the administrative and judiciary institutions.

Table 1. Criteria for justifying the restrictive immigration policy

a. Protection of the Dutch labour market  
b. The Dutch population density  
c. Social security problems  
d. Social housing problems  
e. Economical problems in general as distortion of competition  
f. Concentration and segregation  
g. Prevention of underpaid work of illegal foreign workers  
h. Environmental pollution and the loss of nature reserves  
i. Disruption of the labour market of the homeland of foreign workers

Table 2. Different parties concerned with the entrance of foreign workers

a. The interests of Dutch society in general  
b. The interests of Dutch workers  
c. The interests of foreign workers  
d. The interests of the homelands of the foreign workers and their families  
e. The interests of others (Dutch and foreign companies, etc.)
Table 3. Basic necessities for the existence of the national interest

a. The Dutch economic interest: technological innovation, off-spin and the prevention of distortion of competition
b. The interest of the public health
c. The interest of scientific research
d. Socio-economical interests
e. Cultural interests in general
f. The interests of national and international sport activities
g. The interests of other nations (within the EC and EEA)

The 'national interest' of article 11, sub 5 of the Aliens Act is a vague standard which in theory can cause a clash of competences between the administration and the judiciary. However, such problems have never presented themselves. Article 4:7 (which is the duty to hear both parties), and article 3:2 (the general duty of care) of the general administrative law-act (Algemene wet bestuursrecht) are adequate instruments for judicial review.

Social and legal scientists tend to suggest that the strict immigration policy is merely symbolical in character rather than effective in judicial practice because international migration has increased since the eighties. First, highly developed countries like the US, Japan and EC-countries like Great Britain and Germany supply a large number of highly skilled technicians and key-personnel, of whom most are stationed abroad by multinational companies. Second, an increasing supply of international migrants are asylum seekers and unskilled illegal foreigners working for instance in Dutch factories, restaurants and green houses. The majority of these two categories originate from politically unstable and non-industrialized countries. Suprisingly, neither of these groups is submitted to strict migration policy. Maybe the principle of a strict and severe migration policy lacks political and governmental support but is meant to influence the public opinion. Main targets would be to prevent society from xenophobia and racism and suggest that the Netherlands is still not an immigration country.

Due to international treaties the resident permits of some nationals cannot be refused on basis of article 11, sub 5 of the Aliens Act. The EC and EEA-treaty provides freedom of movement for workers, the establishment of agencies, branches or subsidiaries and the pursuit activities as an self-employed person. The Benelux countries of Belgium, the Netherlands and Luxembourg were established on similar principles. The Association Agreement between the EC and Turkey creates after one, two or three years' legal employment an automatic renewal of a work permit. The treaty and some decisions of the Association Councils still do not provide the freedom of movement for workers who want to stay in Europe for the first time. The European Agreements between the EC and countries like Poland, Romania, Hungary, the Baltic states and Slovenia provide that self-employed persons and those who intend to establish international companies are admitted to member states. There is no right of free movement for individuals except for key-personnel as described in this agreement. There still remain some old treaties of friendship and commerce in force like the Netherlands-United States of America treaty (1956), the Netherlands-Poland treaty (1924), the Netherlands-Switzerland treaty (1878), the Netherlands-Austria treaty (1929) and the Netherlands-Germany treaty (1904). According to the American-Dutch treaty (1956), nationals and companies are permitted to establish and maintain branches, agencies and offices. Other treaties like the General
Agreement on Trade in Services establish a multilateral framework of principals and rules for the free movement of key-personnel. The European Social Charter establishes in article 18 the right to engage in a gainful occupation in the territory of a contracting party. Article 18 and its meaning was tested by the court in 1980 and the conclusion was that this provision does not imply the right of free movement of workers.

Finally, three more lessons can be learned from this study. First, the existence of different categories of workers in immigration policy based on occupational group or branche of industry has created a system in which economic demand is far more decisive than legal differences in provisions of law. In other words, a complicated system of immigration law and policy concerning the entrance of foreign workers, self-employed persons and companies finds its roots in economic trends and clear legal provisions on this point are non-existent. Second, the author suggests the integration of the numerous disciplines concerning migration policy, such as migration sociology, law, demography and economics. Third, legal scientists are not accustomed to pay much attention to legal history and are therefore not willing to recognize that migration law has always been the result of socio-economical and political events. The instruments of regulating migration flows in the fifties and sixties of the twentieth century may be useful and constructive nowadays because of the cyclical fluctuation of national and international economics.